IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MATT ISAACS and MICHELLE ISAACS,

Plaintiff,

v.

SHAYNE R EISENGA REVOCABLE TRUST, SHAYNE EISENGA, NELSON EISENGA and FINISH LINE FOODS AND PACKAGING, LLC,

Defendants.

OPINION and ORDER

12-cv-54-bbc

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In this civil action for monetary and injunctive relief, plaintiffs Matt Isaacs and Michelle Isaacs assert nine state law claims against defendants Shayne Eisenga, Nelson Eisenga, Shayne R Eisenga Revocable Trust and Finish Line Foods and Packaging, LLC arising out plaintiffs' former employment relationship with defendants. Plaintiffs filed the case originally in the Circuit Court for Barron County. Defendants removed it to this court on January 26, 2012, asserting diversity jurisdiction under 28 U.S.C. §§ 1332(a) and 1441(b).

Now before the court is plaintiffs' motion to remand the case under 28 U.S.C. § 1447(c). Dkt. #14. Plaintiffs contend that diversity jurisdiction is not present because they have been members of defendant Finish Line Foods and Packaging, LLC since January 2011, nearly a year before this case was removed. Because the citizenship of a limited liability company is determined by the citizenship of its members, Thomas v. Guardsmark, LLC, 487

F.3d 531, 534 (7th Cir. 2007), plaintiffs contend that their citizenship cannot be diverse from that of Finish Line. Also before the court is defendants' motion to dismiss all of plaintiffs' claims for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6), and to dismiss plaintiffs' claims against defendant Nelson Eisenga for insufficient service of process under Fed. R. Civ. P. 12(b)(4) and (5). Dkt. #8.

Rather than file a timely brief in opposition to defendants' motion to dismiss, plaintiffs filed a motion asking the court to decide their motion to remand. Dkt. #20. When plaintiffs did not receive a response from the court, they filed a brief in opposition to defendants' motion to dismiss, along with a motion requesting leave to file the untimely brief. Dkt. #40. Defendants responded with a motion to strike the late brief. Dkt. #39.

I conclude that jurisdiction is present under 28 U.S.C. § 1332 because there is more than $75,000 in controversy and plaintiffs' citizenship is completely diverse from defendants'. In particular, I conclude that defendants have shown by a preponderance of the evidence that plaintiffs were not members of defendant Finish Line at the time defendants removed this case to federal court. Therefore, I am denying plaintiffs' motion to remand.

With respect to defendants' motion to dismiss, I conclude that defendants have failed to support their arguments that plaintiffs' claims should be dismissed. Thus, I am denying the motion in full. Because I had no need to consider plaintiffs' brief in opposition to resolve the motion to dismiss, I am denying as unnecessary plaintiffs' motion to file an untimely brief and denying defendants' motion to strike the brief as moot.

One final preliminary matter requires attention. Although I did not need to consider

plaintiffs' brief in opposition to defendants' motion to dismiss, I read the brief and noticed that plaintiffs stated on multiple occasions that they had filed an amended complaint that mooted many of defendants' arguments. Plts.' Br., dkt. #34, n.2, n.3. If this had been true, it would have been unnecessary to consider defendants' motion to dismiss at all, because the amended complaint would have mooted the motion to dismiss. However, there is no amended complaint on the electronic docket for this case, so I addressed the merits of defendants' motion.

Solely for the purpose of deciding these motions, I draw the following facts from the complaint and the materials submitted by the parties.

FACTS

Plaintiffs Matt Isaacs and Michelle Isaacs are Wisconsin citizens and former employees of defendant Finish Line Foods and Packaging LLC. Finish Line is a Michigan limited liability company with its principal place of business in Barron County, Wisconsin. It is a processing and packaging company that works with major food companies to manage their inventories. According to Finish Line's Operating Agreement, which is dated February 26, 2010, defendants Shayne Eisenga and Nelson Eisenga are the only members of Finish Line. Both are Michigan citizens. Defendant Shayne Eisenga is the sole trustee for defendant Shayne R Eisenga Revocable Trust.

Defendant Finish Line's Operating Agreement includes several provisions pertaining to membership in the company. Dkt. #25-1. Paragraph 5.7 of the agreement provides that

additional members may be admitted "[u]pon approval of the Members . . . on such terms as the Members may unanimously determine at the time of admission." Paragraph 1.8 of the agreement provides that in the event of the addition of a member, "the agreement will need to be amended."

