

07-4514-cv, -4647-cv
Durant, Nichols, Houston,
Hodgson, & Cortese-Costa,
P.C. v. Dupont

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2008

5 (Argued: January 16, 2009

6 Final submissions: March 13, 2009

Decided: May 6, 2009)

7 Docket Nos. 07-4514-cv, -4647-cv

8
9 DURANT, NICHOLS, HOUSTON, HODGSON, & CORTESE-COSTA, P.C.,

10 Plaintiff-Appellee-
11 Cross-Appellant,

12 - v. -

13 RALPH P. DUPONT,

14 Defendant-Appellant-
15 Cross-Appellee.
16

17 Before: JACOBS, Chief Judge, KEARSE and HALL, Circuit Judges.

18 Appeal and cross-appeal from a judgment of the United
19 States District Court for the District of Connecticut, Janet B.
20 Arterton, Judge, confirming an arbitration award in favor of
21 plaintiff but denying plaintiff prejudgment interest and
22 sanctions.

23 Appeals dismissed; matter remanded for determination of
24 subject matter jurisdiction.

25 LORAIN M. CORTESE-COSTA, Bridgeport,
26 Connecticut (Michel Bayonne, Durant,
27 Nichols, Houston, Hodgson & Cortese-
28 Costa, Bridgeport, Connecticut, on the

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brief), for Plaintiff-Appellee-Cross-Appellant.

WILLIAM H. CLENDENEN, Jr., New Haven, Connecticut (Nancy L. Walker, Clendenen & Shea, New Haven, Connecticut, Barbara J. Radlauer, Ralph P. Dupont pro se, The Dupont Law Firm, Stamford, Connecticut, on the brief), for Defendant-Appellant-Cross-Appellee.

11 KEARSE, Circuit Judge:

12 Defendant Ralph P. Dupont appeals from so much of a
13 judgment entered in the United States District Court for the
14 District of Connecticut, Janet B. Arterton, Judge, as confirmed
15 an arbitration award ("Award") that ordered Dupont to pay
16 \$94,060.80 to plaintiff Durant, Nichols, Houston, Hodgson, &
17 Cortese-Costa, P.C. ("Durant-Nichols"), based on agreements
18 between the parties. Durant-Nichols cross-appeals from so much of
19 the judgment as denied its requests for prejudgment interest on
20 the amount awarded and for sanctions pursuant to 28 U.S.C. § 1927.
21 At oral argument of this appeal, this Court sua sponte raised the
22 issue of federal subject matter jurisdiction, noting that the
23 appellate briefs do not contain adequate jurisdictional
24 statements and that the complaint initiating this action failed to
25 allege any basis for federal jurisdiction. We have now received
26 additional submissions from the parties, which reveal that the
27 existence of federal jurisdiction cannot be determined without the
28 resolution of factual issues. Accordingly, we dismiss the appeals
29 as premature and remand to the district court for findings of fact
30 as to the existence of subject matter jurisdiction.

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I. BACKGROUND

Durant-Nichols is a law firm. Dupont is an attorney who entered into successive "Of Counsel Agreement[s]" with predecessors of Durant-Nichols in 1992 and 1996. Dupont terminated the 1996 agreement in January 1997. The present dispute concerns the claim of Durant-Nichols that it is entitled to a portion of the approximately \$2.75 million in fees collected by Dupont in 2003 with respect to his work on law suits begun in 1998 with respect to the hijacking of a Kuwait Airways airplane; the 1998 suits were related to two contingent-fee actions--arising out of that same hijacking--which had been commenced by Dupont in 1985 and were pending while Dupont was of counsel to Durant-Nichols. In August 2003, Durant-Nichols requested a share of the fees collected by Dupont. Dupont did not respond.

A. Durant-Nichols's First Action

Both of the Of Counsel Agreements between Dupont and Durant-Nichols provided that any controversy or claim arising out of, or relating to any provision of this Agreement or the breach thereof, shall be settled by mediation with the aid of a mediator who is mutually acceptable to the parties or by arbitration in Bridgeport, Connecticut. It is agreed that any party to any award rendered in any such arbitration proceeding may seek a judgment upon the award, and that such judgment may be entered thereon by the court having jurisdiction.

In the summer of 2004, Durant-Nichols commenced an action in

1 Connecticut Superior Court seeking an order compelling Dupont to
2 submit to arbitration ("Durant-Nichols I").

3 Dupont removed Durant-Nichols I to federal district court,
4 premising federal jurisdiction on diversity of citizenship.
5 Citing 28 U.S.C. § 1332, his notice of removal ("Removal Notice")
6 stated that Durant-Nichols "is a Connecticut professional
7 corporation whose only office is in Connecticut," that Dupont "is
8 a citizen and resident of the State of Hawaii," and that the
9 "amount in controversy, exclusive of interest and costs, exceeds
10 \$75,000.00." (Dupont's Removal Notice dated July 7, 2004,
11 ¶¶ 4-7.) In addition, Dupont asserted that the case involved a
12 claim for arbitration under the Federal Arbitration Act ("FAA" or
13 the "Act") and that the district court had jurisdiction under
14 28 U.S.C. § 1331, which confers jurisdiction over cases raising a
15 federal question. (See Dupont's Removal Notice ¶¶ 8-9.) Because
16 Dupont contended that he had not been properly served with the
17 complaint and summons, Durant-Nichols voluntarily dismissed
18 Durant-Nichols I and began the present action.

19 B. The Present Action

20 Durant-Nichols commenced its present action in the
21 district court on August 16, 2004 ("Durant-Nichols II"), again
22 seeking an order compelling arbitration. The complaint alleges
23 that Durant-Nichols "is a professional corporation engaged in the
24 rendering of legal services and whose office is located" in
25 Connecticut, and that Dupont is an attorney "doing business" in

1 Connecticut. (Complaint ¶¶ 1-2.) However, the complaint contains
2 neither a sufficient allegation of Durant-Nichols's citizenship
3 within the meaning of 28 U.S.C. § 1332(c) (for purposes of
4 diversity jurisdiction, a corporation is deemed to be a citizen of
5 both the state of its incorporation and the state where it has its
6 principal place of business), nor any allegation as to Dupont's
7 citizenship. Nor is there any other allegation as to a basis for
8 federal court jurisdiction.

9 Dupont defaulted in response to the Durant-Nichols II
10 complaint, failing to appear or respond. Durant-Nichols moved
11 successfully for a default order compelling arbitration.

12 On November 19, 2004, Dupont, proceeding pro se, moved
13 pursuant to Fed. R. Civ. P. 60(b) to vacate the default. Stating
14 that "he is a citizen and resident of the State of Hawaii and has
15 been for several years" (Dupont Memorandum of Law in Support of
16 Motion To Open Default Judgment, dated November 17, 2004 ("Dupont
17 Vacatur Motion Memorandum") at 3), Dupont asserted, inter alia,
18 that he was not properly served with the Durant-Nichols II papers,
19 that they had been improperly left on the ground at a dwelling (at
20 which he was present) in Pound Ridge, New York, on the night of
21 September 29, 2004 (see Affidavit of Ralph P. Dupont dated
22 November 17, 2004 ("2004 Affidavit"), ¶¶ 2-4), and that he had
23 subsequently lost the papers (see id. ¶¶ 7-8, 11; Dupont Vacatur
24 Motion Memorandum at 3). In a reply memorandum dated December 23,
25 2004 ("Dupont Vacatur Reply Memorandum"), while reiterating that
26 he "is a citizen and resident of the State of Hawaii" (Dupont

1 Vacatur Reply Memorandum at 3, 17), Dupont added the contention
2 that "the Court has no subject matter jurisdiction over this
3 action under the Federal Arbitration Act, 9 U.S.C. § 1, et seq.
4 because the matters [Durant-Nichols] seeks to arbitrate pursuant
5 to the parties [sic] are nonarbitrable." (Dupont Vacatur Reply
6 Memorandum at 35).

7 The district court denied Dupont's motion to vacate the
8 default judgment, finding that Dupont had failed to demonstrate
9 excusable neglect or improper service, and implicitly rejecting
10 his arbitrability-based challenge to subject matter jurisdiction.
11 In an appeal that was timely as to the order denying Dupont's Rule
12 60(b) motion but not as to the underlying order of default (the
13 "2005 Appeal"), Dupont challenged the district court's rejections
14 of his contentions that his default was excusable, that he was not
15 properly served, and that the matters as to which arbitration was
16 sought were "not . . . within the scope of the FAA" (Dupont's
17 brief in 2005 Appeal at 1-2). In addition, Dupont made a new
18 attack on federal subject matter jurisdiction on the ground that
19 the amount in controversy was less than \$75,000. He stated that
20 "the basis for jurisdiction is presumably[] diversity, 28 U.S.C.
21 § 1332, because the Defendant is a citizen of Hawaii" (Dupont's
22 brief in 2005 Appeal at 39; see also id. at 26 ("[Dupont] is a
23 citizen of Hawaii, with a home at 6770 Hawaii Kai Drive,
24 Honolulu. . . . For brief periods of time, and from time to time,
25 Attorney Dupont is present at 14 Peters Lane, Pound Ridge, New
26 York, a short distance from his Stamford[, Connecticut] law

1 office.")); but he argued that "the jurisdictional amount cannot
2 be satisfied" (id. at 39 (emphasis added)). This Court rejected
3 all of Dupont's contentions and affirmed the district court's
4 denial of his motion to vacate the default.

5 The parties proceeded to arbitration, and the arbitrator
6 ruled in favor of Durant-Nichols, awarding it \$94,060.80. Durant-
7 Nichols moved to confirm the Award; Dupont moved to vacate it.
8 The district court granted the motion to confirm, describing the
9 action as a "28 U.S.C. § 1331 federal question fee dispute" that
10 the court had "ordered to be arbitrated . . . under the Federal
11 Arbitration Act, 9 U.S.C. § 1, et seq." Ruling on Plaintiff's
12 Motion To Confirm Arbitration Award, dated September 13, 2007
13 ("Confirmation Order"), at 1. Although Durant-Nichols also moved
14 for prejudgment interest and the imposition of sanctions against
15 Dupont, the district court denied those motions.

16 Dupont has appealed the judgment confirming the Award, and
17 Durant-Nichols has cross-appealed the denial of its motions for
18 prejudgment interest and sanctions. At oral argument of these
19 appeals, this Court pointed out that the FAA does not confer
20 federal jurisdiction and that Durant-Nichols's complaint contained
21 no adequate allegation of diversity jurisdiction; we asked whether
22 there was evidence in the record to show that diversity
23 jurisdiction existed. Both sides conceded that diversity had
24 never been properly pleaded, and they proceeded to submit
25 additional papers.

1 C. The Post-Oral-Argument Submissions on this Appeal

2 Following oral argument, Durant-Nichols moved to amend its
3 complaint pursuant to 28 U.S.C. § 1653 (authorizing the courts to
4 permit amendment of "[d]efective allegations" of jurisdiction), in
5 order to make proper allegations as to the diverse citizenship of
6 the parties and the amount in controversy. (See Durant-Nichols
7 Motion To Amend Pleadings dated January 27, 2009 ("Motion To
8 Amend"), at 1.) In support of its motion, Durant-Nichols stated,
9 inter alia, that it is, and always has been, a Connecticut
10 corporation (see Affidavit of Loraine M. Cortese-Costa sworn to
11 January 26, 2009, ¶ 3); that it has a single office, which is in
12 Bridgeport, Connecticut (see id.); and that on both July 7, 2004,
13 and November 17, 2004--i.e., shortly before and shortly after the
14 August 16, 2004 commencement of this action--Dupont stated that he
15 was a citizen of Hawaii, and on November 17, 2004, stated that he
16 had been a citizen of Hawaii for several years (see id. ¶¶ 2, 5).
17 Durant-Nichols also stated that it was seeking confirmation of an
18 Award of more than \$94,000, that Dupont sought to have the Award
19 vacated, and thus that the amount in controversy is in excess of
20 \$75,000. (See Motion To Amend at 3-4).

21 Dupont opposed Durant-Nichols's motion to amend the
22 complaint, arguing that § 1653 does not authorize such an
23 amendment because the complaint did not contain "defective"
24 jurisdictional allegations but rather contained "no allegations of
25 jurisdiction" (Dupont Response in Opposition to Motion To Amend
26 Pleadings Under § 1653, dated February 3, 2009, at 2 (emphasis in

1 original).) He argued that "[n]othing in the Complaint's
2 allegations sets out either the domicile of the parties or the
3 requisite amount in controversy, and therefore subject matter
4 jurisdiction based on diversity is not available." (Id. at 3.)
5 He asserted that "there are no jurisdictional facts anywhere in
6 the record that unequivocally establish [Dupont's] domicile as of
7 August 13 [sic], 2004, the date the complaint was filed"
8 (Id.)

9 By order dated February 4, 2009, this Court ordered Dupont
10 to file a statement under oath "disclosing the State of which he
11 was a citizen on the date the present action was commenced."
12 Dupont responded with an affidavit, stating, inter alia, that
13 "[o]n August 16, 2004, the date this action was commenced, I
14 believe I was still domiciled in Connecticut and had not changed
15 my domicile to Hawaii or New York" (Affidavit of Ralph P. Dupont
16 dated February 12, 2009 ("Dupont 2009 Aff."), ¶ 1), and that
17 "[a]lthough at various times from 2001 through early 2005, I
18 considered moving permanently to Hawaii, my work, my family and
19 other circumstances always drew me back to my Connecticut law
20 practice, and I never formed a final fixed intention to reside
21 permanently in Hawaii" (id. ¶ 19). Dupont stated that he owned
22 real property in Connecticut "as a partner in two Connecticut
23 partnerships." (Id. ¶ 7.) As to his residences, Dupont stated as
24 follows:

25 2. From 1957 until the early summer of 2001, I
26 lived exclusively in New London, Stonington and
27 Mystic, Connecticut, except for vacations and for

1 brief periods of time in 1977-1978 and 1992-1994,
2 when I taught at law schools in Massachusetts.

3 3. Except for the time when I taught in
4 Massachusetts, I have practiced law and/or taught law
5 in Connecticut from 1957 through the present. At all
6 times from 1957 through the present, I have practiced
7 law at offices in the State of Connecticut. . . . I
8 have never practiced law in any other state except
9 for a brief period in 1956-57, when I was an
10 associate in a New York City law firm. I have no
11 current plans to retire from my Connecticut practice.

12 4. Since 2001 through the present, I have lived
13 in the following places at approximately the
14 following times:

15 a. From January through late spring of
16 2001, I lived in Mystic, CT.

17 b. From the early summer 2001 through
18 December 2001, I resided in various rented,
19 furnished homes or apartments on the Hawaiian
20 Islands of Kauai, Oahu and Molokai. At the end
21 of 2001, I left Hawaii and returned to
22 Connecticut.

23 c. From early 2002 through early 2003, I
24 lived in rented, furnished homes in Guilford,
25 and Mystic, Connecticut.

26 d. In early 2003 through the late spring
27 of 2003, I lived in various rented, furnished
28 homes and hotels on the Islands of Molokai and
29 Oahu in Hawaii.

30 e. From the late spring through the end of
31 2003, I lived at 14 Peter's Lane, Pound Ridge,
32 New York in a home owned and furnished by my
33 wife. During this period, I traveled
34 periodically to Hawaii and stayed in the home I
35 rented on Molokai.

36 f. From January through December 2004, I
37 lived periodically in Pound Ridge, New York, and
38 periodically in a rented, furnished apartment on
39 Hawaii Kai Drive in Honolulu, Hawaii (on the
40 Island of Oahu).

41 5. At all times during the periods described in
42 paragraph 4, I continued to work at my Connecticut
43 law offices whenever I was living in either

1 Connecticut or Pound Ridge, New York. When I was
2 living in Hawaii, I continued to work with and
3 through my Connecticut law office by communicating
4 almost daily with my staff there.

5 6. I was living at 14 Peter's Lane in Pound
6 Ridge, New York, and working at my Stamford,
7 Connecticut law office both when this action was
8 commenced on August 16, 2004, and in October [sic]
9 2004, when the defendant attempted to serve process
10 on me in this action. During this same period, I
11 also continued to rent the Hawaii Kai apartment.

12 (Dupont 2009 Aff. ¶¶ 2-6.)

13 Dupont stated that at the time he filed his November 17,
14 2004 affidavit, proposed answer to the complaint, and memorandum
15 stating that he was a citizen of Hawaii (and had been for several
16 years), he "did not analyze the various elements that comprise
17 citizenship, and [he] did not have domicile in mind." (Id. ¶ 13.)

18 II. DISCUSSION

19 "It is a fundamental precept that federal courts are
20 courts of limited jurisdiction" and lack the power to disregard
21 such limits as have been imposed by the Constitution or Congress.
22 Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).
23 If subject matter jurisdiction is lacking and no party has called
24 the matter to the court's attention, the court has the duty to
25 dismiss the action sua sponte. See, e.g., Louisville & Nashville
26 R.R. v. Mottley, 211 U.S. 149, 152 (1908).

27 Although the district court's Confirmation Order in the
28 present case described this action as raising a federal question
29 under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., that Act

1 in fact does not independently confer subject matter jurisdiction
2 on the federal courts. See, e.g., Perpetual Securities, Inc. v.
3 Tang, 290 F.3d 132, 136 (2d Cir. 2002); see generally Moses H.
4 Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1,
5 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in
6 the field of federal-court jurisdiction. It creates a body of
7 federal substantive law establishing and regulating the duty to
8 honor an agreement to arbitrate, yet it does not create any
9 independent federal-question jurisdiction under 28 U.S.C. § 1331
10 . . . or otherwise."). Thus, "[t]here must be an independent
11 basis of jurisdiction before a district court may entertain
12 petitions under the Act." Harry Hoffman Printing, Inc. v. Graphic
13 Communications, International Union, Local 261, 912 F.2d 608, 611
14 (2d Cir. 1990). Accordingly, it must be determined whether at the
15 time the present action was commenced there was diversity
16 jurisdiction, that is, whether Dupont was a citizen of--i.e.,
17 domiciled in, see, e.g., Gilbert v. David, 235 U.S. 561, 569
18 (1915); Linardos v. Fortuna, 157 F.3d 945, 948 (2d Cir. 1998)--a
19 state other than the state in which Durant-Nichols was
20 incorporated and the state in which it had its principal place of
21 business, see 28 U.S.C. § 1332(c)(1), and whether the amount in
22 controversy "exceeds . . . \$75,000, exclusive of interest and
23 costs," id. § 1332(a).

24 Durant-Nichols suggests that the issue of subject matter
25 jurisdiction in this case has already been resolved, stating that
26 "this Court specifically considered and accepted the district

1 court's exercise of subject matter jurisdiction in its decision on
2 the [2005] appeal" (Durant-Nichols's reply memorandum in support
3 of its Motion To Amend at 1), as our summary order disposing of
4 that appeal "state[d] that '[w]e find no error in the district
5 court's disposition of Dupont's challenge to its subject matter
6 jurisdiction over the underlying action'" (Durant-Nichols's Motion
7 To Amend at 3). This suggestion, however, ignores the nature of
8 the jurisdictional challenges that had been made by Dupont, both
9 in the district court and in this Court. The jurisdictional
10 contentions we rejected in the 2005 Appeal were, as described in
11 Part I.B. above, (a) Dupont's argument in the district court that
12 there was no federal question jurisdiction because the dispute was
13 not arbitrable--an argument that the district court denied sub
14 silentio, making no statement as to any ground of subject matter
15 jurisdiction--and (b) Dupont's new argument in this Court that
16 there was no diversity jurisdiction because the amount in
17 controversy was below the requisite jurisdictional amount. The
18 question we have raised in the present appeal, in contrast, is
19 whether the parties were citizens of different states. During the
20 2005 appeal, no party raised that question; and indeed that issue
21 was masked, as Dupont repeatedly stated that he "is a citizen of
22 Hawaii" (Dupont's brief in 2005 Appeal at 26, 39) and referred to
23 his "conceded Hawaii citizenship" (id. at 17; see also id. at 2
24 ("It is conceded that [Dupont] is a non-resident of
25 Connecticut.")).

1 Notwithstanding any prior proceedings, it is our
2 obligation to raise the matter of subject matter jurisdiction
3 "whenever it appears from the pleadings or otherwise that
4 jurisdiction is lacking." John Birch Society v. National
5 Broadcasting Co., 377 F.2d 194, 199 (2d Cir. 1967) (emphasis
6 added); see, e.g., Fed. R. Civ. P. 12(h)(3) ("If the court
7 determines at any time that it lacks subject-matter jurisdiction,
8 the court must dismiss the action." (emphasis added)).
9 Accordingly, because the complaint contains no allegation as to
10 Durant-Nichols's state of incorporation or as to Dupont's
11 citizenship, we raised the question of diversity at oral argument
12 of these appeals.

13 Although a plaintiff premising federal jurisdiction on
14 diversity of citizenship is required to include in its complaint
15 adequate allegations to show that the district court has subject
16 matter jurisdiction, see, e.g., Fed. R. Civ. P. 8(a)(1), its
17 failure to do so does not always require that the action be
18 dismissed, for "the actual existence of diversity jurisdiction, ab
19 initio, does not depend on the complaint's compliance with these
20 procedural requirements." Jacobs v. Patent Enforcement Fund,
21 Inc., 230 F.3d 565, 568 (2d Cir. 2000) (emphasis in original).
22 Thus, "where the facts necessary to the establishment of diversity
23 jurisdiction are subsequently determined to have obtained all
24 along, a federal court may . . . allow a complaint to be amended
25 to assert those necessary facts," Herrick Co., Inc. v. SCS
26 Communications, Inc., 251 F.3d 315, 329 (2d Cir. 2001); see, e.g.,

1 28 U.S.C. § 1653 ("[d]efective allegations of jurisdiction may be
2 amended, upon terms, in the trial or appellate courts"). Or, when
3 the record as a whole, as supplemented, establishes the existence
4 of the requisite diversity of citizenship between the parties, we
5 may simply "deem the pleadings amended so as to properly allege
6 diversity jurisdiction." Canedy v. Liberty Mutual Insurance Co.,
7 126 F.3d 100, 103 (2d Cir. 1997) (holding diversity established in
8 light of affidavits submitted to this Court, where "the affidavits
9 [we]re contested by neither party, and there [wa]s nothing in the
10 record to suggest lack of jurisdiction"); see, e.g., Jacobs v.
11 Patent Enforcement Fund, Inc., 230 F.3d at 567-68 (upholding
12 default judgment despite the complaint's failure to allege the
13 parties' citizenship, rather than merely their residence, where
14 supplementation of the record before this Court revealed diversity
15 of citizenship).

16 As described in Part I.C. above, Durant-Nichols has now
17 submitted--in support of its postargument motion to amend its
18 complaint--an affidavit stating that it is incorporated in, and
19 has its principal place of business in, Connecticut. Dupont does
20 not dispute these assertions; and as nothing in the record appears
21 to contradict them, we regard the record as sufficient to
22 establish that Durant-Nichols is, for diversity purposes, a
23 citizen only of Connecticut. Moreover, given that Durant-Nichols
24 sought arbitration to obtain a share of Dupont's \$2.75 million fee
25 and was awarded more than \$94,000, there is no question that the

1 amount-in-controversy requirement is satisfied. Dupont has not
2 renewed the contrary contention he advanced in the 2005 Appeal.

3 As to the citizenship of Dupont, however, the parties'
4 submissions are in conflict. Durant-Nichols, which, as the
5 plaintiff, has the burden of proving subject matter jurisdiction,
6 seeks to amend its complaint to allege that Dupont is a citizen of
7 Hawaii. Its motion points out that Dupont stated many times that
8 he was a citizen of Hawaii, making that assertion both shortly
9 before and shortly after the present action was commenced.
10 Dupont, however, in response to this Court's order that he declare
11 under oath the state of his citizenship at the time this action
12 was commenced, has submitted an affidavit stating, "[o]n August
13 16, 2004, the date this action was commenced, I believe I was
14 still domiciled in Connecticut and had not changed my domicile to
15 Hawaii or New York" (Dupont 2009 Aff. ¶ 1). As quoted at length
16 in Part I.C. above, Dupont sought to support this professed belief
17 by describing, inter alia, the various places he lived from 2001
18 through 2004--Hawaii and Connecticut in 2001-2003, and Hawaii and
19 New York in 2003-2004 (see id. ¶¶ 4-6)--and his membership in two
20 partnerships that owned real property in Connecticut (see id.
21 ¶ 7).

22 In addition, Dupont described the location of his books
23 and research papers (see id. ¶ 18 (Connecticut)); the location of
24 his bank accounts (see id. ¶ 8 (Connecticut, New York, and
25 Hawaii)); the states in which he has had driver's licenses (see
26 id. ¶ 11 (Connecticut until May 2003; since May 2003, Hawaii));

1 where he voted (see id. ¶ 10 (Connecticut "before 2004"; New York
2 in 2008; no votes in Hawaii)); and where he filed his tax returns
3 (see id. ¶ 17 ("non-resident Connecticut and New York income tax
4 returns for 2003 and 2004"; "resident Hawaii income tax returns in
5 2003 and 2004"))).

6 Dupont also stated that, in repeatedly saying that he was
7 a citizen of Hawaii, he "did not have domicile in mind" (Dupont
8 2009 Aff. ¶ 13)--this despite the fact that, as discussed in Parts
9 I.A. and B. above, several of his claims of Hawaiian citizenship
10 were made in the course of discussing diversity jurisdiction or,
11 indeed, in support of his own invocation of diversity jurisdiction
12 when he removed Durant-Nichols I to federal court. (When the
13 jurisdictional issue is neglected until after a decision has been
14 rendered on the merits, agreement as to the facts of diversity
15 sometimes becomes harder to achieve.)

16 As we will "generally afford an opportunity for amendment"
17 of the pleadings to cure defective jurisdictional allegations
18 unless "the record clearly indicates that the complaint could not
19 be saved by any truthful amendment," Canedy v. Liberty Mutual
20 Insurance Co., 126 F.3d at 103, and as Dupont himself has provided
21 Durant-Nichols with ample basis for believing that Dupont was a
22 citizen of Hawaii on August 16, 2004, given his claims that he was
23 a Hawaiian citizen on, inter alia, July 7, 2004 (see Dupont's
24 Removal Notice in Durant-Nichols I), and November 17, 2004 (see
25 Dupont's 2004 Affidavit and his Vacatur Motion Memorandum in
26 Durant-Nichols II, and his proposed answer to the Durant-

1 to whether the district court had subject matter jurisdiction of
2 the action, we dismiss the appeal and cross-appeal as premature,
3 and we remand to the district court for supplementation of the
4 record with findings as to the citizenship of Dupont, for
5 diversity purposes, at the time this action was commenced.

6 In allowing Durant-Nichols to amend its complaint to
7 allege that Dupont was a citizen of Hawaii, and remanding to the
8 district court for factual findings, we do not mean to imply that
9 the district court could not find that, at the time this action
10 was commenced, Dupont's domicile was in fact New York, where he
11 lived with his wife in the home owned by her.

12 If the district court determines that it has diversity
13 jurisdiction, i.e., that Dupont was domiciled in Hawaii or New
14 York when the action was commenced, the present appeals will be
15 reinstated--without need for new notices of appeal--upon notice,
16 by either party to this Court by letter within 14 days after such
17 determination, that the district court has supplemented the record
18 with jurisdictional findings. In that event, the parties may
19 file supplemental briefs, not to exceed 10 double-spaced pages, on
20 the jurisdictional decision and any intervening authorities
21 concerning the merits, according to a schedule to be established
22 by this Court's Staff Counsel.

23 In the event that the district court determines that it
24 lacks diversity jurisdiction and dismisses the action, a new
25 notice or notices of appeal will be required in order to obtain
26 appellate review.

1 In either event, the matter shall be referred to this
2 panel.

3 The mandate shall issue forthwith. No costs.