

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

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JON R. ANNIS,

Plaintiff,

v.

H&R BLOCK TAX SERVICES, INC.,

Defendant.  
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OPINION and ORDER

10-cv-735-bbc

In May 2008, plaintiff Jon Annis entered into a “franchise license agreement” with defendant H&R Block Tax Services, Inc., under which plaintiff has the exclusive right to perform tax services on behalf of defendant in Eagle River, Wisconsin in exchange for a royalty. The contract runs through 2018 and contains a non-compete provision that prohibits plaintiff from providing tax services within 25 miles of Eagle River for two years after the contract is terminated.

On November 5, 2010, plaintiff filed a complaint in the Circuit Court for Vilas County, Wisconsin, contending that defendant had breached the exclusivity provision of the contract and violated the Wisconsin Fair Dealership Law by offering tax services online to Eagle River residents. In addition, plaintiff included a claim challenging the legality of the

non-compete provision. On November 22, defendant removed the case to this court under 28 U.S.C. §§ 1441 and 1446 and soon thereafter filed a counterclaim to enforce the non-compete provision and a motion for a preliminary injunction. Now before the court is plaintiff's motion to remand the case to state court for lack of subject matter jurisdiction.

In its notice of removal, defendant pointed to 28 U.S.C. § 1332(a)(1) as a basis for jurisdiction. That statute permits federal courts to hear cases between "citizens of different States" when the amount in controversy exceeds \$75,000. Plaintiff does not challenge defendant's allegation that plaintiff is a citizen of Wisconsin and that defendant is a citizen of Missouri. Instead, plaintiff argues that defendant has failed to show that the amount in controversy meets the jurisdictional minimum. I agree and will grant the motion to remand.

In his opening brief, plaintiff argues that less than \$75,000 is at stake because "the only monetary damages he is seeking from Defendant, excluding costs and reasonable attorney fees, are in the sum of Two Thousand Five Hundred Dollars, which represents the initial deposit he made to Defendant." Plt.'s Br., dkt. #11, at 6. However, as defendant points out, this limitation on plaintiff's damages is not included in the complaint and thus comes too late to have an effect on jurisdiction because "[t]he amount in controversy is the amount required to satisfy the plaintiff's demands in full . . . on the day the suit was removed." Oshana v. Coca Cola, Co., 472 F.3d 506, 510 (7th Cir. 2006). "[P]ost-removal affidavits or stipulations are ineffective to oust federal jurisdiction." Chase v. Shop 'N Save

Warehouse Foods, Inc., 110 F.3d 424, 429 (7th Cir. 1997).

This does not end the matter because, as the proponent of jurisdiction, defendant has the burden to show that an exercise of jurisdiction is appropriate. Smart v. Local 702 International Brotherhood of Electrical Workers, 562 F.3d 798, 802-03 (7th Cir. 2009). Over the years, the Court of Appeals for the Seventh Circuit has described this burden in different ways in the context of the amount in controversy requirement. In one recent case, the court stated that the initial burden is simply to “explai[n] plausibly how the stakes exceed” the jurisdictional minimum and then the burden shifts to the other side to show that “it is legally impossible for the plaintiff to recover that much.” Spivey v. Vertrue, Inc., 528 F.3d 982, 986 (7th Cir. 2008). Similarly, in Meridian Security Insurance Co. v. Sadowski, 441 F.3d 536, 541 (7th Cir. 2006), the court concluded that it was inappropriate to require a party to “prove” a particular amount because the question “[w]hether damages will exceed \$75,000 is not a fact but a prediction.” However, in another recent case, the court concluded that dismissal for lack of subject matter jurisdiction was required because “none of the plaintiffs points to any ‘competent proof’ that he or she could prove damages . . . that would reach the jurisdictional threshold.” McMillian v. Sheraton Chicago Hotel & Towers, 567 F.3d 839, 844-45 (7th Cir. 2009). In Oshana, 472 F.3d at 510-511, the court seemed to combine these two approaches by stating that a “good-faith estimate of the stakes is acceptable if it is plausible and supported by a preponderance of the evidence.” Although

these cases leave some room for doubt regarding the appropriate standard, they suggest that, at a minimum, the proponent of jurisdiction must explain why it is reasonable to infer that more than \$75,000 is at stake. See also Macken ex rel. Macken v. Jensen, 333 F.3d 797, 800 (7th Cir. 2003) (proponent of jurisdiction must “place a realistic value on [equitable] relief”).

In its seven-page brief, defendant advances several reasons why it believes that the amount in controversy requirement is met in this case, but it does not develop any of these arguments. First, defendant points to plaintiff’s request for a declaration of invalidity of the non-compete clause (because it is unreasonable) and the franchise agreement as a whole (as a remedy for the alleged breach of contract). Defendant argues that either one of these declarations is worth more than \$75,000 because plaintiff has been making annual royalty payments between \$43,000 and \$51,000 over the last three years. Thus, defendant argues that the non-compete clause is worth at least \$100,000 because it imposes a two-year restriction and the contract as a whole is worth more than \$300,000 because several years remain on the contract before it expires.

Defendant is correct to argue that a request for declaratory relief may be included in the amount in controversy. In that situation, the task is to measure “the value of the object of the litigation.” Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347 (1977). In this circuit, “the object may be valued from either perspective—what the

plaintiff stands to gain, or what it would cost the defendant to meet the plaintiff's demand.” Macken, 333 F.3d at 799-80. See also Uhl v. Thoroughbred Technology and Telecommunications, Inc., 309 F.3d 978, 983 (7th Cir. 2002) (“[T]he jurisdictional amount should be assessed looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief—the so-called ‘either viewpoint’ rule”).

The problem with defendant’s evidence is that it does not show “what the plaintiff stands to gain” *or* “what it would cost the defendant to meet the plaintiff’s demand.” Rather, the figures show what *defendant* stands to *gain* by keeping plaintiff under contract, which is not a relevant consideration. Defendant does not adduce any evidence or otherwise explain why it is reasonable to believe that (1) *plaintiff* will make \$75,000 more if the contract is invalidated or (2) that defendant will *lose* more than \$75,000 if the contract is invalidated. Defendant fails to address a number of factors that would be relevant to these issues, such as the likelihood that plaintiff will take a substantial number of defendant’s clients or that defendant will be unable to find a quick replacement for plaintiff to cover the Eagle River area. By failing to address the appropriate question, defendant has failed to make a plausible showing that the equitable relief plaintiff requests satisfies the jurisdictional minimum.

Alternatively, defendant notes that plaintiff’s complaint includes a request for lost profits, incidental and consequential damages and an allegation that plaintiff has suffered “tremendous financial losses.” The problem with these allegations is that they are simply

conclusions. Defendant does not explain why it believes that any of plaintiff's damages could amount to more than \$75,000 or even identify what these damages might be. The only alleged damages in the complaint are the clients that plaintiff lost to defendant's website. However, neither party makes any effort to quantify those damages or even speculate about an amount. Because defendant must do more than identify the availability of a particular form of relief, McMillian, 567 F.3d at 844-45, plaintiff's motion to remand will be granted.

#### ORDER

IT IS ORDERED that plaintiff Jon Annis's motion to remand, dkt. #9, is GRANTED.

This case is REMANDED to the Circuit Court for Vilas County, Wisconsin.

Entered this 29th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge