IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WARREN LOVELAND, LLC,

OPINION AND ORDER

Plaintiff,

05-C-162-C

v.

KEYCORP INVESTMENT L.P. IV and OTTER CREEK HOMES L.P.,

Defendants.

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Defendant Keycorp Investment L.P. IV removed this action from the Circuit Court for La Crosse County, Wisconsin to this court under 28 U.S.C. §§ 1441 and 1446. Defendant KeyCorp contends that diversity jurisdiction exists under 28 U.S.C. § 1332. Plaintiff disagrees and has moved to remand the case to state courtfor lack of subject matter jurisdiction. Plaintiff contends that subject matter jurisdiction is lacking because neither the amount in controversy nor the complete diversity requirement of § 1332 is met. I conclude that defendant Keycorp Investment L.P. IV has failed to prove to a reasonable probability that the amount in controversy exceeds $75,000. This conclusion makes it unnecessary to determine whether the parties are truly diverse.

Jurisdiction in removal cases is determined by "looking at the plaintiff's state court complaint, along with the record as a whole." Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993) (citations omitted). For the sole purpose of deciding this motion, I find the following facts from plaintiff's complaint, the notice of removal and the parties' briefs.

FACTS

Plaintiff Warren Loveland, LLC is a limited liability company organized and existing under the laws of Wisconsin; its sole member is Warren Loveland. Defendant Keycorp Investment Limited Partnership IV is an Ohio limited partnership. Its partners are Cox HDTV, Inc., a Delaware corporation with its principal place of business in Atlanta, Georgia, and Westlake Housing Capital Fund II GP, LLC, a Texas limited liability company. Defendant Otter Creek Homes L.P. is a Wisconsin limited partnership whose sole general partner is plaintiff and whose sole limited partner is defendant Keycorp.

Plaintiff and defendant Keycorp formed Otter Creek Homes in 1997 for the purpose of acquiring, building, owning and operating Otter Creek Apartments, a 63-unit qualified low income housing project in Eau Claire, Wisconsin. The partnership agreement calls for the partnership to continue in existence until December 31, 2030. Section 9.7 of the partnership agreement requires plaintiff, as general partner, to "remove the Management Agent if cause for such removal exists" and provides a non-exhaustive list of conditions that

qualify as "cause" for this purpose. The parties agree that under the partnership agreement the management agent, whoever it may be, shall be paid 6% of the gross collected rents. This fee has translated to roughly $21,000 annually. Horizon Management Group, Inc. has served as the management agent since the partnership was formed. Horizon is a Wisconsin corporation whose president and sole shareholder is Denise Loveland, Warren Loveland's wife. Defendant KeyCorp, acting through its asset manager, demanded in writing that plaintiff remove Horizon as the management agent. Plaintiff refused and filed this lawsuit in state court seeking a declaration of the parties' rights and duties under § 9.7 of the partnership agreement. Defendant KeyCorp removed the case to this court.

After removal, defendant KeyCorp filed a counterclaim seeking, among other things, declaratory relief with respect to the parties' rights and obligations under § 9.6(k) of the partnership agreement. Section 9.6(k) provides that defendant KeyCorp may remove plaintiff as general partner if plaintiff fails to "timely and promptly discharge the Management Agent if at any time cause . . . for such removal exists." The general provisions of § 9.6 require written notice from defendant KeyCorp "specifying the circumstances or conditions constituting grounds for removal" and provide plaintiff an opportunity to cure or correct the circumstances. If plaintiff were removed as general partner, it would stand to lose more than $240,000. Plaintiff's complaint seeks no judicial action with respect to § 9.6(k) and makes no mention of this section.

OPINION

As the party invoking federal jurisdiction, defendant KeyCorp bears the burden of proving the facts necessary to establish diversity jurisdiction. NFLC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995). In the context of removal jurisdiction, the Court of Appeals for the Seventh Circuit has determined that this burden requires "proof to a reasonable probability that jurisdiction exists." Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 n.2 (7th Cir. 1993). Diversity jurisdiction exists when the amount in controversy exceeds $75,000 and the adverse parties are citizens of different states. 28 U.S.C. § 1332. Accordingly, defendant must show to a reasonable probability that the jurisdictional amount, $75,000, is in controversy. Shaw, 994 F.2d at 366 n.2.

Defendant KeyCorp attempts to measure the amount in controversy in four different ways: (1) by the loss plaintiff would suffer if defendant is granted declaratory relief on its counterclaim; (2) by the loss defendant would suffer if plaintiff is granted declaratory relief on its claim; (3) by the loss plaintiff would suffer if denied relief on its claim; and (4) by the costs defendant might incur if it received an adverse judgment in a hypothetical lawsuit instigated by Horizon Management Group, Inc.

A. Valuation of Declaratory Relief

In the leading case on calculating the amount in controversy in actions for declaratory or injunctive relief, Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347 (1977), the United States Supreme Court stated that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object litigated." In Hunt, the plaintiff challenged the constitutionality of a North Carolina statute restricting the markings that apple producers were allowed to put on containers shipped into the state. The Court explained that the object of litigation was the right of the individual apple growers and dealers "to conduct their business affairs in North Carolina free from interference of the challenged statute." Id. The Court valued this right with reference to evidence establishing the costs of compliance with the statute and lost profits that were found to be the direct result of the statute. Id. at 347-48.

Defendant KeyCorp has demanded the removal of Horizon as management agent, citing § 9.7 of the partnership agreement. Plaintiff seeks only a declaration that it is not required to remove Horizon under that section. Therefore, the object litigated is the respective rights of the parties under § 9.7 of the partnership agreement. Unlike the record in Hunt, nothing in the record in this case presents evidence of past damages suffered from which I can infer the value of this declaratory relief going forward.

B. Defendant's Counterclaim

Defendant offers a theory that purports to value the amount in controversy with reference to the costs plaintiff would incur as a result of an adverse judgment on its claim. If plaintiff loses on its claim, defendant argues, plaintiff will be removed as general partner. By this measure, plaintiff stands to lose over $240,000. Although defendant's briefing attributes this potential loss to an adverse decision on plaintiff's original claim, the record shows that plaintiff could be removed as general partner only as the result of an adverse judgment on defendant's counterclaim.

Section 9.7 of the partnership agreement does not contain a provision for removal of Warren Loveland, LLC as general partner of Otter Creek. Rather, § 9.6(k) allows defendant to remove plaintiff as general partner if plaintiff fails to timely and promptly discharge Horizon if cause for such removal exists. Plaintiff makes no claim for declaratory relief with respect to § 9.6(k); defendant does so in its counterclaim.

It is quite possible that plaintiff could lose on his claim for declaratory relief with respect to § 9.7 and still prevail on the question of removal as general partner under § 9.6(k). Section 9.6 provides that defendant must give written notification of the grounds for removal as general partner in order to make the removal effective. Furthermore, § 9.6 provides plaintiff an opportunity to cure after receiving such notice. Thus, defendant may prove at trial that cause existed to discharge Horizon and yet fail to prove that it has the

right to remove plaintiff as general partner. Although defendant's rights under § 9.6(k) are related to plaintiff's claim on § 9.7, a holding that cause exists does not result in plaintiff's automatic removal. Defendant admits as much by including separate counterclaims for declaratory relief with respect to these two sections. Therefore, removal of plaintiff as general partner cannot be seen as a direct result of plaintiff's receiving an adverse judgment on his claim, but only as a result of defendant's counterclaim.

Courts are divided on the question whether a compulsory counterclaim worth more than $75,000 may satisfy the amount in controversy requirement in removal cases when plaintiff's complaint does not. 14B Charles Alan Wright et al., Federal Practice & Procedure § 3706 (1998); compare Mesa Industries, Inc. v. Eaglebrook Products, Inc., 980 F.Supp 323 (D. Ariz. 1997)(removal denied), with Swallow & Associates v. Henry Molded Products, Inc., 794 F. Supp. 660 (E.D. Mich. 1992)(removal permitted). The majority position is that the value of a compulsory counterclaim is not included in the amount in controversy for diversity jurisdiction purposes. Mesa Industries, Inc., 980 F. Supp at 326-27 (stating that the majority of cases do not allow removal where original claim did not meet statutory minimum). The Court of Appeals for the Seventh Circuit has not addressed this question. It is not necessary for this court to reach the question because defendant KeyCorp filed its counterclaim *after* removal.

In St. Paul Mercury Indemnity Co. v Red Cab Co., 303 U.S. 283, 293 (1938), the

Supreme Court stated generally that jurisdiction must exist at the time of removal. In that case the plaintiff had attempted to reduce the amount of its claim in order to destroy federal jurisdiction after a proper removal. In Federal Deposit Insurance Corporation v. Elefant, 790 F.2d 661 (7th Cir. 1986), the Court of Appeals for the Seventh Circuit applied this timing rule to a post-removal counterclaim by the defendant. The court held that where no jurisdiction exists over plaintiff's original claim and defendant files a post-removal counterclaim invoking federal law, remand to state court is required. Id. at 667; see also Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 390 (1998)(stating in dicta that for removal jurisdiction court looks at the record prior to defendant's answer in federal court). I see no reason why a counterclaim based on diversity jurisdiction should be treated any differently from one based on federal question jurisdiction when applying this doctrine. See, e.g., Morgan Music, Inc. v. Baldwin Piano & Organ Company, No. 96-C-573-C (W.D. Wis. Apr. 30, 1997). Accordingly, I conclude that defendant's counterclaim for declaratory relief based on § 9.6(k) of the partnership agreement cannot be used to determine the amount in controversy.

C. Costs to Defendant

Defendant's next argument is that it stands to lose more than $75,000 in the event that plaintiff is granted relief on its claim. Defendant argues that if plaintiff is successful on

its claim, defendant will lose the value of its right to demand removal of the management agent, which it values at $21,000 annually, presumably for the next 25 years (the remaining duration of the partnership agreement). The parties agree that $21,000 approximates the annual fee paid by the partnership to the management agent and defendant has submitted evidence that this fee will remain static into the foreseeable future.

The Court of Appeals for the Seventh Circuit has adopted the "either viewpoint" rule, under which the object litigated can be valued by "what the plaintiff stands to gain, or what it would cost the defendant to meet the plaintiff's demand." Macken v. Jensen, 333 F.3d 797, 799 (7th Cir. 2003); see also Uhl v. Thoroughbred Technology & Telecommunications, 309 F.3d 978, 983-84 (7th Cir. 2002); McCarty v. Amoco Pipeline Co., 595 F.2d 389, 391-95 (7th Cir. 1979). Defendant KeyCorp is correct in identifying the object litigated as the right to demand removal of the management agent; if plaintiff obtains the declaration it seeks, defendant will lose the value of its right to remove Horizon under § 9.7. However, defendant's method of valuing this right is defective.

The pecuniary value to defendant of the choice of management agent should be measured by the difference between the value of the services a replacement management agent would provide and the value of the services Horizon currently provides, discounted by defendant's interest in the partnership. Although defendant does not explicitly make the argument that Horizon's services are worthless, this is the necessary implication of its

argument that the value of replacing Horizon is equal to the amount of the management fee itself. As nothing in the record shows that Horizon's services are utterly worthless, I cannot accept the management fee as a measure of the direct costs to defendant of plaintiff prevailing on its claim. Because defendant has not submitted evidence to support its assertion that its costs in meeting plaintiff's demand would exceed $75,000, I turn to the parties' arguments relating to the value to plaintiff of not removing Horizon.

D. Costs to Plaintiff

Defendant offers a theory that values the amount in controversy with reference to the pecuniary losses plaintiff would incur if denied declaratory relief. Not surprisingly, this theory measures plaintiff's potential losses as they relate to the management fees. Defendant correctly cites Mailwaukee Mailing, Shipment and Equipment, Inc. v. Neopost, Inc., 259 F. Supp. 2d 769 (E.D. Wis. 2003), for the proposition that the amount in controversy may be measured by future losses suffered by the plaintiff as a direct result of being denied declaratory relief. In essence, this is how the Supreme Court determined the amount in controversy in Hunt when it valued the plaintiffs' rights in terms of the costs of complying with the challenged statute. However, defendant's application of this proposition to the facts of this case is flawed.

Defendant points out that Horizon's president and sole shareholder, Denise

Loveland, is Warren Loveland's wife. Defendant then infers that "some portion of the property management fee . . . ultimately flows to Denise Loveland and that Mr. Loveland has an undivided half-interest in that property" by virtue of Wisconsin's marital property statutes. Therefore, if plaintiff loses on its claim and Horizon is removed, plaintiff will forgo a portion of the management fees. In making this argument, defendant is urging this court to ignore the legal distinctions between Horizon Management, Inc. and Denise Loveland and plaintiff Warren Loveland, LLC and Warren Loveland. By looking past the troublesome existence of these entities, defendant argues, this court can see that the management fees paid to Horizon are a "benefit" to Warren Loveland and, by strained inference, to plaintiff. Defendant has made no effort to quantify the share of these management fees that passes from Horizon to Denise Loveland, much less the fraction of that amount Warren Loveland would invest in plaintiff. I cannot conclude that Horizon's income accrues to plaintiff in sums large enough to meet the jurisdictional minimum absent much stronger evidence than the fact of Denise and Warren Loveland's marital relationship.

E. Horizon's Hypothetical Claim

Finally, defendant argues that this action "should be seen for what it is: a way for Warren Loveland to avoid terminating his wife . . . and the awkwardness of potential

litigation initiated by his wife as a result of such action." Defendant argues that "Mr. Loveland (through his company) seems to be acting to protect his wife in this case." If the true party in interest is Denise Loveland and not plaintiff, then plaintiff may not have standing to sue. It is not clear why defendant believes that challenging plaintiff's standing to sue will help it establish jurisdiction. If a party does not have standing to sue, there is no case or controversy and the federal courts lack subject matter jurisdiction to hear the case. Discovery House, Inc. v. Consolidated City of Indianapolis, 319 F.3d 277, 279 (7th Cir. 2003).

However, it is unnecessary to address the issue of plaintiff's standing because defendant's argument suffers from two obvious defects. Defendant contends that if plaintiff had removed Horizon, Horizon would have sued KeyCorp for the lost management fees. Defendant suggests that this hypothetical makes it "readily apparent" that the management fees are the appropriate measure of the amount in controversy in the present case. The first problem with this theory is that Horizon's hypothetical claim is not before this court and is based on facts that, if true, would render the claims before this court moot. Plaintiff did not remove Horizon as management agent and defendant is not being sued for the management fees. Indeed, had plaintiff removed Horizon, it would not have filed the present lawsuit. I cannot measure the amount in controversy in terms of claims not before the court and grounded in imagined events. The second major problem with defendant's

theory is that it is based on conjecture rather than evidence. Gould, 1 F.3d at 547 (removing party bears the burden of establishing jurisdiction by preponderance of *evidence*).

Nothing in the record shows that the plaintiff's claim for declaratory relief puts more than $75,000 in controversy. When the monetary value of a controversy cannot be estimated, litigation must commence in state court. Macken v. Jensen, 333 F.3d 797 (7th Cir. 2003). All doubts should be resolved against removal both to protect against exposing the successful party in this action to challenges of the final judgment on jurisdictional grounds and to prevent an infringement upon state sovereignty. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993); Morgan Music, Inc., No. 96-C-573-C (W.D. Wis. Apr. 30, 1997). None of defendant's proffered valuations of the amount in controversy are supported by both law and evidence. Because defendant has not met its burden, I must remand this case to state court.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion to remand is GRANTED.

2. This case is REMANDED to the Circuit Court for La Crosse County, Wisconsin.

3. The clerk of court is directed to return the record in case number 5-C-162-C to the Circuit Court for La Crosse County, Wisconsin.

Entered this 17th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge