IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WEATHER SHIELD MFG., INC.,

Plaintiff,

v.

JON R. CHAMBERLAIN, BILTBEST PRODUCTS, INC. and MIKE M. TRAYNOR,

Defendants.

OPINION and ORDER

07-C-0153-C

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Defendants removed this civil action from the Circuit Court for Taylor County, Wisconsin to this court under 28 U.S.C. §§ 1441 and 1446. Defendants contend that the case may be removed because diversity jurisdiction exists under 28 U.S.C. § 1332(a)(1). Plaintiff disagrees and has moved to remand the case to state court for lack of subject matter jurisdiction.

Under 28 U.S.C. § 1332(a)(1), jurisdiction exists if there is complete diversity of citizenship between the plaintiffs and defendants and the amount in controversy exceeds $75,000. In this case defendants have failed to meet their burden to show that the jurisdictional amount is satisfied with respect to the claims against at least two of the

defendants; therefore plaintiff's motion to remand for lack of subject matter jurisdiction will be granted.

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).

BACKGROUND FACTS

Plaintiff Weather Shield Manufacturing, Inc. is a Wisconsin corporation engaged in the business of manufacturing windows and doors. Defendant BiltBest Products, Inc. is a Delaware corporation with its principal place of business in Ste. Genevieve, Missouri. BiltBest manufactures and supplies windows and door products to the new construction residential housing market through selected professional window and door dealers and distributors.

Defendant Jon R. Chamberlain is a citizen of the state of Missouri. Between September 2, 2003 through June 30, 2006 Chamberlain was employed by plaintiff as Director of Sales. As present, Chamberlain is Vice President of Sales and Marketing of defendant BiltBest.

Defendant Mike M. Traynor is a citizen of the state of Illinois. Between March 1, 1996 and January 24, 2005, Traynor was employed by Weather Shield as a territory

manager. Traynor was promoted to Regional Sales Manager on January 24, 2005 and retained this position until his resignation from plaintiff on November 10, 2006. Traynor is employed presently by defendant BiltBest as a division sales manager.

While employed by plaintiff, defendants Chamberlain and Traynor each executed a "Letter Agreement Concerning Employment," which imposed various limitations on their conduct with plaintiff's competitors. Under defendant Chamberlain's agreement he may not: 1) "disclose to any party, or use for [him]self, any of [plaintiff's] confidential information" during the term of his employment or for a period of three years thereafter; 2) "solicit from any 'customers' of [plaintiff] any business of any type that competes with [plaintiff's] business or products" during the term of his employment or for a period of eighteen months thereafter; or 3) "recruit, solicit, or otherwise attempt to encourage an employee of [plaintiff] or its Affiliates to leave their employment with the Company" during the term of his employment and for a period of two years thereafter.

Under defendant Traynor's agreement, he may not use plaintiff's confidential information for himself or disclose it to a third person during the term of his employment or for a period of two years thereafter.

After defendant Chamberlain terminated his employment with plaintiff and began working at defendant BiltBest, plaintiff sent a letter to Jay Hoffer of BiltBest informing him of the content of defendant Chamberlain's agreement with plaintiff. Plaintiff warned

defendant BiltBest that it would be liable for tortious interference with contract if the provisions of the agreement were not followed.

Plaintiff contends that defendant Chamberlain breached each of the provisions listed above by 1) soliciting plaintiff's customers for the benefit of defendant BiltBest; 2) soliciting defendant Traynor to resign his employment with plaintiff to work for defendant BiltBest; and 3) disclosing confidential information to defendant BiltBest, including company pricing, discount information and the identification of plaintiff's customers. Plaintiff seeks an unspecified amount of damages for breach of contract and injunctions restricting defendant Chamberlain's ability to solicit plaintiff's customers, his ability to recruit or solicit plaintiff's employees to leave their respective employment and his ability to disclose plaintiff's confidential information.

With respect to defendant Traynor, plaintiff contends that he breached the agreement by using plaintiff's confidential pricing information for the benefit of defendant BiltBest. Plaintiff seeks an unspecified amount of damages for breach of contract and an injunction restricting Traynor's ability to use plaintiff's confidential information.