Beginning in 2010, plaintiff Matt Isaacs worked as a manager for Finish Line and was responsible for the day-to-day operations of the company. Plaintiff Michelle Isaacs operated Finish Line's food outlet and assisted with general office and bookkeeping services. As part of plaintiffs' salary arrangement, defendants told plaintiffs that they would pay the mortgage on plaintiffs' home and then reconvey it to plaintiffs. Defendants also told plaintiffs they would get title to defendants' truck and that plaintiffs would be made 1/3 owners of Finish Line beginning on January 1, 2011. On December 7, 2010, defendant Shayne Eisenga emailed Matt Isaacs stating, in part,

> Matt we both feel it is a good idea to make you a partner. Our accountant expressed 1/3 ownership would probably be best and there would be no money needed upfront, it is just something we need to structure. We can do this after the 1st of the year, if that is fine with you.

Dkt. #37-1.

On August 29, 2011, defendants Shayne and Nelson Eisenga sent a letter to Matt stating, in part,

> This letter is to confirm our commitment to making you a member (part owner) of Finish Line Foods and Packing LLC. After conferring with the company accountant and attorney, for several practical and tax reasons, our plan is to make your ownership interest effective with the start of the company's new fiscal year which will be January 1, 2012.
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> * * *

> Prior to becoming a member, all of the members will be signing an Operating Agreement setting forth the organization and operation of the company as well as the rights and responsibilities of the members. The agreement will contain a provision that will require you to offer to sell your interest in the company back to the company or other members if you are no longer employed by the company.

Dkt. #26-2.

Defendants never executed a new operating agreement or any other document making plaintiffs members of Finish Line. Additionally, defendants have not executed a land contract reconveying plaintiffs' house to plaintiffs and have refused to sign over the title to defendants' truck to plaintiffs. In December 2011, plaintiffs' employment with Finish Line was terminated.

OPINION

A. Motion to Remand

The burden of establishing diversity jurisdiction in a removal case rests on defendants, the parties seeking removal. Tylka v. Gerber Products Co., 211 F.3d 445, 448 (7th Cir. 2000). "If [a defendant's] allegations of jurisdictional facts are challenged by [its] adversary in any appropriate manner, [the defendant] must support them by competent proof. . .[F]or that purpose the court may demand that the party alleging jurisdiction justify [its] allegations by a preponderance of evidence." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); see also Meridian Security Insurance Co. v. Sadowski, 441 F.3d 536, 543 (7th Cir. 2006) (party seeking removal must establish jurisdictional facts by preponderance of evidence).

Under 28 U.S.C. § 1332(a)(1), federal courts "shall have jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between citizens of different states." There is no dispute that the amount in controversy exceeds $75,000. Additionally, there is no dispute that plaintiffs' citizenship is completely diverse from the citizenship of defendants Shayne and Nelson Eisenga and the Trust. The only question is whether plaintiffs' citizenship is diverse from Finish Line's, and this question boils down to whether plaintiffs were members of Finish Line at the time this case was removed to federal court.

I conclude that defendants have shown by a preponderance of the evidence that plaintiffs were not members of Finish Line at any time. The evidence submitted by both sides establishes that plaintiffs were not admitted as members of Finish Line when it was formed as a limited liability company. In particular, the company's Operating Agreement identifies only defendants Shayne and Nelson Eisenga as members and plaintiffs admit they were not members at the time of formation. Additionally, although plaintiffs allege that defendants promised to make them part-owners in the company, there is no evidence that defendants ever followed through on their promise. Indeed, if defendants had followed through on their promise, plaintiffs would have no reason to sue defendants to gain their membership interest. Instead, the evidence shows that defendants told Matt Isaacs in 2010 and again in 2011 that he would be made a member of the company. However, as plaintiffs allege in their complaint, "[d]efendants have refused to execute an operating agreement and/or documentation establishing plaintiffs' 1/3 ownership of Finish Line." Plts.' Cpt., dkt.

#1-1, ¶ 36. Further, under the company's Operating Agreement, the company would be required to amend or issue a new agreement if new members were added. No new agreement has been issued.

Plaintiffs' arguments to the contrary are unpersuasive. First, plaintiffs contend that the court must accept as true their own assertions that they are members of defendant Finish Line. However, when a court is considering whether it has subject matter jurisdiction, it "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 444 (7th Cir. 2009) (citation omitted). In this case, plaintiffs have offered no evidence to support their assertions that they are members of Finish Line. They do not explain how they became members or who made them members and they do not provide any documentation that they were ever made members. The only evidence they point to is the December 2010 email from defendant Shayne Eisenga to Matt Isaacs, in which Shayne stated "we both feel it is a good idea to make you a partner . . . We can do this after the 1st of the year." This email establishes only that Shayne told Matt he intended to make him a partner. It does not establish that either plaintiff ever became a member of the company.

Plaintiffs also argue that the court should not exercise jurisdiction over the case because it would jeopardize the potential remedies plaintiffs may receive. They contend that if they win the case on the merits in this court, "this Court would have to rule that diversity jurisdiction did not exist from the outset of the case. By deciding for [plaintiffs], diversity

of citizenship would necessarily be destroyed as Finish Line and [plaintiffs] would both be Wisconsin residents." Plts.' Br., dkt. #36, at 11. Plaintiffs contend that defendants would then simply move to vacate the judgment for lack of jurisdiction.

This argument makes no sense. If plaintiffs prevail on their claim that defendants refused unlawfully to make them members of Finish Line, the court could order defendants to make plaintiffs members of the company and pay them any damages they are owed. Neither of these remedies would undermine my conclusion that plaintiffs were not members of Finish Line at the time this case was removed. Greenberger v. GEICO General Insurance Co., 631 F.3d 392, 396 (7th Cir. 2011) ("[J]urisdiction is determined based on the facts at the time of filing or removal and is not lost by subsequent developments in the case.").

Because I conclude that defendants have shown that jurisdiction is present under § 1332(a), I am denying plaintiffs' motion to remand.

B. Defendants' Motion to Dismiss

Plaintiffs' complaint contains nine "counts" against defendants, which can be divided into the following legal theories:

> (a) defendants breached an agreement between the parties by failing to make plaintiffs part-owners of defendant Finish Line (count 1);
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> (b) defendants breached an agreement between the parties by failing to reconvey plaintiffs' house to them (counts 2 and 3);
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> (c) defendants engaged in fraudulent and negligent misrepresentation by telling plaintiffs that they would be made part owners of Finish Line and that defendants would convey a truck and plaintiffs' home to them (counts 4 and 5);

(c) defendants are promissorily estopped from denying plaintiffs an ownership interest in Finish Line and in refusing to convey plaintiffs their home and truck (count 6);

(d) defendants have converted plaintiffs' property interest in Finish Line and a snow plow (count 7);

(e) defendants cannot enforce a restrictive covenant against plaintiffs that would prohibit plaintiffs from competing against them (this is mislabled as a second count 7); and

(f) defendants Shayne and Nelson Eisenga breached fiduciary duties owed to plaintiffs (count 8).

Defendants have moved to dismiss the claims in plaintiffs' complaint on several grounds.

1. Failure to satisfy pleading standards

Defendants' primary argument is that plaintiffs failed to plead enough facts to state a plausible claim for relief as to any claim in their complaint, as required by Fed. R. Civ. P. 8 and discussed in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Defendants contend that plaintiffs' complaint consists primarily of conclusory assertions or legal conclusions that must be disregarded.

The problem with defendants' argument is that they make no attempt to analyze plaintiffs' claims and identify specific pleading deficiencies. For example, defendants do not argue that plaintiffs failed to plead facts to satisfy a particular element of their breach of contract claim or that plaintiffs' conversion claim is somehow deficient. Rather, defendants' simply assert generally that plaintiffs have failed to plead facts sufficient to support *any* of

their claims.

To succeed on a motion to dismiss for failure to state a claim, defendants must do more than make broad assertions that plaintiffs' complaint is inadequate. Defendant must make specific arguments explaining how the complaint is inadequate and, particularly, which elements of plaintiffs' claims are not supported by allegations in the complaint. Yeksigian v. Nappi, 900 F.2d 101, 104 (7th Cir. 1990) ("defendants have the burden on a motion to dismiss to establish the legal insufficiency of the complaint"). It is not the court's responsibility to conduct the necessary analysis for defendants. Therefore, I am denying defendants' motion to dismiss plaintiffs' complaint for failure to plead allegations sufficient to state a claim.

2. Misrepresentation claims

Defendants' next argument is that plaintiffs' misrepresentation claims should be dismissed because Wisconsin has no cause of action for misrepresentation in the context of an employment relationship. Defendants rely solely on Mackenzie v. Miller Brewing Co., 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739, in which the Wisconsin Supreme Court considered whether an employee could bring a claim for intentional misrepresentation against his employer on the basis of allegations that the employer misrepresented to the plaintiff that his position would not be affected by a reorganization of the company. The court held that the employee's only remedy was in contract, concluding that "Wisconsin does not recognize a cause of action for the tort of intentional misrepresentation to induce

continued employment in the at-will employment context." Id. at ¶ 10. The court cited its decision in Tatge v. Chambers & Owen, Inc., 219 Wis. 2d 99, 579 N.W.2d 217 (1998), in which it had held that the plaintiff could not bring a claim for intentional misrepresentation on the ground that his employer had lied to him about the effect of his refusing to sign a covenant not to compete. In that case, the plaintiff's supervisor had told him nothing would happen if he refused to sign a covenant not to compete, but after he refused, he was terminated. Id. at103-04, 579 N.W.2d 217. The court held that the plaintiff's only remedy was in contract. Id. at 107-08, 579 N.W.2d 217.

Both Tatge and Mackenzie are distinguishable from this case. In those cases, the misrepresentations were made while Tatge and Mackenzie were employed by their respective employers. However, in this case, plaintiffs allege in their complaint that they "were to receive compensation for their work at Finish Line that was to include bonuses and 'sweat equity' in Finish Line" and that "[r]ather than receiving higher salaries as compensation for their work at Finish Line, Defendants represented and agreed that Plaintiffs would become a 1/3 owner of Finish Line . . . ." Plts.' Cpt., dkt. #1-1, ¶¶ 24, 25. Although it is not precisely clear that defendants' alleged misrepresentations were made before plaintiffs began working for defendants, I can infer from these allegations that defendants made misrepresentations before plaintiffs entered into an employment relationship with defendants in an effort to induce plaintiffs to work for them.

The rule barring misrepresentation claims in situations in which there is an at-will contract does not apply when there is no employment relationship, and an employee who

is induced into entering an employment contract may sue in tort. Betterman v. Fleming Companies, Inc., 2004 WI App 44, ¶ 20, 271 Wis. 2d 193, 677 N.W.2d 673. As the court explained in Tatge, if "no employment relationship existed at the time of the misrepresentations, any duty to refrain from misrepresentation must have existed independently from the performance of [the] employment contract." Tatge, 219 Wis. 2d at 109, 579 N.W.2d 217. In Mackenzie, the court explained that "there is a distinction between actions involving fraudulent inducements to commence employment and fraudulent inducements to continue employment. . . . The essential difference is that fraudulent inducement to commence employment occurs prior to the formation of the at-will contract. Of course, both employees and employers may be subjected to a fraud action based on conduct that occurred prior to the formation of an at-will contract." Mackenzie, 2001 WI 23 at ¶ 18 n. 15 (citation omitted).

Because plaintiffs' allegations suggest that they were induced to work for defendants on the basis of misrepresentations regarding their compensation, I will deny defendants' motion to dismiss the misrepresentation claims. However, if it turns out that defendants' alleged misrepresentations were made after plaintiffs had started working for defendants, I will dismiss plaintiffs' misrepresentation claims under the rule in Mackenzie and Tatge.

3. Statute of limitations

Defendants include a two-sentence argument regarding the statute of limitations in their motion to dismiss, arguing that because "[n]either the claims regarding the alleged

land contract nor the claims regarding the transfer of title to the vehicle contain dates on which the alleged acts were to occur," they should be dismissed as barred by the applicable statute of limitations. Dfts.' Br., dkt. #9, at 9. This is another argument that makes no sense and defendants cite no law to support it. "A statute of limitations provides an affirmative defense, and a plaintiff is not required to plead facts in the complaint to anticipate and defeat affirmative defenses." Independent Trust Corp. v. Stewart Information Services Corp., 665 F.3d 930, 935 (7th Cir. 2012). Moreover, although the complaint does not contain specific dates, it states that the relevant events occurred in 2010 and 2011. In Wisconsin, the statute of limitations for contract claims is six years, Wis. Stat. § 893.43, and thus, plaintiffs' claims are not time-barred.

4. Service of process

Defendants' final argument is that plaintiffs' claims against defendant Nelson Eisenga should be dismissed because plaintiffs have not properly served him. As an initial matter, at the time defendants filed their motion to dismiss, their argument about service was premature. Defendants filed their motion to dismiss on the same day they removed the case. However, when a case is removed to federal court, a plaintiff has 120 days in which to accomplish service of process to avoid possible dismissal of the suit. Fed. R. Civ. P. 81(c)(1); Fed. R. Civ. P. 4(m); Cardenas v. City of Chicago, 646 F.3d 1001, 1004 (7th Cir. 2011). Thus, plaintiffs had until May 25, 2012 to accomplish service. Plaintiffs filed an affidavit of service for Nelson Eisenga on March 14, 2012, showing that Nelson was served

with the complaint and summons on March 3, 2012. (The affidavit states that Nelson was served with the complaint from case number 11-cv-638-GC. This was the number assigned to the case by the Circuit Court for Barron County, before the case was removed to this court.)

ORDER

IT IS ORDERED that

1. Plaintiffs Matt Isaacs' and Michelle Isaacs' motion to remand, dkt. #14, is DENIED.

2. The motion to dismiss filed by defendants Shayne Eisenga, Nelson Eisenga, Shayne R Eisenga Revocable Trust and Finish Line Foods and Packaging, LLC, dkt. #8, is DENIED.

3. Plaintiffs' motion for leave to postpone filing a brief in opposition to defendants' motion to dismiss, dkt. #20, and motion for leave to file a brief in opposition, dkt. #40, are DENIED.

4. Defendants' motion to strike, dkt. #39, is DENIED.

Entered this 11th day of June, 2012.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge