

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV17-02684 JAK (Ex)

Date July 27, 2017

Title Denise Shuler, et al. v. EmeriCare Inc., et al.

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) ORDER RE MOTION TO REMAND (DKT. 9)

**REQUEST TO FILE OPPOSITION TO PLAINTIFF'S MOTION TO REMAND
(DKT. 22, 23)**

I. Introduction

Denise Shuler (“Plaintiff”) brought this action in the Los Angeles Superior Court on February 24, 2017, as an individual and successor in interest on behalf of Frances Ann Riedel (“Riedel”). The action seeks relief against EmeriCare Inc., *dba* Brookdale San Dimas (“EmeriCare”) and Brookdale Living Communities, Inc. (“Brookdale”) (jointly, “Defendants”). Ex. A to Notice of Removal, Complaint, Dkt. 1. Michael Stone and Rani Riedel are named as nominal defendants. *Id.* The Complaint advances the following causes of action: (i) elder abuse and neglect, Cal. Welfare & Inst. Code § 15610 *et seq.*; (ii) violation of Patient’s Bill of Rights, Cal. Health & Safety Code §§ 1599 and 1276; (iii) wrongful death; (iv) negligent hiring, training and supervision; (v) negligence; and (vi) unfair business practices, Cal. Bus. & Prof. Code § 17200. *Id.*

On April 7, 2017, Defendants removed the action based on claimed diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. Notice of Removal (“Notice”), Dkt. 1 ¶ 6. The removal was based upon Defendants’ representation that they are not California citizens. *Id.* ¶¶ 8-11. It is undisputed that Plaintiff is a citizen of California, and that the citizenship of the nominal defendants is not relevant to the determination whether there is diversity jurisdiction. *Id.* ¶

Plaintiff moved to remand the action to the Superior Court on May 5, 2017 (“Motion”). Dkt. 9-1. Plaintiff alleges that, because EmeriCare is a citizen of California, there is not complete diversity. *Id.* at 4. Defendants opposed the Motion (“Opposition”)¹ (Dkt. 24), and Plaintiff replied. Dkt. 25.

A hearing on the Motion was held on July 24, 2017. For the reasons stated in this Order, the Motion is **DENIED**.

¹ Plaintiff failed to file a timely opposition. The Court issued an order directing that, on or before July 5, 2017, Plaintiff file any opposition to the Motion accompanied by a request for late filing that explained the reasons for the request. Dkt. 20. On July 5, 2015, Plaintiff filed the request (Dkts. 22, 23), and the Motion (Dkt. 24). Based on a review of these filings, they good cause has been shown as to the missed deadline. Accordingly, the requests are **GRANTED**.

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II. Factual and Procedural Background

The Complaint alleges that on July 3, 2016, Riedel fell, and was then transported to a hospital, where she was diagnosed with having a broken hip. Complaint ¶ 73. She was 75. *Id.* ¶ 70. Prior to her accident, Plaintiff had lived independently at her home, and “was able to perform the activities of daily living.” *Id.* ¶ 71. Three days after the accident, Riedel was transferred from the hospital to EmeriCare’s Los Angeles County facility for rehabilitation. *Id.* ¶ 73. The Complaint alleges that, while Riedel was at the facility, she received inadequate care. *Id.* ¶¶ 74-90. This caused a rapid decline in her health, and then her death. *Id.* ¶¶ 92, 126.

According to the Complaint, Defendants are business entities engaged in the ownership and operation of a skilled nursing facility licensed in California. *Id.* ¶ 14. The Complaint represents that Brookdale is a corporation organized under the laws of Delaware doing business in Los Angeles. *Id.* ¶ 10. In the Notice, Defendants represent that Brookdale is organized under the laws of Delaware, and has its principal place of business in Tennessee. Notice ¶ 8.

The Complaint also alleges that EmeriCare is a Delaware corporation with its principal place of business in Los Angeles. Complaint ¶ 10. In the Notice of Removal, Defendants represent that EmeriCare is organized under the laws of Delaware, and has its principal place of business in Tennessee. Notice ¶ 11.

In support of the Motion, Plaintiff submitted certain business and public records. The website of the Tennessee Secretary of State does not show any results for a search of the name EmeriCare, Inc. Ex. E-2 to Declaration of Mary E. Lockington (“Lockington Decl.”), Dkt. 9-2 at 44. The website of the California Secretary of State shows that EmeriCare is registered to do business in California. Ex. E-2 to Lockington Decl., Dkt. 9-2 at 46. It is listed as a “Foreign Stock” entity. *Id.* Both the entity address and the entity mailing address for EmeriCare are in Tennessee. *Id.* Corporation Service Company (“CSC”) is designated as the agent for service of process for EmeriCare in California. *Id.* CSC has a California mailing address.

Plaintiff has also submitted what appears to be a public record for the San Dimas EmeriCare facility. The record states that the facility is located in San Dimas. Ex. F to Lockington Decl., Dkt. 9-2 at 49. It lists EmeriCare as the licensee of the facility. *Id.* A Seattle address is shown for EmeriCare. *Id.*

In support of the Opposition, as part of the effort to meet their burden of proof, Defendants filed a declaration from Joanne Leskowicz, Senior Vice President of Tax for Brookdale Senior Living. Declaration of Joanne Leskowicz (“Leskowicz Decl.”), Dkt. 24-1 ¶ 1.² She does not describe the relationship among Brookdale Senior Living, EmeriCare and Brookdale. However, she states that, through 2016, EmeriCare’s headquarters were located in Seattle, Washington. *Id.* ¶ 5. In 2017, they were

² Plaintiff requests in her reply that the Leskowicz Decl. be disregarded because, due to Defendants’ late-filed Opposition, she did not have the ability to request that the Court order Leskowicz to appear at the hearing for cross-examination. However, the Opposition was filed two and a half weeks before the hearing. No justification is provided for the failure to file any such request in that time. Nor is it likely that, had she been present and called to testify, evidence that varies from what has been submitted would have been elicited.

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relocated to Tennessee. *Id.* Leskowicz states that all of the directors of the board and executive officers of EmeriCare are located in Tennessee, and that EmeriCare directs, controls and coordinates the implementation of global activities from Tennessee. *Id.* ¶¶ 6-7. The declaration of Leskowicz attaches a “Fictitious Business Name Statement” for Emeritus at San Dimas³ that identifies the “principal place of business” for Emeritus as 1740 San Dimas Ave. Ex. A to Leskowicz Decl., Dkt. 24-1 at 5. EmeriCare is listed as its registered owner. *Id.* A Seattle address is listed for EmeriCare. *Id.*

III. Analysis

A. **Legal Standards**

A motion to remand challenges the removal of an action. *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). In general, a state civil action may be removed only if, at the time of removal, it is one that could have been brought originally in a federal court. 28 U.S.C. § 1441(a). Federal courts have diversity jurisdiction over a removed action where the amount in controversy exceeds \$75,000 and the adverse parties are citizens of different states. 28 U.S.C. §§ 1332, 1441. Complete diversity of citizenship is required, *i.e.*, “the citizenship of each plaintiff [must be] different from that of each defendant.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009).

Because federal courts are ones of limited jurisdiction, the removal statute is to be strictly construed; any doubt about removal is to be resolved in favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The removing party has the burden of establishing that it was proper to do so. *Id.* “If a case is improperly removed, the federal court must remand the action because it has no subject-matter jurisdiction to decide the case.” *ARCO Env’tl. Remediation, L.L.C. v. Dep’t of Health & Env’tl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000).

B. **Application**

Plaintiff asserts that this action must be remanded because Defendants have not established by a preponderance of the evidence that there is complete diversity of citizenship. Dkt. 9-1 at 7. The premise of this position is that the Leskowicz Declaration provides only conclusory statements as to the basis for determining the citizenship of EmeriCare. These arguments are not persuasive.

1. Citizenship of Plaintiffs

a) **Citizenship of Riedel**

A “natural person’s state citizenship is [] determined by her state of domicile, not her state of residence. A person’s domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001).

[T]he determination of an individual’s domicile involves a number of factors . . . including: current

³ The facility at issue in this action was called “Emeritus” until 2014, when Brookdale and Emeritus merged. Leskowicz Decl., Dkt. 24-1 ¶ 4.

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residence, voting registration and voting practices, location of personal and real property, location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, place of employment or business, driver's license and automobile registration, and payment of taxes.

Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986). A person's "domicile for purposes of diversity is determined as of the time the lawsuit is filed." *Id.*

The parties agree that Riedel is a citizen of California. The Complaint alleges that prior to her accident, Riedel resided in Los Angeles. Complaint ¶ 4. After her accident, Riedel entered rehabilitation in San Dimas, California. *Id.* ¶ 73. This is consistent with an intent to remain in California. There is sufficient evidence to support the parties' position that Riedel was a citizen of California prior to her death.

b) Citizenship of Plaintiff

Pursuant to 28 U.S.C. § 1332(c)(2), "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." In this case, however, Plaintiff is suing both as an individual and as successor in interest to Riedel. Complaint. Thus, it is proper to consider Plaintiff's citizenship as an individual in addition to the citizenship of Riedel.

As stated above, an individual's citizenship is determined by her state of domicile. The parties agree that Plaintiff was an individual residing in Los Angeles at all relevant times. *Id.* ¶ 6; Notice ¶ 7.

2. Citizenship of Defendants

a) Citizenship of Brookdale

The standard that applies to the determination of the citizenship of a corporation for purposes of diversity jurisdiction is specified by statute. Thus, a corporation "shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business [.]” 28 U.S.C. § 1332(c)(1). "Principal place of business" refers to the "nerve center" of the corporation. The nerve center is the "place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010).

The parties agree that Brookdale is a citizen of Delaware and Tennessee. Notice ¶ 6; Dkt. 9-1 at 2.

b) Citizenship of Nominal Defendants

"Nominal party" status is an exception to the complete diversity requirement. "Defendants who are nominal parties with nothing at stake may be disregarded in determining diversity, despite the propriety of their technical joinder." *Strotek Corp. v. Air Transp. Ass'n of Am.*, 300 F.3d 1129, 1133 (9th Cir. 2002) (citing *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 873 (9th Cir. 2000)); see also *Walden v. Skinner*, 101 U.S. 577, 584 (1879) ("[T]he rule is settled that the mere fact that one or more [nominal] parties reside in the same State with one of the actual parties to the controversy will not defeat the jurisdiction of the [federal] court."). In such a case, "[r]emoving Defendants bear the burden of

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proving a defendant is a nominal party.” *Latino v. Wells Fargo Bank, N.A.*, No. 2:11-CV-02037-MCE, 2011 WL 4928880, at *2 (E.D. Cal. Oct. 17, 2011).

The Complaint names Michael Stone and Rani Riedel as nominal defendants. Complaint. In its Notice, Defendants did not oppose this designation. See Notice ¶¶ 12-13. For these reasons, Defendants have shown that, for purposes of determining diversity jurisdiction, Michael Stone and Rani Riedel are nominal parties whose citizenship is not relevant to the assessment of whether there is diversity jurisdiction.

c) Citizenship of EmeriCare

Plaintiff argues that EmeriCare is a California citizen because California is “where it generates 100% of its income.” Dkt. 9-1 at 7. As noted above, a corporation is a citizen of every State in which it has been incorporated and where it has its principal place of business. *Hertz* rejected the argument, which Plaintiff advances here, that a corporation is a citizen of any state where it engages in a significant amount of business activity from which it may derive revenues. 559 U.S. at 95. As the Supreme Court explained, “the application of a more general business activities test has led some courts . . . to look, not at a particular place within a State, but *incorrectly* at the State itself, measuring the total amount of business activities that the corporation conducts there and determining whether they are ‘significantly larger’ than in the next-ranking State.” *Id.* at 93 (emphasis added). Therefore, the operative question is the location of EmeriCare’s nerve center. *Id.*

Plaintiff argues that EmeriCare has not met its burden to show that it is a citizen of Tennessee. She contends that its corporate headquarters or nerve center cannot be there because “they are not authorized by the state of Tennessee to conduct business within that state.” Dkt. 9-1 at 7. In support of this position, Plaintiff submits an online business entity search through the Tennessee Secretary of State website showing no records for EmeriCare. Ex. E-1 to Lockington Decl., Dkt. 9-2 at 44-45. By contrast, a search of the California Secretary of State website does display a record for EmeriCare. Ex. E-2 to Lockington Decl., Dkt. 9-2 at 46. However, these records support Defendants’ representation that the nerve center of EmeriCare is located in Tennessee. Thus, the website of the California Secretary of State lists EmeriCare as a foreign corporation. *Id.* Both the entity address and the entity mailing address shown are in Tennessee. *Id.* The only California address listed is for a registered agent where EmeriCare may be served within California. *Id.* Similarly, the record for the San Dimas EmeriCare facility lists EmeriCare as the licensee. Ex. F to Lockington Decl., Dkt. 9-2 at 49. A Seattle address is provided for EmeriCare. *Id.*⁴

Finally, in her reply brief, Plaintiff argues that the Fictitious Business Name Statement provided by Defendants establishes that the nerve center of EmeriCare is in California because it lists a San Dimas address for the fictitious business name. Dkt. 25 at 5. However, “[d]oing business under a fictitious

⁴ At the hearing, Defendants’ counsel made representations as to the effect of the merger of Brookdale and Emeritus, which included the movement of the principal place of business of EmeriCare from Seattle, Washington to Tennessee. He also stated that he assumes that there is no requirement under Tennessee law for EmeriCare to register with the Secretary of State in Tennessee as a condition of doing business there. Because neither of these positions has been supported with admissible evidence, they are not considered in connection with the analysis in this Order. Instead, the Leskovic Declaration, including its exhibits, and the public records provided by Plaintiff, are the only evidence that has been assessed.

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business name does not create a separate legal entity.” *Meller & Snyder v. R & T Properties, Inc.*, 62 Cal. App. 4th 1303, 1311 (1998). