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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kathy Rogers,
Plaintiff,
v.
Shandra Gosney, et al.,
Defendants.
Bobby-Jean Jones Colyer, et al.,
Counter-Claimants,
v.
Kathy Rogers,
Counter-Defendant.

No. CV-16-08154-PCT-GMS
ORDER

Pending before the Court is the Motion to Remand of Plaintiff Kathy Rogers. (Doc. 9.) For the following reasons, the Court grants the motion.

BACKGROUND

Plaintiff Kathy Rogers, a resident of Missouri, originally filed this action in Yavapai County Superior Court on June 6, 2016, naming as defendants Bobby-Jean Jones Colyer, a resident of Idaho, and Shandra Gosney, whose state of residence is disputed. Defendant Colyer was served on June 21. Plaintiff attempted to serve Defendant Gosney in June and July, but was unsuccessful until July 28. Both Defendants filed a timely Notice of Removal with this Court on July 11, stating that removal was proper on the

1 basis of diversity jurisdiction. The Notice of Removal stated that “Defendant Shandra
2 Gosney is a resident of the State of Arizona.” (Doc. 1 at 2.) It also stated that the amount
3 in controversy requirement was met, because Plaintiff certified that she sought damages
4 in excess of \$50,000, and that “[b]ased on Plaintiff’s pleading,” in which she “alleges
5 damages for medical expenses, past and future, pain and suffering, loss of enjoyment of
6 life and lingering disabilities, lost wages, and punitive damages,” Plaintiff “seeks
7 damages in excess of the \$75,000 threshold for removal.” (Doc. 1 at 2–3.) The Notice of
8 Removal contained a statement that Shandra Gosney waived service.

9 The following day, Defendants filed a Corrected Notice of Removal stating that
10 “At the time of the filing of the complaint Defendant Shandra Gosney was not a resident
11 of the State of Arizona” but was instead “currently domiciled in a horse trailer in North
12 Dakota” and “had not established residency in any particular place,” although she “does
13 sojourn from time to time in Arizona.” (Doc. 7 at 2.) The amount-in-controversy
14 paragraph was unchanged. The Corrected Notice of Removal did not contain a statement
15 that Shandra Gosney waived service.

16 Plaintiff filed a motion to remand, asserting that Defendant Gosney is in fact a
17 resident of the State of Arizona and that removal is thus improper under 28 U.S.C.
18 § 1441(b)(2). Defendants filed a response asserting that Shandra Gosney is not a resident
19 of Arizona and that even if she is, removal is proper because Gosney had not been served
20 when the Notice of Removal was filed.

21 DISCUSSION

22 I. Legal Standard

23 The removal statute, 28 U.S.C. § 1441, provides in relevant part:

24 [A]ny civil action brought in a State court of which the district courts of the
25 United States have original jurisdiction, may be removed by the defendant . . . to
26 the district court of the United States for the district and division embracing the
place where such action is pending.

27 28 U.S.C. § 1441(a); *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)
28 (“Only . . . actions that originally could have been filed in federal court may be removed

1 to federal court by the defendant.”). In an action not involving a federal question,
2 removal is proper “only if none of the parties in interest properly joined and served as
3 defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b);
4 *see* 28 U.S.C. § 1332(a)(1). In an action removed based on diversity jurisdiction, the
5 requisite diversity must exist at the time of removal. *See Miller v. Grgurich*, 763 F.2d
6 372, 373 (9th Cir. 1985).

7 Courts strictly construe the removal statute against removal jurisdiction. *See*
8 *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941); *see also Gaus v.*
9 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam). There is a “strong
10 presumption” against removal jurisdiction, and “[f]ederal jurisdiction must be rejected if
11 there is any doubt as to the right of removal in the first instance.” *Gaus*, 980 F.2d at 566.
12 “The ‘strong presumption’ against removal jurisdiction means that the defendant always
13 has the burden of establishing that removal is proper.” *Id.*; *see Lew v. Moss*, 797 F.2d
14 747, 749 (9th Cir. 1986) (“[T]he party asserting diversity jurisdiction bears the burden of
15 proof.”).

16 **II. Analysis**

17 **A. Shandra Gosney’s Domicile**

18 Removal on the basis of diversity jurisdiction is not permitted if at least one of the
19 defendants seeking removal is a citizen of the state in which the action is brought. 28
20 U.S.C. § 1441(b). To establish citizenship in a particular state for diversity jurisdiction
21 purposes, a party must be “domiciled” in that state. *See, e.g., Gilbert v. David*, 235 U.S.
22 561, 569 (1915); *Lew*, 797 F.2d at 749. “[T]he existence of domicile for purposes of
23 diversity is determined as of the time the lawsuit is filed.” *Lew*, 797 F.2d at 750.
24 “‘Domicile’ is not necessarily synonymous with ‘residence,’ and one can reside in one
25 place but be domiciled in another.” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S.
26 30, 48 (1989). “[A] person is ‘domiciled’ in a location where he or she has established a
27 ‘fixed habitation or abode in a particular place, and intends to remain there permanently
28 or indefinitely.’” *Lew*, 797 F.2d at 749–50 (quoting *Owens v. Huntling*, 115 F.2d 160,

1 162 (9th Cir. 1940)); *see Holyfield*, 490 U.S. at 48. A change in domicile requires the
2 confluence of physical presence at the new location with an intention to remain there
3 indefinitely. *See, e.g., Williamson v. Osenton*, 232 U.S. 619, 624 (1914); *Lew*, 797 F.2d at
4 750. A person’s old domicile is not lost until a new one is acquired, and there is a
5 presumption in favor of an established domicile as against an allegedly newly acquired
6 one. *Lew*, 797 F.2d at 750–51.

7 Shandra Gosney was apparently domiciled in Arizona for several years prior to
8 this action, including as recently as two weeks prior to the filing of the Notice of
9 Removal. On March 7, 2012, in an action by Shandra Gosney to determine parental
10 rights, the Maricopa County Superior Court found that Shandra Gosney resided in
11 Scottsdale, Arizona. (Doc. 9-2 at 3.) On April 28, 2015, in a sworn and notarized Petition
12 for Dissolution of Marriage, Shandra Gosney listed her mailing address as being in
13 Scottsdale, Arizona. (Doc. 16-1 at 2.) On July 23, 2015, Shandra Gosney submitted a
14 Verified Motion to Dismiss for Lack of Subject Matter Jurisdiction in a Colorado action
15 regarding parental rights, attaching the Maricopa County Superior Court findings and
16 specifically asserting that her residence, and that of her son, “has at all times remained in
17 Arizona.” (Doc. 9-3 at 3.) Finally, on June 28, 2016, in a Response to Verified Petition to
18 Establish Step-Parent Visitation, Shandra Gosney admitted that she considered herself,
19 and her son, to be “permanent residents of Maricopa County, Arizona.”¹ (Doc. 9-1 at 2,
20 9). This statement was made less than two weeks prior to the filing of the Notice of
21 Removal in this Court.

22 Defendants assert, however, that Shandra Gosney is no longer a domiciliary of
23 Arizona. Specifically, Defendants state that Shandra Gosney is currently living in North
24 Dakota, in a horse trailer registered in Colorado; “has not established residency in any
25 particular place”; has “essentially bec[o]me homeless”; and “at the current time . . .
26 believes it is most likely she will establish residency in Nevada,” where her parents live

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28 ¹ Contrary to Defendants’ assertions, this is an adoptive admission of a party
opponent, and is not hearsay. *See Fed. R. Evid. 801(d)(2)(B)*.

1 and where most of her property is currently stored. (Doc. 14 at 2–4.)

2 These assertions are insufficient to establish that Shandra Gosney is no longer
3 domiciled in Arizona. In fact, they indicate just the opposite. Shandra Gosney was
4 domiciled in Arizona in the years leading up to this action. A person’s old domicile is not
5 lost until a new one is acquired. *Lew*, 797 F.2d at 750. To acquire a new domicile, a
6 person must have a “fixed habitation or abode in a particular place,” with the intent “to
7 remain there permanently or indefinitely.” *Id.* at 749–50. If Shandra Gosney is currently
8 living in one state, essentially homeless, and believes that she will in the future establish
9 residency in a different state, she has not met this standard.

10 “The ‘strong presumption against removal jurisdiction means that the defendant
11 always has the burden of establishing that removal is proper,’ and that the court resolves
12 all ambiguity in favor of remand to state court.” *Hunter v. Philip Morris USA*, 852 F.3d
13 1039, 1042 (9th Cir. 2009) (quoting *Gaus*, 980 F.2d at 566). Defendants have not met this
14 burden, and the Court accordingly treats Shandra Gosney as an Arizona domiciliary for
15 purposes of removal jurisdiction.

16 **B. The “Properly Joined and Served” Language**

17 While removal on the basis of diversity jurisdiction is impermissible if there is an
18 in-state defendant, the text of the removal statute limits that prohibition to in-state
19 defendants who are “properly joined and served.” 28 U.S.C. § 1441(b). Defendants assert
20 that even if Shandra Gosney is domiciled in Arizona, removal jurisdiction is still proper
21 because Gosney was not served prior to the filing of the Notice of Removal.

22 The Ninth Circuit has not addressed whether the presence of an unserved in-state
23 defendant precludes removal based on diversity jurisdiction. The Ninth Circuit and other
24 circuits have, however, stated that even unserved defendants must be considered in
25 determining whether diversity exists. *See Preaseau v. Prudential Ins. Co. of Am.*, 591
26 F.2d 74, 78–79 (9th Cir. 1979); *see also N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883
27 (5th Cir. 1998); *Pecherski v. Gen. Motors Corp.*, 636 F.2d 1156, 1158–61 (8th Cir.
28 1981).

1 Other district courts in the Ninth Circuit have found that the “properly joined and
2 served” language does not permit removal in all cases where an in-state defendant has not
3 yet been served, but only those where the in-state defendant was fraudulently joined. *See*
4 *Mass. Mut. Life Ins. Co. v. Mozilo*, No. 2:12-cv-03613-MRP-MAN, 2012 WL 11047336,
5 at *1 (C.D. Cal. June 28, 2012); *Khashan v. Ghasemi*, CV10-00543 MMM (CWx), 2010
6 WL 1444884, at *2 (C.D. Cal. Apr. 5, 2010); *Standing v. Watson Pharm., Inc.*, CV 09-
7 0527 DOC(ANx), 2009 WL 842211, at *5 (C.D. Cal. Mar. 26, 2009). This view is
8 persuasive, for reasons expressed by the District of New Jersey:

9 [I]t is inconceivable that Congress, in adding the “properly joined and
10 served” language, intended to create an arbitrary means for a forum
11 defendant to avoid the forum defendant rule simply by filing a notice of
removal before the plaintiff is able to effect process.

12 *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008).

13 The Court adopts this understanding of § 1441(b), and finds that whether or not
14 Gosney’s waiver of service in the initial Notice of Removal remains effective without
15 being repeated in the Corrected Notice of Removal, her status as an in-state defendant
16 precludes removal jurisdiction, absent evidence of fraudulent joinder.

17 **C. Allegations of Fraudulent Joinder**

18 Defendants do argue that Shandra Gosney was joined in this action in a fraudulent
19 attempt to defeat removal jurisdiction. (Doc. 14 at 5.) The bar for showing fraudulent
20 joinder is a high one. “If the plaintiff fails to state a cause of action against a resident
21 defendant, and the failure is obvious according to the settled rules of the state, the joinder
22 of the resident defendant is fraudulent.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313,
23 1318 (9th Cir. 1998) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th
24 Cir. 1987)), *cert. denied*, 525 U.S. 963 (1998).

25 There is a presumption against a finding of fraudulent joinder. *See Plute v.*
26 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001); *Diaz v.*
27 *Allstate Ins. Group*, 185 F.R.D. 581, 586 (C.D. Cal. 1998). A defendant ““must
28 demonstrate that there is *no possibility the plaintiff will be able to establish a cause of*

1 *action* in state court against the alleged sham defendant.” *Diaz*, 185 F.R.D. at 586
2 (quoting *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998)).
3 “[I]t must appear to a ‘near certainty’ that joinder was fraudulent.” *Id.* (quoting *Lewis v.*
4 *Time, Inc.*, 83 F.R.D. 455, 466 (E.D. Cal. 1979), *aff’d*, 710 F.2d 549 (9th Cir. 1983)).
5 “‘The standard is not whether plaintiffs will actually or even probably prevail on the
6 merits, but whether there is a possibility that they may do so.’” *Id.* (quoting *Lieberman v.*
7 *Meshkin, Mandarin*, No. C-96-3344 SI, 1996 WL 732506, at *2 (N.D. Cal. Dec. 11,
8 1996)). “In determining whether a defendant was joined fraudulently, the court resolves
9 ‘all disputed questions of fact and all ambiguities in the controlling state law in favor of
10 the non-removing party.’” *Lieberman*, 1996 WL 732506, at *2 (quoting *Dodson v.*
11 *Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992)).

12 Defendants argue that the joinder of Shandra Gosney is fraudulent because
13 “Plaintiff is and should be aware that Defendant Gosney did not physically engage in any
14 way with Plaintiff.” (Doc. 14 at 5.) Regardless of any evidence Defendants cite in support
15 of this position, Plaintiff asserts otherwise in her Complaint. (Doc. 7-1 at 3.) This is a
16 disputed question of fact, raising at least a possibility that Plaintiff will succeed on the
17 merits of her claim, and leaving no basis for the Court to find fraudulent joinder. Further,
18 while Defendants assert that Shandra Gosney was joined merely so that “a third party”
19 could “use the legal process to harass” her, (Doc. 14 at 6), the Court “need not inquire
20 into plaintiff’s motives” so long as there is an objective basis for the joinder. *See Levine*
21 *v. Allmerica Fin. Life Ins. & Annuity Co.*, 41 F. Supp. 2d 1077, 1078 (C.D. Cal. 1999).

22 **D. Attorneys’ Fees**

23 The removal statute provides that a district court may require payment of costs and
24 attorneys’ fees incurred as a result of an improper removal. 28 U.S.C. § 1447(c). Absent
25 unusual circumstances, however, costs and fees “‘should not be awarded when the
26 removing party has an objectively reasonable basis for removal.’” *Patel v. Del Taco, Inc.*,
27 446 F.3d 996, 999 (9th Cir. 2006) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S.
28 132, 136 (2005)). Plaintiff argues that she is entitled to an award of costs and fees in this

1 case because there was no objectively reasonable basis for Defendants' removal. (Doc. 9
2 at 3.) Defendants' arguments on Gosney's domicile and the "properly joined and served"
3 language of § 1441(b) are not objectively unreasonable, and the Court will not award fees
4 to Plaintiff.

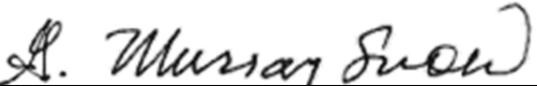
5 **CONCLUSION**

6 Defendant Shandra Gosney is a domiciliary of Arizona. Removal is improper
7 under the in-state defendant rule of 28 U.S.C. § 1441, and that statute's "properly joined
8 and served" limitation does not apply here.

9 **IT IS THEREFORE ORDERED** that the Motion to Remand of Plaintiff Kathy
10 Rogers (Doc. 9) is **GRANTED** and directing the Clerk of Court to remand this matter
11 back to Yavapai County Superior Court.

12 **IT IS FURTHER ORDERED** denying the Plaintiff's request for attorneys' fees.

13 Dated this 14th day of September, 2016.

14 
15

Honorable G. Murray Snow
16 United States District Judge