

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

E&G FRANCHISE SYSTEMS, INC.,

Plaintiff,

OPINION and
ORDER

03-C-0276-C

v.

THOMAS J. GRAHEK and
TJG DEVELOPMENT, INC.,
a Minnesota corporation,

Defendants.

This is a civil action for monetary relief in which plaintiff seeks to recover settlement costs and fees pursuant to a contractual indemnification provision. Plaintiffs initially brought this suit in the Circuit Court for Eau Claire County, Wisconsin, but defendants removed it to this court pursuant to 28 U.S.C. §§ 1441 and 1446, alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs contend that defendants violated the indemnification clause contained in the Territory Representative Agreement between the two parties by failing to reimburse plaintiffs for settlement costs arising in connection with the agreement.

Generally, a plaintiff alerts the court to problems with the exercise of federal jurisdiction of a removed case by filing a motion for remand. See 28 U.S.C. § 1447(c). Although that was not done in this case, the court has an independent obligation to insure that it exists. See generally, Wild v. Subscription Plus, Inc., 292 F.3d 526 (7th Cir. 2002). Although a defendant may remove merely by filing notice of removal, 28 U.S.C. § 1446, the party seeking to invoke jurisdiction always bears the burden of supporting its jurisdictional allegations by "competent proof." NFLC, Inc. v. Devcom Mid- America, Inc., 45 F.3d 231, 237 (7th Cir. 1995) (citing McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936)). The Court of Appeals for the Seventh Circuit has interpreted this burden to mean that a party must show "to a reasonable probability that jurisdiction exists." Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997).

To prove the existence of diversity jurisdiction, the plaintiff must show both that the \$75,000 amount in controversy has been satisfied and that there is complete diversity of citizenship. Because plaintiff has alleged \$264,888.26 in damages, exclusive of costs and attorney fees, the \$75,000 amount in controversy requirement is satisfied. To satisfy the complete diversity requirement, there must not be citizens of the same state on opposite sides of a lawsuit. Turner/Ozane v. Hyman/Power, 111 F.3d 1312, 1318 (7th Cir. 1997). In the notice of removal, defendant alleges that, at the time the complaint was filed, plaintiff was a Wisconsin corporation with its principal place of business in Eau Claire, Wisconsin,

defendant TJG Development, Inc. was a Minnesota corporation with its principal place of business in Stillwater, Minnesota and defendant Grahek was a “resident” of Minnesota. The Court of Appeals for the Seventh Circuit has adopted a “nerve center” approach to determining the citizenship of corporations under which corporation citizenship is determined by the state of incorporation and the location of the principal place of business. Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991). Thus, plaintiff is a citizen of Wisconsin and defendant TJG Development, Inc. is a citizen of Minnesota and there is diversity between them.

In order to satisfy the complete diversity requirement, plaintiff must also be diverse from defendant Grahek. A party who wishes to invoke diversity jurisdiction must plead citizenship distinctly; pleading residency is insufficient. Salzstein v. Bekins Van Lines, Inc., 747 F.Supp. 1281, 1282 (S.D. Ill. 1990); Jones v. Hadican, 552 F.2d 249, 251, n.3 (8th Cir. 1977), *cert. denied*, 431 U.S. 941 (1977); 15 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 102.31 (3d. ed. 2003). Cf. Howell by Goerdt v. Tribune Entertainment Co., 106 F.3d 215 (7th Cir. 1997) (holding that “John Doe” defendants are not allowed in federal diversity suits “because the existence of diversity jurisdiction cannot be determined without knowledge of every defendant’s place of citizenship”) (emphasis added). Because defendants’ notice of removal states only that defendant Grahek is a “resident” of Minnesota, it is insufficient to establish diversity jurisdiction. A defective allegation of

jurisdiction may generally be amended on its terms at any stage in the proceeding. 28 U.S.C. § 1653. Accordingly, defendants may have until September 3, 2003, to provide this court with verification of defendant Grahek's citizenship.

ORDER

IT IS ORDERED that defendants have until September 3, 2003, to submit an affidavit setting forth the citizenship of defendant Grahek.

Entered this 27th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge