

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

LAURA KLEISS,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
GRANITE RUN MALL,	:	
SDG MACERICH PROPERTIES, L.P.,	:	
SIMON PROPERTY GROUP, INC. and	:	
SIMON PROPERTY GROUP, L.P.,	:	No. 06-374
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

March 6, 2006

Plaintiff Laura Kleiss sued the Granite Run Mall, SDG Macerich Properties, L.P., Simon Property Group, Inc., and Simon Property Group, L.P. (collectively “Defendants”) in the Philadelphia County Court of Common Pleas. Plaintiff allegedly injured herself while at the Granite Run Mall. Defendants filed a notice of removal with this Court, but the Court remanded the case back to state court. Defendants now seek to remove this case again, claiming that subsequent events have revealed that the amount in controversy requirement is met and therefore diversity jurisdiction exists. Presently before the Court is Plaintiff’s motion to remand this case to state court. Plaintiff also seeks attorneys’ fees associated with litigating the removal of this case. For the reasons below, the Court grants the motion to remand and denies the motion for attorneys’ fees.

I. BACKGROUND

On or about August 31, 2005, Plaintiff brought a personal injury action against Defendants in the Philadelphia County Court of Common Pleas. She claims that while walking at the mall on September 1, 2003, she slipped on some liquid and fell. (Compl. ¶¶ 7-8.) Plaintiff is a citizen of

Pennsylvania. (*Id.* ¶ 1.) Although the Complaint indicates that each of the Defendants maintain a designated office for service of process in the Commonwealth, none of the Defendants are citizens of Pennsylvania.¹ (*See id.* ¶¶ 3-5, Second Notice of Removal ¶ 15(b)-(e).) The Complaint seeks damages “in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, plus costs and delay damages” for knee and nerve injuries suffered as a result of the spill, as well as future medical expenses. (Compl. ¶¶ 13-14.) Defendants requested that Plaintiff stipulate that her damages would not exceed \$75,000.² (Sept. 20, 2005 letter to Andrew Gaber from Gary Keith Feldbaum.) Plaintiff’s counsel refused to so stipulate, and shortly thereafter, Defendants sought to remove the case to this Court. (*See* First Notice of Removal ¶ 6; *see also* Sept. 20, 2005 letter to Andrew Gaber from Gary Keith Feldbaum.) The Court remanded the case to the Philadelphia County Court of Common Pleas. (*See* Nov. 7, 2005 Order.) Subsequently, the Court of Common Pleas conducted a case management conference. (*See* Second Notice of Removal ¶ 7.) At that conference, Plaintiff filed a Case Management Conference Memorandum that demanded \$75,000 and contained a claim that the Plaintiff “has a possible future loss of earning capacity claim as a result of the incident and injuries.” (*Id.* ¶¶ 8-10.) Accordingly, Defendants claim that Plaintiffs have now exceeded the \$75,000 threshold necessary for this Court to exercise federal subject matter jurisdiction under 28 U.S.C. § 1332.

¹ The Complaint asserts that Defendant Granite Run Mall has a “usual place of business” in Pennsylvania. (Compl. ¶ 2.) But “Granite Run Mall” is a fictitious name and, as Defendants accurately point out, the citizenship of defendants sued under fictitious names are disregarded under the removal statutes. (Second Notice of Removal ¶ 15(e) (*citing* 28 U.S.C. § 1441(a)).)

² Although the letter seeks a stipulation that damages will not exceed \$75,000, the enclosed stipulation limits Plaintiff’s damages to \$50,000. (*Compare* Sept. 20, 2005 letter to Andrew Gaber from Gary Keith Feldbaum *with* Unsigned Stipulation included with letter.)

II. STANDARD OF REVIEW

Under 28 U.S.C. § 1441(a), defendants in state court may remove “any civil action . . . of which the district courts of the United States have original jurisdiction . . . to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a) (2005). Federal courts possess diversity jurisdiction over all civil actions between citizens of different states if the amount in controversy exceeds \$75,000, exclusive of interests and costs. 28 U.S.C. § 1332(a)(1). The burden of demonstrating the existence of federal jurisdiction rests with the party asserting jurisdiction, *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), and the defendant’s right to remove is determined according to the plaintiff’s pleading at the time of the petition for removal. *Angus v. Shiley*, 989 F.2d 142, 145 (3d Cir. 1993); *see also Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999) (“Even though actual damages may not be established until later in the litigation, the amount in controversy is measured as of the date of removal.”) Provided that “the case stated by the initial pleading is not removable,” a defendant must file a notice of removal within thirty days after receiving a “paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b).

In considering a motion to remand, “28 U.S.C. § 1441 is to be strictly construed against removal so that the Congressional intent to restrict federal diversity jurisdiction is honored.” *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004) (internal citation omitted); *see also Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985) (“Because lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile, the removal statute should be strictly construed and all doubts should be resolved in

favor of remand.”). “This policy ‘has always been rigorously enforced by the courts.’” *Samuel-Bassett*, 357 F.3d at 396 (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1937)). Therefore, if the court determines that federal subject matter jurisdiction does not exist, the case must be remanded. 28 U.S.C. § 1447(c).

III. DISCUSSION

A. Motion to Remand

In the Third Circuit, when it appears to a legal certainty that the plaintiff was never entitled to recover the jurisdictional amount, the case must be dismissed. *See Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993); *see also Samuel-Bassett*, 357 F.3d at 398. Thus, defendants must show to a legal certainty that the amount in controversy exceeds the statutory minimum. *Samuel-Bassett*, 357 F.3d at 398 (“We recognize that requiring a defendant to show to a legal certainty that the amount in controversy exceeds the statutory minimum may lead to somewhat bizarre situations.”). “Unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.” *State Farm Mut. Auto. Ins. Co. v. Powell*, 87 F.3d 93, 96 (3d Cir. 1996) (quoting *Red Cab Co.*, 303 U.S. at 288-89); *see also Werwinski v. Ford Motor Co.*, 286 F.3d 661, 667 (3d Cir. 2002) (stating that “the amount in controversy must be calculated based on a ‘reasonable reading’ of the complaint, and a plaintiff’s stipulation subsequent to removal as to the amount in controversy or the types of relief sought is of ‘no legal significance’ to the court’s determination”) (quoting *Angus*, 989 F.2d at 145).

Defendants contend that subsequent events make it clear that this Court has subject matter jurisdiction over the litigation. Specifically, Defendants rely on a Case Management Conference

Memorandum submitted by Plaintiff in state court. As previously noted, a case not removable by an initial pleading may still be removed if a notice of removal is filed within thirty days after receipt by defendant “of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b). The Court will assume for purposes of this motion that the Case Management Conference Memorandum qualifies as an “other paper” and may be considered by this Court. *See Broderick v. Dellasandro*, 859 F. Supp. 176, 178-80 (E.D. Pa. 1994) (examining legal landscape surrounding definition of “other paper” and concluding attorney correspondence qualified); *see also Efford v. Milam*, 368 F. Supp. 2d 380, 384-85 (E.D. Pa. 2005) (same).

The Court concludes that this “other paper” is insufficient to confer subject matter jurisdiction. First, the demand made by Plaintiff is \$75,000, which is clearly not an amount that *exceeds* \$75,000. *See* 28 U.S.C. § 1332(a) (“The district courts 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 . . .”). Defendants argue that Plaintiff’s self-limiting valuation of her claims does not control the true value of those claims and furthermore, that Plaintiff’s demand for \$75,000 supports a finding that she could recover more than \$75,000. (Defs.’ Mem. of Law in Opp’n to Pl.’s Mot. for Remand at 6-7; Defs.’ Answer to Pl.’s Mot. to Remand ¶¶ 10, 13-15.) Defendants’ argument is unpersuasive. To the extent Plaintiff’s Complaint left the value of her claims in doubt, the Case Management Conference Memorandum set the outer limit of the value of Plaintiff’s claims. It defies common sense to suggest that Plaintiff’s counsel made a demand of \$75,000 knowing that the value of the claims exceed that amount. Making a settlement demand of \$75,000 in the hopes that your client would receive more than \$75,000 would be an unprecedented and awkward tactic

of negotiating. Indeed, the Court would be shocked if, as suggested by Defendants' logic, Defendants rejected Plaintiff's demand of \$75,000 and made an offer greater than that amount. Plaintiff's \$75,000 demand does not show to a legal certainty that the amount in controversy exceeds the statutory minimum.

Second, although Defendants theorize that Plaintiff's claims exceed \$75,000 based on Plaintiff's suggestion that a claim for future lost earning capacity "possibly" exists, that is hardly the type of representation that Defendants can rely on to sustain their burden. (Defs.' Answer to Pl.'s Mot. to Remand ¶¶ 7, 13.) The unsubstantiated numbers Defendants use to demonstrate that the jurisdictional threshold is satisfied are too theoretical to sufficiently support their claim that the jurisdictional limit is met. Furthermore, the fact that Plaintiff may not even assert such a claim adds another layer of conjecture to the analysis. When determining if the jurisdictional minimum is satisfied, "[i]f this Court has to guess, defendant has not proved its point." *Irving v. Allstate Indem. Co.*, 97 F. Supp. 2d 653, 656 (E.D. Pa. 2000).

Third, the Court will not read too much into a demand made on a two-page form completed in preparation for a settlement conference. The Congressional intent to limit federal subject matter jurisdiction would be thwarted if a case could be removed simply because Plaintiff's counsel demanded a certain dollar figure, regardless of the reasonableness of that demand. *See Samuel-Bassett*, 357 F.3d at 403 ("Moreover, estimations of the amounts recoverable must be realistic. The inquiry should be objective and not based on fanciful, 'pie-in-the-sky,' or simply wishful amounts, because otherwise the policy to limit diversity jurisdiction will be frustrated.").

Finally, the fact that Plaintiff did not miss any work, did not have surgery, and has totaled under \$7,000 in medical bills thus far indicates to the Court that Defendant cannot show to a legal

certainty that the amount in controversy exceeds the statutory minimum.³ *See Angus*, 989 F.2d at 146 (stating that courts should make an independent appraisal of the claim’s value when the complaint fails to specify a precise damage amount). Accordingly, the Court will once again remand this matter to the Philadelphia County Court of Common Pleas.

B. Attorneys’ Fees Under the Removal Statute

Plaintiff also seeks reasonable attorneys’ fees associated with litigating the removal of this case, including, but not limited to, fees associated with filing both motions to remand. Plaintiff, relying on Seventh Circuit case law, asserts that under 28 U.S.C. § 1447(c), if a court remands an action, plaintiff, as the prevailing party, is presumptively entitled to recover attorneys’ fees associated with litigating removal. (Mem. of Law in Supp. of Pl.’s [Second] Mot. to Remand at 4-5 (*citing Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000)).) Plaintiff is correct that 28 U.S.C. § 1447(c) provides for attorneys’ fees to accompany a remand order: “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). However, this Court does not read the statute as creating a presumption in favor of awarding attorneys’ fees. Rather, the decision to award attorneys fees under the statute is left to the broad discretion of the Court. *See Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996). While a showing of bad faith is not a prerequisite to awarding attorneys’ fees when remanding an action, there is no presumption of a fee award that arises by virtue of a remand order. Rather, a court must “be flexible in determining whether to

³ Although Defendants correctly note that the standards set forth in *Samuel-Bassett* are binding legal precedent on this Court, their statement that “there is no requirement that the Defendant prove to a legal certainty that Plaintiff’s claim must exceed the jurisdictional amount” is incorrect. That is exactly what *Samuel-Bassett* requires. 357 F.3d at 398.

require the payment of fees under section 1447(c).” *Id.*

The Court finds nothing in Defendants’ first removal petition that would warrant granting attorneys’ fees to Plaintiff’s counsel. Defendants had a legitimate – albeit ultimately unsuccessful – argument that this Court had diversity jurisdiction over this matter. Although doubts must be resolved in favor of remand, it would unfairly punish parties seeking access to the federal courts if a remand order automatically included an award of attorneys’ fees.

The second notice of removal requires additional analysis but leads to the same conclusion. Defendants’ second removal petition does not present a close question for this Court since it is premised on the thinnest of reeds. Furthermore, Plaintiff correctly notes that the demand did not exceed \$75,000, as required to get into federal court. However, this Court will not award possibly thousands of dollars in attorneys’ fees based on a penny.⁴ Additionally, Plaintiff’s second motion to remand is largely taken from the original motion and inexplicably relies on case law from other circuits, even though the Third Circuit has addressed the issue of remand. Thus, it is a stretch for Plaintiff’s counsel to assert that he “has been forced to expend substantial resources in responding to these baseless and improper removals.” (Mem. of Law in Supp. of Pl.’s [Second] Mot. to Remand at 5.) Finally, the Court notes Plaintiff’s statement that “[Plaintiff’s demand] is made for strategic purposes, with the understanding that the ultimate settlement, and thus the value of the case, is less than the amount demanded. If anything, Plaintiff’s demand of \$75,000 should serve as evidence that the value of the case is less than \$75,000.” (*Id.* at 4.) Had Plaintiff made that revelation earlier, perhaps much of this disagreement over removal could have been avoided. Because the Court finds

⁴ That is not to say that had Plaintiff demanded \$75,000.01, Defendants could have properly removed to this Court. The question would, however, become closer.

that both parties are responsible for this prolonged and unnecessary jurisdictional appetizer, the Court will not include attorneys' fees with its remand order. The Court also trusts that Defendants will not attempt a third bite at the apple and that the parties will now direct their efforts to the main course of this litigation.

IV. CONCLUSION

Defendants have fallen short of sustaining their burden of demonstrating that diversity jurisdiction exists here and therefore the Court remands this case. However, the Court exercises its discretion and will not order Defendants to pay attorneys' fees. An appropriate Order follows.

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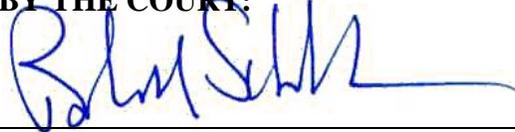
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ORDER

AND NOW, this 6th day of **March, 2006**, upon consideration of Plaintiff's Motion to Remand, Defendants' response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. The motion (Document No. 2) is **GRANTED in part and DENIED in part.**
2. This case is **REMANDED** to the Philadelphia County Court of Common Pleas.
3. Plaintiff's request for attorneys' fees is **DENIED.**

BY THE COURT:



Berle M. Schiller, J.