

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ZUZU TECHNOLOGIES, LLC,

Plaintiff,

OPINION AND
ORDER

03-C-0515-C

v.

L & L SOLUTIONS, LLC,
VERVIDIAN, LLC,
DARREN LABRIE,
JONATHAN LEM and
SEAN SNODGRASS,

Defendants.

This action was removed to this court by defendants from the Circuit Court for Lincoln County, Wisconsin under 28 U.S.C. §§ 1441 and 1446. Plaintiff asserts several state law claims against defendants. Two motions are now before the court: defendants' motion to dismiss for lack of personal jurisdiction and plaintiff's motion to remand the case to state court because this court lacks subject matter jurisdiction to hear the case. Because the power of a federal court to hear a case is contingent on the existence of subject matter jurisdiction, I will address plaintiff's motion first.

In their notice of removal, defendants identify 28 U.S.C. § 1332(a)(1) as the basis for federal jurisdiction in this case. Under that statute, jurisdiction exists if there is complete diversity of citizenship between the plaintiffs and defendants and the amount in controversy exceeds \$75,000. In a removed case where plaintiff has not specified an amount in its complaint, defendants must show that removal is proper by a preponderance of the evidence and with “competent proof,” that is, proof to a “reasonable probability” that jurisdiction exists. Chase v. Shop ‘N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997).

As an initial matter, I note that there is a question whether there is complete diversity of citizenship between the parties. Plaintiff does not dispute defendants’ allegation in their notice of removal that plaintiff’s members are citizens of Wisconsin, that defendants Darren Labrie, Jonathan Lem and Sean Snodgrass are citizens of California and that these defendants are the sole members of L & L Solutions. See Belleville Catering Co. v. Champaign Market Place, L.L.C., __ F.3d __, No. 02-3975, 2003 WL 22836971, *1 (7th Cir., Dec. 1, 2003) (citing Cosgrove v. Bartolotta, 150 F.3d 729 (7th Cir. 1998)) (stating that limited liability companies are citizens of every state of which any member is a citizen). However, plaintiff alleges that it is a member of defendant Vervdian. If true, this would mean that a citizen of Wisconsin was on both sides of the case and that this court could not exercise jurisdiction. Strawbridge v. Curtiss, 3 Cranch 267, 268, 2 L. Ed. 435 (1806) (holding that complete diversity is necessary for diversity jurisdiction). However, I need not

resolve this dispute because I conclude that defendants have failed to meet their burden in showing that the amount in controversy is greater than \$75,000.

In their four-page brief, defendants present three reasons why the jurisdictional minimum is met in this case. First, they point to their allegation in the notice of removal that the amount in controversy is greater than \$75,000. However, it is well-settled that defendant may not rely on allegations alone to meet its burden when the amount in controversy is in dispute. See, e.g., Belleville Catering, 2003 WL 22836971, at *1-2 (stating that federal judge must not accept jurisdictional allegations at face value because “a federal judge’s first duty” is to make independent inquiry into existence of federal jurisdiction); see also In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997).

Second, defendants point to plaintiff’s request in its complaint for punitive damages and note that Wisconsin law allows for punitive damages in some instances. Again, it is insufficient for defendants to “simply wave the statute [providing for punitive damages] in our faces.” Brand Name, 123 F.3d at 607. Rather, “they must present *evidence* of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt.” Id.; see also 15 Moore’s Federal Practice § 102.107[3], at 102-188 (“The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pleaded.”).

Finally, defendants submitted an affidavit from defense counsel in which he averred that during a telephone conversation in July 2003, plaintiff's counsel stated that he was seeking damages of "several hundred thousand dollars." According to plaintiff, counsel stated only that he had "no idea whether the breach of contract claim was worth zero . . . or worth six figures" because defendants had not provided plaintiff with sufficient information to make this determination. Generally, disputes in affidavits must be resolved in favor of the proponent of jurisdiction. RAR, Inc. v. Turner Diesel Ltd., 107 F.3d 1272, 1275 (7th Cir. 1997). However, defendants have cited no authority that would allow me to consider a disputed telephone conversation for the purpose of determining the amount in controversy. As plaintiff points out, Fed. R. Evid. 408 prohibits the use of settlement discussions to prove the amount of a claim. Even assuming that I could consider the conversation, it would be insufficient nevertheless because the conversation does not reveal any basis for a conclusion that plaintiff's case is worth more than \$75,000.

Because defendants have failed to prove to a reasonable probability that this court may exercise jurisdiction to hear this case, I will grant plaintiff's motion to remand the case to state court. Defendants may reassert their motion to dismiss for lack of personal jurisdiction in state court, if they wish.

ORDER

IT IS ORDERED THAT plaintiff's motion to remand this action to the state court for lack of subject matter jurisdiction is GRANTED. The clerk of court is directed to return the record of this case to the Circuit Court for Lincoln County, Wisconsin.

Entered this 5th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge