

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

SUSAN GUSTAFSON,

Plaintiff,

v.

MEMORANDUM AND ORDER
07-C-94-S

KATHRYN ZUMBRUNNEN, ROBERT
ZUMBRUNNEN LAW OFFICES and
SHELL LAKE STATE BANK

Defendants.

Georgia L. Gustafson, commenced this action in her capacity as representative of the estate of George Skille, to recover certain assets for the estate from defendants Kathryn zumBrunnen and Shell Lake State Bank. Jurisdiction was alleged under 28 U.S.C. § 1332 based on diversity of citizenship. The matter is presently before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. The following facts relevant to the jurisdictional issue are presumed true for purposes of the pending motion.

BACKGROUND

George Skille, a Wisconsin resident, died in 2002. At the time of his death he owned a bank account worth approximately \$150,000. Eight of his descendants, Georgia Gustafson, Christian Gustafson, Leif Skille, Susan Gustafson, Sven Skille, Jack Gustafson, Carrie Gustafson and Richard Gustafson, expected to

inherit equal shares of the account. However, shortly before his death he named his wife, Betty, as joint owner on the account. After George's death, Betty transferred the money from the account to her own account. In forming the joint account and taking the money for herself, Betty was acting on the advice of defendants and contrary to George's testamentary desires.

On February 16, 2007 Georgia Gustafson, who is a resident of Minnesota, commenced this action as personal representative of George Skille's estate alleging diversity jurisdiction based on the fact that defendants were all Wisconsin residents. Shortly after filing the complaint plaintiff was made aware that pursuant to 28 U.S.C. § 1332(c)(2) she was deemed a resident of Wisconsin, eliminating diversity of citizenship between the parties.

In an effort to correct the jurisdictional defect plaintiff moved on April 27, 2007 to file an amended complaint changing her capacity to beneficiary and adding other beneficiaries, which motion the Court granted on May 9, 2007. The first amended complaint named beneficiaries Georgia Gustafson, Christian Gustafson, Leif Skille, Susan Gustafson, Sven Skille, Jack Gustafson, Carrie Gustafson and Richard Gustafson as plaintiffs and sought compensatory and punitive damages of \$210,000 from Kathryn zumBrunnen and \$150,000 from Shell Lake Bank. However, since plaintiffs had pro rata claims to the alleged damages, no plaintiff's claim approached the requisite \$75,000 jurisdictional amount.

Recognizing this jurisdiction defect in the first amended complaint, and without seeking further leave of the Court, a "modified first amended complaint" was filed on May 14, 2007 naming Susan Gustafson, a beneficiary "acting on behalf of the estate" of George Skille, as the sole plaintiff.

MEMORANDUM

Defendants now move to dismiss the modified first amended complaint as both procedurally improper and lacking subject matter jurisdiction. Plaintiff contends that the additional modification to the complaint was by stipulation of defendants and that both the jurisdictional amount and diversity of citizenship requirements are now satisfied. The sequence of proposed complaints has revealed that no matter how creative the pleading, there is simply not federal subject matter jurisdiction over this controversy. Accordingly, the Court disregards the procedural issues and dismisses the matter for lack of jurisdiction.

The issue raised by the most recent complaint is whether 28 U.S.C. § 1332(c)(2) applies to a beneficiary suing on behalf of an estate to recover assets. Section 1332(c)(2) provides that "the legal representative of the estate of a decedent shall be deemed a citizen only of the same state as the decedent...." Defendants maintain that Susan Gustafson "acting on behalf of the estate" is "the legal representative of the estate" as that phrase is used in

§ 1332(c)(2), therefore she is deemed a Wisconsin resident. Plaintiff argues that only specifically appointed representatives satisfy the definition.

The language of § 1332(c)(2), and the undisputed Congressional purpose in enacting it, leave no doubt that it applies to this plaintiff. Susan Gustafson's asserted basis for authority to act on behalf of the estate is § 879.63, Wis. Stat.:

Whenever there is reason to believe that the estate of a decedent as set forth in the inventory does not include property which should be included in the estate, and the personal representative had failed to secure the property or bring an action to secure the property, any person interested may, on behalf of the estate, bring an action in the court in which the estate is being administered to reach the property and make it part of the estate.

Plaintiff maintains that Wisconsin case law permits such an action in federal court under the same circumstances. Whether a beneficiary is acting pursuant to the statute or parallel case law, she is acting as "the legal representative of the estate" in bringing the action under any reasonable understanding of that phrase. Plaintiff argues extensively that she is legally entitled to and is representing the estate. The name given to the representative of the estate is irrelevant to the diversity inquiry - substance rather than labels controls the analysis. Steinlage ex rel Smith v. Mayo Clinic Rochester, 435 F.3d 913, 920 (8th Cir. 2006). The sole issue is whether the plaintiff is legally

representing the estate. Id.; See also Milam v. State Farm Mut. Auto. Ins. Co., 972 F.2d 166, 168 (7th Cir. 1992) (widow not representing the estate only because Louisiana law does not regard estate as an entity). There is no question that plaintiff is suing as the legal representative of George Skille's estate.

A contrary interpretation would permit complete circumvention of the purpose of § 1332(c)(2). Plaintiff acknowledges that the purpose of the statute is to limit the scope of diversity jurisdiction by ending the practice of creating or destroying federal diversity jurisdiction by choosing estate representatives whose citizenship differs from the decedent. See Steinlage, 435 F.3d at 917-18. Yet this is precisely the goal of plaintiffs' procedural machinations. The sole reason for Georgia Gustafson's withdrawal and Susan Gustafson's insertion as plaintiff is to create diversity jurisdiction where none existed by substituting a different estate representative who does not carry the same title. If jurisdiction could be established by such voluntary actions, plaintiffs could accomplish the exact result Congress sought to foreclose in enacting § 1332(c)(2).

CONCLUSION

None of the individual beneficiaries have a claim against these defendants that meets the jurisdictional amount. Any beneficiary bringing an action on behalf of the estate is legally

representing the estate and therefore deemed a Wisconsin resident pursuant to § 1332(c)(2). Accordingly, regardless of how plaintiffs attempt to configure the action, the Court lacks subject matter jurisdiction.

ORDER

IT IS ORDERED that plaintiff's modified first amended complaint is dismissed without prejudice for lack of subject matter jurisdiction and that judgment be entered accordingly.

Entered this 25th day of July, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge