

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SELECTBUILD NEVADA, INC.,)
)
Plaintiff,)
vs.)
)
S&S CONCRETE & MATERIALS, LLC,)
)
Defendant.)

Case No.: 2:10-cv-02142-GMN-RJJ

ORDER

This lawsuit was originally filed on January 13, 2010 in the Eighth Judicial District Court of Clark County, Nevada. On December 9, 2010, Defendant removed the case to this Court, contending that diversity jurisdiction exists and that Defendant first learned that the case was removable on December 7, 2010. Plaintiff subsequently filed a Motion to Remand (ECF No. 8), contending that removal was untimely and that Defendant has failed to meet its burden of showing that there is complete diversity of citizenship. Plaintiff also requested attorney’s fees in that Motion. Defendant filed a Response (ECF No. 9), to which Plaintiff filed a Reply (ECF No. 12). For the reasons that follow, Plaintiff’s Motion will be granted, though it will not be awarded fees.

I. REMOVAL WAS PROCEDURALLY PROPER

Title 28, section 1446(b) of the United States Code provides that:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

1 If the case stated by the initial pleading is not removable, a notice
2 of removal may be filed within thirty days after receipt by the
3 defendant, through service or otherwise, of a copy of an amended
4 pleading, motion, order or other paper from which it may first be
5 ascertained that the case is one which is or has become
6 removable, except that a case may not be removed on the basis of
7 jurisdiction conferred by section 1332 of this title more than 1
8 year after commencement of the action.

9 Defendant contends that Plaintiff's initial Complaint was not removable because it did
10 not demonstrate that the amount in controversy was in excess of \$75,000.00. Instead, Defendant
11 argues that the document that first put it on notice that the case was removable was Plaintiff's
12 First Supplement to Initial Early Arbitration Conference Case Disclosures, which was provided
13 to Defendant on December 7, 2010 and alleged damages of \$544,776.00. (See Resp. 3:10-13,
14 ECF No. 9.)

15 Plaintiff, however, cites to the Prayer for Relief contained in its January 2010 Complaint
16 as demonstrating that the amount in controversy in this lawsuit has always clearly been in excess
17 of \$75,000.00. That portion of the Complaint states:

18 WHEREFORE, Plaintiff SELECTBUILD NEVADA, INC., prays

19 for relief from this Court as follows:

- 20 1. For an award of compensatory damages in excess of \$50,000, a
21 specific amount to be determined at the time of trial;
- 22 2. For an award of general damages in excess of \$50,000, a specific
23 amount to be determined at the time of trial;
- 24 3. Punitive damages;
- 25 4. The maximum pre-judgment and post-judgment interest as
provided by law;
5. For an award reimbursing Plaintiff's reasonable attorneys' fees,
costs and expenses incurred in the prosecution of this matter; and

1 6. For such other and further relief as the Court deems just and
2 proper.

3 (Compl. 8-9, Ex. A, ECF No. 1.) Analyzing the language of this section, Plaintiff argues: “A
4 cursory review of SelectBuild’s prayer for relief set forth in its Complaint reveals that
5 SelectBuild sought both ‘compensatory damages in excess of \$50,000’ as well as ‘general
6 damages in excess of \$50,000.’ . . . \$50,000.00 + \$50,000.00 = \$100,000.00.” (Reply 4:14-18,
7 ECF No. 12.)

8 What Plaintiff fails to realize, however, is that general damages are a type of compensatory
9 damages. See Black’s Law Dictionary 446 (9th ed. 2009) (defining “general damages” as
10 “[d]amages that the law presumes follow from the type of wrong complained of; specif.,
11 compensatory damages for harm that so frequently results from the tort for which the party has
12 sued that the harm is reasonably expected and need not be alleged or proved.”). Thus, the
13 Complaint’s Prayer for Relief does not “affirmatively reveal[] on its face the facts necessary for
14 federal court jurisdiction,” *Harris v. Bankers Life and Casualty Co.*, 425 F.3d 689, 690 (9th Cir.
15 2005) (internal quotation marks omitted), as required for a Complaint to be removable. Rather,
16 the Prayer for Relief is, at best, unclear. Although it is true that, if viewed generously, the
17 Prayer for Relief could be construed as indicating that Plaintiff is seeking at least \$100,000 in
18 damages, it could more easily be viewed as simply nonsensical. As the first numbered
19 paragraph in the Prayer for Relief already requests compensatory damages in excess of \$50,000,
20 Plaintiff’s second paragraph, which is simply requesting a type of compensatory damages, could
21 be read as needlessly redundant. The Complaint is therefore indeterminate with regard to
22 whether Plaintiff’s claim is actually in excess of \$75,000.00, and such indeterminate pleadings
23 do not initiate the thirty day removal window. See *Harris*, 425 F.3d at 695. Defendant does not
24 appear to have received notice that the amount in controversy exceeded \$75,000.00 until
25 December 7, 2010, and the subsequent removal of the action two days later was therefore

1 procedurally proper.

2 **II. HOWEVER, DEFENDANT HAS FAILED TO ESTABLISH COMPLETE**
3 **DIVERSITY OF CITIZENSHIP**

4 Plaintiff also seeks remand because it contends that Defendant has not adequately
5 demonstrated that complete diversity of citizenship exists in this case. Plaintiff is correct, and
6 this lawsuit will be remanded.

7 A civil action brought in a state court may be removed by the defendant to a federal
8 district court if the district court could have had original jurisdiction over the matter. 28 U.S.C. §
9 1441(a). But, “[i]f at any time before final judgment it appears that the district court lacks
10 subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). District courts
11 have subject matter jurisdiction over civil actions arising under federal law, see 28 U.S.C. §
12 1331, or where no plaintiff is a citizen of the same state as a defendant and the amount in
13 controversy exceeds \$75,000.00, see 28 U.S.C. § 1332(a). However, even if complete diversity
14 exists, a case cannot be removed if any of the defendants are citizens of the state in which the
15 action is brought. 28 U.S.C. § 1441(b).

16 Removal statutes are strictly construed against removal jurisdiction. *Gaus v. Miles*, 980
17 F.2d 564, 566 (9th Cir. 1992). “Federal jurisdiction must be rejected if there is any doubt as to
18 the right of removal in the first instance.” *Id.* The defendant has the burden of establishing that
19 removal is proper. *Id.*

20 Defendant’s Petition for Removal (ECF No. 1) sets forth the following facts in support of
21 its position that diversity jurisdiction exists: “Upon information and belief, at all relevant times
22 Plaintiff has been a Nevada corporation duly authorized to conduct business in Clark County,
23 Nevada” and “Defendant has at all relevant times been an Arizona Limited Liability Company
24 duly authorized to conduct business in Clark County, Nevada.” (Pet. for Removal 2 ¶¶ 2-3, ECF
25 No. 1.) Such allegations are insufficient to establish diversity jurisdiction, as limited-liability

1 companies are citizens of all of the states in which their constituent members are citizens, see
2 Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006), so the
3 citizenship of each of an LLC's members must be set forth in order to establish diversity
4 jurisdiction.

5 In Defendant's Certificate of Interested Parties (ECF No. 2) and in the exhibits attached
6 to its Response (ECF No. 9) to Plaintiff's Motion to Remand, Defendant demonstrates that it is
7 owned in equal 50% shares by the Robert Swartzman Family Trust and the Michael J. & Ashia
8 H. Stone Revocable Inter Vivos Trust, both of which are managed in Bullhead City, Arizona.
9 (See Stone Decl., Ex. K, ECF No. 9.) However, the Court's inquiry cannot end there, as "[a]
10 trust has the citizenship of its trustee or trustees," Columbia Properties Anchorage, 437 F.3d at
11 899, so the citizenship of the trusts' trustees must also be examined.

12 Consequently, the Court ordered Defendant to:

13 fully brief the citizenship of the Robert P. Swartzman and Denise D.
14 Swartzman Family Trust and the Michael J. Stone and Ashia H.
15 Stone Revocable Inter Vivos Trust at the time this action was
16 commenced in state court and at the time this action was removed to
17 this Court, bearing in mind that "[a] trust has the citizenship of its
18 trustee or trustees," Johnson v. Columbia Properties Anchorage, LP,
19 437 F.3d 894, 899 (9th Cir. 2006).

18 (Minute Order, ECF No. 14.) In its responsive brief (ECF No. 15), Defendant provided the trust
19 agreements for both of the trusts, each of which sets forth the trust's trustees, (see Exs. D & E,
20 ECF No. 15). The Michael J. & Ashia H. Stone Revocable Inter Vivos Trust Agreement names
21 Michael J. Stone and Ashia H. Stone as its trustees, (see Ex. D, ECF No. 15), and the Robert P.
22 Swartzman and Denise D. Swartzman Family Trust Agreement establishes that Robert P.
23 Schwartzman and Denise D. Swartzman are its trustees, (see Ex. E, ECF No. 15). However,
24 noticeably absent from any of the exhibits submitted in this case is an indication of Ashia H.
25 Stone's place of residence, let alone the state in which she is a citizen.

1 Further, although the exhibits submitted by Defendant appear to indicate that Michael J.
2 Stone, Robert P. Swartzman, and Denise D. Swartzman reside in Bullhead City, Arizona, they
3 do not establish that those people are citizens of Arizona. Despite Defendant's argument that
4 the trusts are citizens of Arizona because "[e]ach and every corporate and trust document
5 identifies the trustees' residency as Bullhead City, Arizona," (Supp. Brief 3:23-24, ECF No. 15),
6 one's residence does not determine one's citizenship, see *Kanter v. Warner-Lambert Co.*, 265
7 F.3d 853, 857 (9th Cir. 2001). Rather, one's domicile, which is the place he or she resides "with
8 the intention to remain or to which she intends to return," determines one's citizenship. *Id.* Yet,
9 Defendant has failed to argue or provide evidence that Michael J. Stone, Robert P. Swartzman,
10 and Denise D. Swartzman intend to remain in Arizona.

11 Ultimately, Defendant has failed to sustain its burden of setting forth the relevant
12 citizenships of the parties to this action despite having been given ample opportunity to do so.
13 The case must therefore be remanded, as diversity jurisdiction has not been established.

14 **III. ATTORNEY'S FEES WILL NOT BE AWARDED**

15 As Plaintiff acknowledges, (see Mot. 11:15-16, ECF No. 8), a court may award attorney's
16 fees under 28 U.S.C. § 1447(c) only where the removing party "lacked an objectively reasonable
17 basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). It does
18 not appear as though the Defendant lacked a reasonable basis for seeking removal here: removal
19 was timely, more than \$75,000 was at stake, and it is possible that complete diversity of
20 citizenship exists but was just not properly pleaded. The primary issue with the removal was
21 Defendant's failure to properly set forth the citizenships of the parties, not that Defendant
22 removed the case on some unreasonable basis. Accordingly, Plaintiff's request for attorney's
23 fees will be denied.

24 **CONCLUSION**

25 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Remand (ECF No. 8) is hereby

1 **GRANTED**, though its request for attorneys' fees is denied. **The Clerk's Office is directed to**
2 **mail a copy of this Order to the clerk of the court for the Eighth Judicial District Court,**
3 **Clark County, Nevada.**

4 DATED this 21st day of July, 2011.

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8 Gloria M. Navarro
9 United States District Judge
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