

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

APEX INVESTMENT GROUP I,
LLC,

Plaintiff,

v.

FANTASY HOUSE, INC., d/b/a
FANTASY GIFTS,

Defendant.

OPINION and ORDER

06-C-519-C

In this civil action, plaintiff Apex Investment Group I, LLC, is seeking monetary relief from its former tenant, defendant Fantasy House, Inc., for costs associated with defendant's alleged breach of the parties' lease agreement. Now before the court is defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Although defendant concedes that the parties are diverse, it contends that the amount in controversy does not exceed \$75,000, and therefore that this court lacks subject matter jurisdiction under 28 U.S.C. § 1332. Because I find that the complaint makes plausible allegations that the amount in controversy exceeds \$75,000, defendant's motion will be denied.

I draw the following jurisdictional facts from the complaint, the lease agreement and

the briefs and affidavits submitted in conjunction with defendant's pending motion.

JURISDICTIONAL FACTS

A. Parties

Plaintiff Apex Investment Group I, LLC is a limited liability corporation incorporated under the laws of Wisconsin, with its principal place of business in Madison, Wisconsin.

Defendant Fantasy House, Inc. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

B. The Lease Agreement

On June 28, 2001, defendant entered into a lease agreement with Wesley Zulty and Zulty Investments, LLC. Plaintiff is the successor in interest to Wesley Zulty and Zulty Investments, LLC. Under the terms of the lease, plaintiff agreed to rent a store front in a commercial shopping center in Madison, Wisconsin, from August 1, 2001 to July 31, 2006.

The lease contained several provisions governing rental payments. Article II, section 2.2, entitled "additional rent," required defendant to "pay to the landlord [each month] an amount equal to one twelfth of the estimated annual real estate taxes, insurance and common areas costs on the leased premises." In addition, section 2.2 provided that

any monthly minimum rent payment or additional monthly rent payment

(common area charges) received by the Landlord or his agent after the fifth calendar day of any month or received by the Landlord in an amount less than the amount due, shall bear liquidated damages of \$40.00 per day from the fifth day of each month until paid.

The lease required defendant to pay all water, sewer, gas, electricity and fire protection charges during the effective dates of the lease.

In the summer of 2006, defendant stopped operating its store and abandoned the store front. Defendant did not sublease the space and did not continue making rental payments. Although the lease authorized plaintiff to sublease the store front in the event that defendant were to abandon it, plaintiff did not do so.

C. The Lawsuit

On September 19, 2006, plaintiff filed the complaint in this case, alleging that defendant owes it \$170,016.08 in rental payments and compounded late fees and interest.

DISCUSSION

The parties agree that there is only one potential source for subject matter jurisdiction over this lawsuit: 28 U.S.C. § 1332, which requires complete diversity of citizenship between the parties and an amount in controversy of more than \$75,000. The parties are clearly diverse; therefore, the question is whether plaintiff has properly alleged the amount

at stake.

“The amount in controversy in a diversity case is the stakes that the plaintiff or defendant alleges, and provided the allegation is not false to a ‘legal certainty’ the amount is taken as true for purposes of jurisdiction.” Smoot v. Mazda Motors of America, Inc., 469 F.3d 675, 677 (7th Cir. 2006). “In other words, when the complaint includes a number, it controls unless the plaintiff’s recovering that amount in the litigation would be legally impossible.” Id.; Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 815-16 (7th Cir. 2006).

In this case, plaintiff alleged in its complaint that “the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs,” *dk.* #2, at ¶ 1(c), and that it “has been damaged in the sum of \$170,016.08,” *id.*, ¶ 15. Clearly, the problem is not that plaintiff failed to make the requisite jurisdictional allegations. The problem, defendant contends, is that under the terms of the parties’ lease agreement, plaintiff could not possibly be entitled to recover that much money from them.

Although defendant concedes that it may be liable for rent and some late fees on the abandoned store, it contends that the amount it owes cannot meet the jurisdictional minimum. It appears that the parties are fighting mainly about whether plaintiff was entitled under the agreement to compound the interest and late fees. If so, the amount in controversy would exceed \$75,000.

Although defendant may well be correct in asserting that plaintiff was not entitled to compound the late fees and interest on the broken lease agreement, the arguments it raises are addressed to the merits of the parties' contract dispute, not to the question whether plaintiff has properly invoked this court's subject matter jurisdiction. To satisfy diversity jurisdiction, plaintiff "must demonstrate no more than a good faith, minimally reasonable belief that its claim will result in a judgment in excess of \$75,000." Neuma, Inc. v. AMP, Inc., 259 F.3d 864, 881 (7th Cir. 2001) (citing St. Paul Mercury Indemnification Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)). Because it has done just that, defendant's motion to dismiss will be denied.

ORDER

IT IS ORDERED that defendant Fantasy House, Inc.'s motion to dismiss for lack of subject matter jurisdiction is DENIED.

Entered this 29th day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge