

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD A. DILORETO and JEANNE : CIVIL ACTION
DILORETO :
 :
 :
 v. :
 :
 :
 CNA INSURANCE COMPANY, SHIHADDEH :
 CARPETS, INC., SHIHADDEH CARPET, RUGS, :
 WOOD, VINYL, and PETER L. SHIHADDEH : NO. 98-3488

MEMORANDUM AND ORDER

HUTTON, J.

December 17, 1998

Presently before the Court are Plaintiffs Richard and Jeanne Diloreto's Motion for Remand (Docket No. 9) and Defendants' opposition thereto (Docket No. 10).

I. BACKGROUND

Plaintiffs Richard and Jeanne DiLoreto filed a complaint in the Court of Common Pleas of Chester County against the Defendants Shihadeh Carpets, Inc., Shihadeh Carpet, Rugs, Wood, and Vinyl, and Peter Shihadeh. This suit consists of three claims which the Court of Common Pleas consolidated into one suit. In the first claim, the DiLoretos seek an award of up to \$50,000 against Shihadeh for alleged damage caused to various rugs which the Plaintiffs contracted Shihadeh to clean and/or cut. In the second claim, originally filed at the District Justice level, Shihadeh seeks an award of amounts due for the cleaning and cutting services performed for the DiLoretos. The third and final claim is a

counterclaim, originally brought at the District Justice level, for alleged damage to the rugs. This counterclaim appears to mirror the claim in Plaintiffs' original complaint.

Subsequently, the DiLoretos filed another complaint in the Court of Common Pleas of Chester County. In this complaint, Plaintiffs seek a declaratory judgment that Defendant Transcontinental Insurance Company¹ has a duty to defend and indemnify its insureds, Defendants Shihadeh, Inc., Shihadeh Carpet, Rugs, Wood, and Vinyl, and Peter L. Shihadeh, in the underlying suit. On July 7, 1998, Defendant Transcontinental Insurance Company removed this declaratory judgment complaint to this Court. On August 21, 1998, Plaintiffs filed their Petition to Remand.

II. Standard of Review

In general, a defendant may remove a civil action filed in state court if the federal court would have had original jurisdiction to hear the matter. See 28 U.S.C. § 1441(b) (1994 & Supp. 1997); see also Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991). Once the case has been removed, however, the federal court may remand if there has been a procedural defect in removal, or if the court determines that it lacks federal subject matter jurisdiction to hear the case. See 28 U.S.C. § 1447(c) (1994 & Supp. 1997); see

¹ In the declaratory judgment complaint, Plaintiffs incorrectly named CNA Insurance Company as a defendant. The correct defendant is Transcontinental Insurance Company.

also Township of Whitehall v. Allentown Auto Auction, 966 F. Supp. 385, 386 (E.D. Pa. 1997). Upon a motion to remand, it is always the moving party's burden to establish the propriety of removal, and all doubts as to the existence of federal jurisdiction must be resolved in favor of remand. See Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992); Independent Mach. Co. v. International Tray Pads & Packaging, Inc., No. CIV.A.97-2987, 1998 WL 35002, at *2 (D. N.J. Jan. 5, 1998).

III. DISCUSSION

Defendants' Notice of Removal invokes the Court's diversity jurisdiction. Under diversity jurisdiction, a district court has jurisdiction over a civil action if the parties are citizens of different states and the amount in controversy exceeds \$75,000.² See 28 U.S.C. § 1332(a) (1994 & Supp. 1997). If either

² The statute now provides as follows:

The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For purposes of this section, section 1355, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the

(continued...)

of these requirements are not met, the court may remand a removed case to the state court for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c).³ The Plaintiffs argue that: (1) there is a lack of complete diversity of citizenship and (2) the amount in controversy does not exceed \$75,000.

A. Diversity of Citizenship

In order to establish diversity of citizenship, there must be complete diversity. See Development Fin. Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156, 158 (3d Cir. 1995). Thus, “[i]t is axiomatic that the federal judiciary’s diversity jurisdiction depends on complete diversity between all plaintiffs and all defendants.” Id.

²(...continued)
State in which such alien is domiciled.

28 U.S.C. § 1332(a) (1994 & Supp. 1997).

³ Congress has provided that:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expense, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c) (1994 & Supp. 1997).

In this case, it is undisputed that the DiLoretos and Shihadeh are citizens of Pennsylvania.⁴ Thus, it appears that there is a lack of complete diversity because the DiLoretos are the Plaintiffs and Shihadeh is a Defendant. Nevertheless, the Defendant Transcontinental contends that there is complete diversity because Shihadeh and any of his corporations are properly realigned with the Plaintiffs.

1. Realignment of the Parties

The leading case on realignment of parties is City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941). In that decision, the Supreme Court iterated the fundamental principle that "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants." See id. at 69. "It is our duty ... to 'look beyond the pleadings and arrange the parties according to their sides in the dispute' Whether the necessary 'collision of interests . . . exists . . . must be ascertained from the 'principal purpose of the suit' . . . and the 'primary and controlling matter in dispute'" Id. The Third Circuit adheres to the "principal purpose" or "primary issue" test, under which a court must first identify the primary issue in controversy

⁴ Peter Shihadeh is a citizen of Pennsylvania. While it is unclear whether the Shihadeh Carpets, Inc. or Shihadeh Carpet, Rugs, Wood, and Vinyl are citizens of Pennsylvania for diversity purposes, the realignment argument is the same with respect to these parties. Further, it is undisputed between the parties that there is diversity among the remaining parties.

and then determine whether there is a real dispute by opposing parties over that issue. See Ackerman v. Hook, 183 F.2d 11, 14-15 (3d Cir. 1950).

In the case at bar, the Court agrees with the Defendants that Shihadeh and his corporations are properly realigned with the Plaintiffs. Like the Plaintiffs, Shihadeh and his corporations would clearly benefit from a finding that Transcontinental has a duty to defend and indemnify him in the underlying suit. This position is adversarial to that of Transcontinental under the "principal purpose" test. See Martin v. Universal Underwriters Co., 676 F. Supp. 77, (E.D. Pa. 1987) (holding that, even though individual defendants were resident of state in which declaratory judgment action was commenced against insurer, court had diversity of citizenship because plaintiff already obtained judgments against individuals and decision in favor of plaintiff would reduce or eliminate their liability). Therefore, after properly realigning the parties, the Court finds that complete diversity exists.

2. 28 U.S.C. § 1332(c)

Plaintiffs also argue that, under 28 U.S.C. § 1332(c)(1), Defendant Transcontinental must be deemed a citizen of Pennsylvania which the Plaintiffs are citizens. But 28 U.S.C. § 1332(c)(1) provides:

[A] corporation shall be deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal

place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen

28 U.S.C. § 1332(c)(1) (1994) (emphasis added). The Third Circuit determined in Myers v. State Farm Ins. Co., 842 F.2d 705 (3d Cir. 1988) that Section 1332(c)(1) refers to "direct action" where an injured party can sue a liability insurance company directly, without naming its insured. See id. at 707. The intent being to exclude from federal courts purely local tort cases between citizens of the same state, notwithstanding the fact that the defendant happened to be insured by an out of state insurance company. See id. Thus, suits on the insurance contract are not the kind of "direct action" contemplated by Section 1332(c)(1). See id.

The present case seeks a declaratory judgment based on the duty to defend and indemnify an insured. Plaintiffs are not attempting to establish tort liability but are asserting the Defendant Transcontinental's contractual obligation to defend Shihadeh and pay any judgment that may be entered against Shihadeh. Moreover, Section 1332(c)(1) applies where the insurance company is not named in the action. The insurance company is a named party in this action. Therefore, on this basis as well as the Myers decision, the Court finds that Section 1332(c)(1) does not apply in

these circumstances. See National Fire & Marine Ins. Co. v. Guy Management Corp., No. CIV.A.88-0385, 1988 WL 36350, at *1 (E.D. Pa. Apr. 18, 1988) (finding that Section 1332(c)(1) does not apply when insurance company is named in declaratory judgment action).

After concluding that the parties must be realigned to represent their respective interests and that Section 1332(c)(1) does not apply in this case, it thus appears that diversity of citizenship exists. The Court must now consider whether the amount in controversy exceeds \$75,000.

B. Amount in Controversy

To determine the amount in controversy, the Court must look at the complaint itself. See Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993). The Court makes this determination by examining the jurisdictional amount in effect on the date of removal. TJS Brokerage & Co. v. CRST, Inc., 958 F. Supp. 220, 221 (E.D. Pa. 1997).

Although the standard of proof is unclear in the Third Circuit, this Court recently concluded that the defendant must prove the amount in controversy by a preponderance of the evidence. See Feldman v. New York Life Ins. Co., No. CIV.A.97-4684, 1998 WL 94800, at *2 (E.D. Pa. Mar. 4, 1998) ("[D]efendant must prove the amount in controversy by a preponderance of the evidence."); see also Mercante v. Preston Trucking Co., No. CIV.A.96-5904, 1997 WL 230826, at *2 (E.D. Pa. May 1, 1997) (analyzing circuit split

concerning standard for amount in controversy and concluding that preponderance of the evidence is appropriate). If the Court concludes by a preponderance of the evidence that the claim is really for less than the jurisdictional amount, the case must be remanded to the state court. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1939); Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997); Garnder v. Beasley FM Acquisition Corp., No. CIV.A.97-2900, 1997 WL 325794, at *3 (E.D. Pa. June 6, 1997).

Here, neither party disputes that the DiLoretos underlying complaint seeks an amount not in excess of \$50,000. Thus, Defendant Transcontinental may have to indemnify Shihadeh up to \$50,000. Defendant Transcontinental argues that the Court should also take into consideration the potential liability of defending the insured in the underlying suit. Costs in this federal action, of course, are excluded in determining the sum in controversy. See 28 U.S.C. § 1332 (1994). However, where the underlying instrument or contract itself provides for their payment, costs and attorneys' fees must be considered in determining the jurisdictional amount. Thus, where the insurance company is required by the policy to provide its insured with a defense, the cost of defense is considered in determining the jurisdictional amount. See Allstate Ins. Co. v. Dillard, 190 F. Supp. 111, 113 (E.D. Pa. 1960).

Therefore, a declaratory judgment in favor of the Plaintiffs will result in an obligation to: (1) indemnify the Shihadeh for an amount not in excess of \$50,000 and (2) pay the expenses of defending Shihadeh including attorneys' fees and court costs. The critical issue then is whether the costs of defending Shihadeh and his corporations will cost more than \$25,000. Clearly, if the underlying suit goes to trial, these costs could be over \$25,000 and-- adding this amount to the \$50,000 of alleged damages-- the amount in controversy would be over \$75,000. Despite the critical nature of this issue, the Defendant does not provide the Court with any information or estimates concerning how much the defense of the insured in this case would cost. Because the burden of proof is on the Defendant to prove the amount in controversy by a preponderance of the evidence, the Court will therefore allow the Defendant ten (10) days to submit additional evidence on this issue.

An appropriate Order follows.

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O R D E R

AND NOW, this 17th day of December, 1998, upon consideration of Plaintiffs' Motion for Remand and Defendants' opposition thereto, IT IS HEREBY ORDERED that the Defendant Transcontinental Insurance Co. **SHALL** submit additional evidence concerning the costs of defense within ten (10) days of the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.