Finally, plaintiff contends that defendant BiltBest intentionally interfered with the contractual relationship between plaintiff and defendant Chamberlain. Plaintiff seeks an unspecified amount of damages for tortious interference with a contract.

OPINION

A. Legal Standard for Establishing Diversity Jurisdiction

As the party invoking federal jurisdiction, defendants bear 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 a case that is removed, 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. In a case in which the plaintiff fails to specify an amount of damages in the complaint, a "good-faith estimate of the stakes" by the defendant may suffice in measuring that value. Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006). However, 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). The parties in this case appear to agree that they are of diverse citizenship; the question is whether the amount in controversy exceeds $75,000.

The requirements of § 1332(a) must be met as to *each* defendant in order to support

the exercise of subject matter jurisdiction over the entire case. Kamel v. Hill-Rom Co., 108 F.3d 799, 805 (7th Cir. 1997) (citing Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829 (1989)). This includes the amount in controversy requirement. In cases involving multiple defendants that are not jointly liable to the plaintiff, the plaintiff's claims against each defendant may not be aggregated to satisfy the jurisdictional minimum. National Union Fire Ins. Co. v. Wilkins-Lowe & Co., 29 F.3d 337, 339-40 (7th Cir. 1994). Plaintiff's complaint cannot be read to allege that defendants are jointly liable to plaintiff. Accordingly, defendants must prove to a reasonable probability that the jurisdictional amount, $75,000, is in controversy with respect to each defendant. Although defendants present some evidence that the claim against defendant Chamberlain exceeds $75,000, they fail to demonstrate sufficiently that the claims against either defendant Traynor or defendant BiltBest meet that amount in controversy requirement.

B. Legal Standard for Measuring the Value of Injunctive Relief

In their brief, defendants focus almost exclusively on the value of the injunctive relief sought by plaintiff. In this context, the United States Supreme Court held in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347 (1977), 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 was able to place a value on this right because the evidence established 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.

In this case there are multiple defendants and multiple objects of litigation. The objects of litigation involving injunctive relief include plaintiff's right to 1) restrain defendant Chamberlain from soliciting plaintiff's customers until December 31, 2007; 2) restrain defendant Chamberlain from recruiting or encouraging plaintiff's employees to leave their respective employment until June 30, 2008; 3) restrain defendant Chamberlain from disclosing plaintiff's confidential information until June 30, 2009; and 4) restrain defendant Traynor from using plaintiff's confidential information until November 10, 2008.

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). Defendants attempt to satisfy only one "viewpoint" which is the benefit

of the injunctions to the plaintiff.

C. The Standard Applied to Defendants

Defendants provide two methods for valuing the injunctions plaintiff seeks against defendant Chamberlain. Neither is particularly persuasive. The first theory measures plaintiff's potential losses as they relate to the past profits generated by defendant Chamberlain while employed by plaintiff. Defendants list a number of courts that have used a former employee's past sales performance records to measure the value of the relief sought in cases involving a breach of an employment agreement. Wysong & Miles Co. v. Weller Machinists Co., No. CIV. 101CV01005, 2002 WL 1602456 (M.D.N.C 2002); Robert Half International v. Van Steenis, 784 F. Supp. 1263, 1265 (E.D. Mich. 1991); Basicomputer Corp. v. Scott, 791 F. Supp. 1280, 1286 (N.D. Ohio 1991) aff'd, 973 F.2d 507, 510 (6th Cir. 1992). Relying on these cases, defendants argue that, as the director of sales, Chamberlain was responsible, either directly or indirectly, for an estimated $250 million in annual sales while he was employed by plaintiff and that defendant Chamberlain would have been responsible for generating more than $75,000 in profits for plaintiff, given the industry's typical net profit margin of 5-10%.

It is doubtful that this bare allegation is sufficient to show to a reasonable probability that jurisdiction exists. Unlike the parties in the cases cited, defendants make no attempt

to show how defendant Chamberlain was responsible for those sales or, more important, why his alleged activities with defendant BiltBest are worth that amount. Although defendants are not required to prove with precision an exact dollar amount, they may not rely on speculation alone.

Defendants' second method of valuing the injunctive relief rests on the salaries earned by defendants Chamberlain and Traynor while employed by plaintiff. Their salaries are not helpful in this case. Defendants cite Component Management Services, Inc. v. America II Electronics, Inc., 2003 WL 23119152 (N.D. Tex. 2003), in which the non-compete agreement restricted the former employee's ability to be *employed* by a competitor of the former employer. Because that contract greatly restricted the future employer's ability to hire the employee, it made sense to measure the value of the injunction (to the future employer) using the former salary.

There is no such restriction in this case. Under this employment agreement, defendant Chamberlain is permitted to work for one of plaintiff's competitors, but he may not solicit plaintiff's customers. Chamberlain's previous salary is not related to the value of the object of litigation in this case.

Defendants make a passing reference to the value of the injunction restricting Chamberlain from disclosing plaintiff's confidential information and to the unspecified damages sought by plaintiff, but defendants make no effort to estimate the value of these

additional remedies. When an argument is not developed meaningfully it is deemed waived. Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999). Again, a precise dollar amount is not required, but defendants have failed to offer a "good-faith estimate," as they are required to do. Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006).

Even if I assumed that the claim against defendant Chamberlain is worth more than $75,000, defendants make no showing that the amount in controversy exceeds $75,000 with respect to the claims against defendants Traynor and BiltBest. Defendants ignore defendant BiltBest in their brief and point only to plaintiff's past profits to value an injunction against defendant Traynor. This evidence is irrelevant. The claim against defendant Traynor seeks to restrain him from disclosing confidential information. Traynor's past sales performance is not helpful in determining the value of a restriction on his ability to use plaintiff's confidential information. Because defendants point to no other evidence of the worth of that restriction, defendants have not proven to a reasonable probability that the amount in controversy exceeds $75,000 with respect to the claim against Traynor.

Defendants have not raised the possibility that the court may exercise supplemental jurisdiction over the claims against defendants Traynor and BiltBest (assuming that the claim against defendant Chamberlain satisfied the jurisdictional minimum). Even if they had, such supplemental jurisdiction would be barred under 28 U.S.C. § 1367(b). In a

diversity case, a court may not exercise supplemental jurisdiction over defendants that do not satisfy the requirements of 28 U.S.C. § 1332, including the amount in controversy requirement. See Truserv Corp. v. H.R.W. of New Mexico, 2002 U.S. Dist. LEXIS 7787, at *4 (N.D. Ill. April 29, 2002). Because original jurisdiction in this case is claimed exclusively under § 1332, supplemental jurisdiction over the claims against defendants Traynor and BiltBest is not permitted.

Because defendants have not met their burden to show that the amount of controversy requirement of 28 U.S.C. § 1332(a) is satisfied for defendants Traynor and BiltBest, I will remand this case to state court.

D. Plaintiff's Request for Costs and Fees

In Martin v. Franklin Capital Corp., 126 S. Ct. 704 (2005), the Supreme Court examined the language of 28 U.S.C. § 1447(c) to determine the standard by which requests for costs and fees should be judged in a removal case. In that case, the Court determined that "absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." Id. at 141.

In this case, the defendants lacked such an "objectively reasonable basis for seeking removal." Defendants were required to show that the jurisdictional minimum was met for

each defendant and failed to do so. In fact, they did not even attempt to estimate the claim against defendant BiltBest. Without at least an estimate of this claim, there was not an "objectively reasonable basis for seeking removal." Therefore, I will grant plaintiff's request for reimbursement of costs and attorney fees.

ORDER

IT IS ORDERED that

1. Plaintiff Weather Shield Mfg., Inc.'s motion to remand for lack of subject matter jurisdiction is granted.

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

3. Plaintiff's request for reimbursement of costs and attorney fees under 28 U.S.C. § 1447(c) is GRANTED.

4. Plaintiff may have until June 26, 2007, in which to submit an itemization of the actual expenses, including costs and attorney fees, it incurred in responding to defendants' removal of the case.

5. Defendants may have until July 10, 2007, in which to file an objection to any itemized costs and fees.

6. The clerk of court is directed to return the record in case number 07-C-153-C to the Circuit Court for Taylor County, Wisconsin.

Entered this 12th day of June, 2007.

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