

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

DONALD R. ELIASON, and RICHARD L.
ELIASON,

Plaintiffs,

v.

GINA A. MOLGAARD, and THE GINA A.
MOLGAARD TRUST

Defendants.

OPINION AND ORDER

15-cv-833-wmc

Gina A. Molgaard, a longtime resident of Watersmeet in Northern Michigan, was declared mentally incapacitated by two physicians in early 2015 and then moved to two different assisted living facilities across the border in Northern Wisconsin at the direction of Marsha Lewis, Molgaard's friend and holder of durable powers of attorney, both for her generally and for her health care specifically. Plaintiffs Donald R. and Richard L. Eliason are both residents of St. Germain, Wisconsin, and seek to enforce a promissory note against Molgaard and The Gina A. Molgaard Trust in federal court, but to do so they must establish diversity jurisdiction.

In initially addressing defendants' motion to dismiss for lack of subject matter jurisdiction, the court was unable to determine on the pleadings alone whether Molgaard remained domiciled in Michigan despite residing for some time at assisted living facilities in Wisconsin. Accordingly, the court scheduled a telephonic status conference with the parties to address the need to further develop the record. Now, with the benefit of additional evidentiary materials from the parties, the court concludes that plaintiffs have

failed to meet their burden of proving that there is diversity of citizenship between themselves and Molgaard. For the reasons identified below, however, the court will give plaintiffs an opportunity for an evidentiary hearing before dismissing this lawsuit because of a lack of subject matter jurisdiction.

BACKGROUND¹

Molgaard executed the promissory note at issue in this case on or around January 1, 2009. At that time, she lived year-round at her home in Watersmeet, Michigan, with Marsha Lewis, her long-standing friend, fellow widow, and the named trustee of The Gina A. Molgaard Trust. The two had both lived there since October of 1999, while Molgaard had spent her summers there since 1985, the year in which Molgaard sold the restaurant that her late husband and she had run in St. Germain, Wisconsin, for more than thirty years. According to Lewis, Molgaard's Watersmeet home is "very remote with very few neighbors, being in a heavily wooded area." (Aff. of Marsha Lewis (dkt. #40) ¶ 6.) In fact, the Watersmeet home has only had electricity year-round since 1999. Before that, Molgaard spent her summers in Watersmeet and winters in Florida.

In 2010, likely because of, or at least in anticipation of, her declining health, Molgaard signed a Durable Power of Attorney for Health Care, which designated Lewis to make medical care decisions in the event she became unable to do so for herself. Molgaard was first officially diagnosed with mild dementia in 2011 at a hospital in

¹ The court derives the following facts relevant from the parties' submissions, including those invited by the court at the telephonic status conference held on June 28, 2016, making note where the parties have identified factual disputes.

Rhineland, Wisconsin. Then, in the summer or fall of 2014, someone discovered Molgaard “wandering” on a road in a wooded area near her home in Watersmeet. (*Id.* at ¶ 11.)

Around that same time, Lewis placed Molgaard in short-term, “respite care” at Milestone Senior Living (“Milestone”) in Eagle River, Wisconsin, which the parties refer to as a “community-based residential facility” or “CBRF.”² This first placement was for one week while Lewis attended a wedding out of town. Lewis was pleased with the level of attention Molgaard received during her first stay at Milestone.

In January of 2015, a Watersmeet neighbor once again discovered Molgaard wandering, but this time in temperatures below 10°F. As a result, Lewis became concerned that she could not continue as Molgaard’s principal caregiver while also working part-time. So, Lewis began exploring options for Molgaard’s care.

On February 2, 2015, Lewis took Molgaard to her primary care physician, Dr. Elmer Linboom, also located in Eagle River, Wisconsin, for an examination of her mental condition. Dr. Linboom and a second physician, Dr. Michael Byrnes, both signed a declaration of Molgaard’s mental incapacity that same day.

In February of 2015, Lewis was working in Iron River, Michigan, which she was advised had no assisted living facility.³ While an apartment-style assisted living facility

² “‘Community-based residential facility’ means a place where 5 or more adults who are not related to the operator or administrator and who do not require care above intermediate level nursing care reside and receive care, treatment or services that are above the level of room and board but that include no more than 3 hours of nursing care per week per resident.” Wis. Stat. § 50.01.

³ For context, Google Maps indicates that Eagle River, Wisconsin, is roughly twenty-seven miles south of Watersmeet, while Iron River, Michigan, is about thirty miles southeast of Watersmeet

in Crystal Falls, Michigan, was fifteen miles east of Iron River, it would not have provided Molgaard enough supervision. On February 18, 2015, therefore, Lewis moved Molgaard to a CBRF in Eagle River, Wisconsin, named Diane's Home of the Northwoods ("Diane's Home"), which gave Molgaard adequate supervision while still allowing her some privacy. Lewis also identifies other factors supporting her decision to move Molgaard to Eagle River: (1) as already mentioned, Molgaard's primary care physician was located there; (2) Molgaard's brother and closest living relative resides nearby in Sugar Camp, Wisconsin, where he could conveniently visit Molgaard;⁴ (3) Lewis did most of her banking, shopping and social activities in Eagle River; and (4) Molgaard "had more friends in Wisconsin than she did in Michigan who would be likely to visit her."⁵ (Aff. of Marsha Lewis (dkt. #40) ¶ 15.)

All of the evidence suggests that Lewis did not view Molgaard's first move to a CBRF in Eagle River as permanent. Indeed, about a month later, she spoke to the director of Diane's Home about the possibility of Molgaard returning to her home in Watersmeet. According to Lewis, the director advised her to "leave Gina where she was until the weather became warmer as it would be too unsafe for her to be home at that time." (*Id.* at ¶ 16.) In April of 2015, however, Lewis avers that Molgaard's condition

and thirty-five miles northeast of Eagle River.

⁴ Although Lewis does not indicate whether he has actually visited Molgaard, Sugar Camp is just sixteen miles southwest of Eagle River.

⁵ Although again, Lewis fails to mention whether those friends have in fact visited Molgaard, a possible explanation for Lewis's and Molgaard's apparent preexisting contacts with Eagle River is that Lewis and her late husband purchased a restaurant in Eagle River in 1991, which Lewis sold in 2004 (and presumably managed in that span of time). According to Lewis, Molgaard often helped her at that restaurant. (Aff. of Marsha Lewis (dkt. #40) ¶ 9.)

worsened, and so she did not believe she could both care for Molgaard in Watersmeet and work part-time.

Lewis then met with an attorney in Hurley, Wisconsin, to draft estate planning documents for Molgaard, including a General Durable Power of Attorney that Molgaard signed on April 16, 2015. The General Durable Power of Attorney gives Lewis the authority to “establish a new residency or domicile for [Molgaard], from time to time and at any time, within or without the state, for such purposes as [Lewis] shall deem appropriate[.]” (Aff. of Lawrence Wiesneske Ex. A (dkt. #15-1) ¶ 31.) Consistent with Lewis’s conversation with the director of Diane’s Home a month earlier, however, the General Durable Power of Attorney also includes a statement of Molgaard’s express “intention to return to [her] residence from any hospital, hospice, nursing home, or other health care facility.” (*Id.* at VI.)

According to Lewis, Molgaard’s mental health condition continued to worsen. This is corroborated by Dr. Linboom, who noted after a visit with Molgaard on August 21, 2015, that she was unable to identify his profession or an ink pen. (Aff. of Elmer L. Linboom Ex. B (dkt. #16-2).) By this time, Lewis also reports noticing that Diane’s Home was short-staffed and that the level of care Molgaard was receiving was inadequate. Accordingly, as confirmed in Dr. Linboom’s notes from the August 21st visit, Lewis began to consider moving Molgaard to another, familiar Eagle River CBRF -- Milestone. Not only was Lewis already familiar with Milestone from Molgaard’s previous, brief stay in its respite care program, but it offered a “memory unit” that would provide Molgaard with a higher level of care. Although Dr. Linboom’s notes reflect his

agreement that Milestone “would be a reasonable option at [that] time,” he also noted his warning to Lewis that “it might not be too long before Gina [would] need skilled nursing.” (*Id.*)

On August 24, 2015, Lewis moved Molgaard, who was by then 84 years old, to Milestone with the hope that the social stimulation there would slow her decline.⁶ As a result of the move, Molgaard was actually closer to a hospital than she would have been if she returned to her residence in Watersmeet.⁷ As a result, Lewis avers in her affidavit, “there was no doubt in my mind that when I moved Gina A. Molgaard to the Milestone Senior Living [CBRF] in Eagle River, Wisconsin on August 24, 2015, that the move would be permanent and that she would never be able to return to her home in Watersmeet, Michigan.” (*Aff. of Marsha Lewis (dkt. #40) ¶ 21.*) Molgaard was already residing at Milestone when plaintiffs filed their complaint in December of 2015. She has remained there since.

OPINION

In their motion to dismiss, defendants argue that complete diversity among the parties does not exist because Molgaard was already domiciled in Wisconsin, as were the plaintiffs, at the time they filed their complaint. In an opinion and order dated June 9, 2016, the court initially determined that the factual record at the time was insufficient to

⁶ The record includes two more notes from Linboom documenting Molgaard’s declining mental health after August 21, 2015 -- one on September 21 and the other on October 1. (*Aff. of Elmer L. Linboom Ex. B (dkt. #16-2).*)

⁷ As previously noted, Molgaard’s long-time residence in Watersmeet, Michigan, is roughly thirty miles from the nearest hospital in Eagle River, Wisconsin, while Milestone is actually in Eagle River.

determine whether Molgaard's domicile had changed from Michigan to Wisconsin, particularly given that defendants gave essentially no explanation as to the reasons Lewis moved Molgaard to Eagle River, let alone whether she intended for her to remain there indefinitely. (Dkt. #37.) At a telephonic hearing to address the need to further develop the record as to subject matter jurisdiction, the court invited the parties to submit additional materials with respect to Molgaard's domicile, including any proffers, affidavits and legal arguments. *See Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986) ("We do not suggest that the district court or this court must always or even often conduct an inquest on jurisdiction; but certainly if deficiencies in the pleadings, or facts brought out in pretrial discovery or at trial, fairly shriek that there is no federal jurisdiction, the district judge must conduct whatever supplementary factual proceedings are necessary to resolve the doubt."). Having now considered the parties' additional briefing and affidavits, the court finds that plaintiffs have not met their burden to show that diversity jurisdiction exists.

In deciding any motion to dismiss under Rule 12(b)(1), the court must accept all well-pleaded factual allegations as true and draw reasonable inferences in plaintiffs' favor. *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995). Where, as here, a movant brings a factual challenge to jurisdiction, contending that external facts destroy jurisdiction despite the complaint's facial sufficiency, the court "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) (internal quotation marks and citations omitted).

Since plaintiffs assert federal jurisdiction, they have the burden of proof. *Craig v. Ont. Corp.*, 543 F.3d 872, 876 (7th Cir. 2008); *see also McCann v. Newman Irrevocable Tr.*, 458 F.3d 281, 288 (3d Cir. 2006) (explaining that if the party asserting a new domicile presents sufficient evidence to rebut the established domicile claimed by plaintiff, the burden of proving diversity remains with plaintiff). More specifically, “a proponent of federal jurisdiction must, if material factual allegations are contested, prove those jurisdictional facts by a preponderance of the evidence.” *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006).

Ordinarily, for diversity purposes, an individual establishes domicile in a particular state if she both: (1) physically resides in that state; and (2) intends to remain there. *Midwest Transit, Inc. v. Hicks*, 79 F. App’x 205, 208 (7th Cir. 2003) (citing *Dakuras v. Edwards*, 312 F.3d 256, 258 (7th Cir. 2002); *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996)). Even a long absence from one’s domicile alone cannot establish a new domicile, if one intends to return. *Gravdahl v. Conwell*, No. 00-C-0579, 2002 WL 398599, at *2 (N.D. Ill. Mar. 14, 2002); *Seaboard Fin. Co. v. Davis*, 276 F. Supp. 507, 510 (N.D. Ill. 1967). Indeed, there is a general presumption in the ordinary case that an individual maintains an already-established domicile when he or she relocates. *See Texas v. Florida*, 306 U.S. 398, 427 (1939); *Mitchell v. United States*, 88 U.S. 350, 353 (1875); *Sadat v. Mertes*, 615 F.2d 1176, 1181 (7th Cir. 1980).

As already alluded to, however, this is no ordinary case. In particular, there is *no* dispute whether defendant Gina A. Molgaard herself intended to change her domicile from Michigan to Wisconsin, or even whether she had the mental capacity to do so. Instead, the parties disagree whether defendant's friend, *Marsha Lewis*, under the authority afforded her by the two durable powers of attorney, intended to change Molgaard's domicile to Wisconsin by December of 2015, when plaintiffs filed this suit in federal court.

In its 2002 decision in *Dakuras*, the Seventh Circuit, persuaded by the reasoning of the Tenth Circuit in *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 12 F.3d 171 (10th Cir. 1993), held that a guardian could change the domicile of his or her ward, since to hold otherwise would improperly elevate the importance of the presumption against changing domicile above "the interests of the person the presumption was designed to protect." *Dakuras*, 312 F.3d at 258 (citing *Rishell*, 12 F.3d at 174). Notably, despite this court's lengthy discussion of the holding in *Dakuras* in its previous order, plaintiffs do *not* challenge Lewis's legal authority to change Molgaard's domicile for diversity purposes even though Lewis has not sought to be appointed Molgaard's guardian by a court.⁸ On the contrary, plaintiffs concede that "the General POA granted

⁸ At least one other court has posited that *Rishell* and *Dakuras* may be distinguishable from other cases on the basis that they both "involved a court-appointed guardian with recognized legal capacity to act on behalf of the incompetent." See *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.2d 444, 449 n.3 (5th Cir. 2003); see also *Rishell*, 12 F.3d at 173 ("[state courts] have allowed legal representatives of incompetent persons to change the domiciles of their wards for diverse beneficial purposes, but usually only under court direction or because of a family relationship between the representative and the ward"). Likely, plaintiffs recognize that the express language of the General Durable POA granted this power with or without a court's imprimatur. Regardless, they have waived the issue here.

Lewis the authority to establish a new residency or domicile for Molgaard after April 16, 2015.” (Pls.’ Resp. Br. (dkt. #43) at 3.) Likewise, plaintiffs do not contend that Lewis moved Molgaard to Wisconsin to destroy federal jurisdiction, which would constitute an improper purpose about which the *Dakuras* court expressed concern. *See* 312 F.3d at 259.

Given these concessions, Lewis’s latest affidavit appropriately focuses on this court’s expressed concern as to her previously unstated intent in moving Molgaard to Milestone in August of 2015, by unequivocally stating that she understood the move would be “permanent.” Also, her affidavit provides much-needed context regarding Molgaard’s and her connections to both Wisconsin and Michigan, as well as the reasons for moving Molgaard to Milestone that, along with Dr. Linboom’s contemporaneous notes, bolsters her view that Molgaard would never be able to return to Watersmeet.

Still, there remains some doubt as to the weight that should be given Lewis’s now-stated intent. This is particularly so given that *Molgaard’s* own, last-stated intent with respect to her domicile, as expressed in the General Power of Attorney she signed on April 16, 2015, was to remain domiciled in Michigan. As previously discussed, defendants would explain away Molgaard’s stated intent by filing an affidavit from an elder law expert who opines that such expressions are typically included so that the declarant can keep her homestead Medicaid asset exemption (dkt. #15), but as the court observed in its earlier order, “this explanation essentially *supports* a finding that Lewis desired *not* to affect the status of Molgaard’s existing domicile in Michigan.” (Dkt. #37.)

Additionally, on August 27, 2015, three days after Lewis moved Molgaard to Milestone, she filed an answer on Molgaard's behalf in a state court case, admitting an allegation that Molgaard was a resident of Michigan. (Dkt. #14-1.) Defendants contend, however, that Lewis, acting without the advice of an attorney, did not understand, nor could have understood, the possible significance of that representation.

Principally, plaintiffs challenge Lewis's stated belief that Molgaard's move to Milestone would be "permanent" by pointing to Dr. Linboom's note just three days before the move to Milestone, in which he agrees the move was a "reasonable option" for the time being, but also notes telling "Marsha [Lewis] that it might not be too long before Gina will need skilled nursing[.]" (Aff. of Elmer L. Linboom Ex. B (dkt. #16-2).) Being so informed, plaintiffs argue, Lewis could not have reasonably believed that Molgaard's move to Milestone would be permanent. As further support, plaintiffs point to Dr. Linboom's note from October 1, 2015, indicating that "Gina has been deteriorating rather fast the last few months and she may need placement into a skilled nursing facility as Milestone is only a CBRF. Marsha is getting closer to this inevitability." (*Id.*)

While Dr. Linboom's warnings to Lewis may call into question the strength of her stated belief that Molgaard's August move to *Milestone* was permanent, plaintiffs offer essentially no reason to doubt Lewis's stated, broader intent to leave Molgaard in Wisconsin indefinitely, where health care options were (and would continue to be) far superior to those near Watersmeet. At least, given Molgaard's rapidly escalating need for

physical and mental care, this was true by the time plaintiffs filed their complaint, which, of course, is the critical period for jurisdictional purposes.

“It is well-established that in ascertaining intent to remain for purposes of establishing domicile a party’s entire course of conduct may be taken into account.” *Perry v. Pogemiller*, 16 F.3d 138, 140 (7th Cir. 1993). Only if a party’s conduct is *inconsistent* with her assertion of intent, does it deserves little weight. *See Sadat*, 615 F.2d at 1181.

Here, Lewis’s intent for Molgaard to continue living and receiving medical care in Wisconsin permanently (or even more to the point, intent never to return her to Watersmeet) strikes this court as wholly credible given: (1) Molgaard’s continuous residence in Eagle River from February of 2015 through the filing of the complaint in December of 2015; (2) Molgaard’s deteriorating mental capacity to care for herself; and (3) the relative availability of health care services in the geographic area surrounding Eagle River, Wisconsin compared to Watersmeet, Michigan. Put somewhat differently, neither Lewis’s questionable belief that Molgaard’s most recent move to Milestone would be *permanent*, nor her continued claim to Molgaard’s homestead exemption in Michigan, though disingenuous at best and fraudulent at worst, call into significant doubt that she moved Molgaard to Eagle River, Wisconsin, permanently because that is where she would receive the best care. *Cf. Hicks*, 79 F. App’x at 209 (noting that the question regarding an individual’s intent to change his domicile was whether it “was indeed bona fide”).

In fairness to plaintiffs, as already explained, the court invited the parties to further develop the facts surrounding Molgaard’s move to Wisconsin, because not only

had Lewis (until now) failed to address, much less explain, her intent in moving Molgaard in the first round of briefing on defendants' motion to dismiss, the record was devoid of facts from which the court could evaluate any implicit intent to move Molgaard to Wisconsin permanently. Now, with the benefit of additional, uncontradicted facts submitted by defendants, the greater preponderance of the evidence is that after attempting various, unsuccessful short-term moves, Lewis had moved Molgaard to Eagle River in August of 2015 for the remainder of her life, or at least with no intent, expectation or even hope of her ever returning to Watersmeet, except for burial.

While long-time residents of Michigan, both Lewis and Molgaard had significant connections to Eagle River, Wisconsin, and Molgaard retained important contacts with Eagle River even after she moved to Watersmeet, including relationships with her brother and friends. In addition, Lewis credibly affirms that she moved Molgaard to Milestone in Eagle River permanently because of her familiarity with it, because it was better equipped for Molgaard's medical needs than comparable facilities near her house in Michigan, and because it is located near a hospital, unlike her former Watersmeet home.

To be sure, the record still lacks some details, such as the likely location of "skilled nursing facilities," which Dr. Linboom predicted Molgaard may need soon, including facilities near Iron River, Michigan, where Lewis is currently working part time. Even assuming that Lewis will need to move Molgaard to another facility, however, plaintiffs offer no evidence supporting an inference that Lewis would move her back to a facility in Michigan, rather than in Wisconsin.⁹ Moreover, while Molgaard's last stated intent in

⁹ Nor have plaintiffs sought any additional discovery or an evidentiary hearing to further develop

her April of 2015 General POA was to remain domiciled in Michigan, plaintiffs offer no reason why that statement of intent deserves significant weight, particularly given that Molgaard had been declared mentally incapacitated by two physicians approximately two months before signing the POA.

Regardless, under the reasoning the Seventh Circuit adopted in *Dakuras*, a guardian is legally charged with changing his or her ward's domicile any time after the POA is executed because the best interests of the ward should be at the center of the analysis. 312 F.3d at 258. As already mentioned, plaintiffs concede that the POA did just that here, by “grant[ing] Lewis the authority to establish a new residency or domicile for Molgaard after April 16, 2015” (Pls.’ Resp. Br. (dkt. #43) at 3), and Lewis has provided ample evidentiary support to find her claimed intent to do so credible.

Finally, plaintiffs’ evidence that Lewis’s failure to change “where Molgaard’s Medicaid benefits are administered, taxes are paid, mail is received, and/or bank accounts and/or personal property are located from Michigan to Wisconsin” falls short, since they again fail to explain why those factors, typically evaluated as objective manifestations of an individual’s intent to be domiciled in a particular state, are of significance where the named defendant has been declared incompetent. Indeed, neither the *Dakuras*, *Acridge* nor *Rishell* courts, all of which held that a guardian may change the domicile of his or her ward, considered those factors in determining whether diversity jurisdiction existed.

Although the record is not overwhelmingly one-sided, defendants have presented enough facts to defeat the presumption in favor of Molgaard’s established domicile in

the factual record.

Watersmeet, Michigan, and plaintiffs have otherwise failed to meet their burden to show that Molgaard remains domiciled there. Even so, there remain deficiencies in the factual record that the court has identified, and given Lewis's only statement regarding her intent to change Molgaard's domicile is expressed in an affidavit prepared after plaintiffs filed this case in federal court, an assessment of her credibility is tentative, however persuaded the court may be generally. Accordingly, the court will give plaintiffs one last opportunity to establish diversity jurisdiction by challenging Lewis's credibility in an evidentiary hearing, should they so wish. Plaintiffs may have one week from the date of this order to notify the court of their desire for an evidentiary hearing to determine Molgaard's domicile. If plaintiffs do not make such a request, however, the court will dismiss this case for lack of subject matter jurisdiction due to a lack of complete diversity of citizenship.

ORDER

IT IS ORDERED that:

1. Plaintiffs shall have until October 3, 2016, to notify the court that it requests an evidentiary hearing to determine Gina A. Molgaard's domicile.
2. Failure to do so timely shall result in dismissal of this case without prejudice by the clerk of court for lack of subject matter jurisdiction.

Entered this 26th day of September, 2016.

BY THE COURT:

WILLIAM M. CONLEY
District Judge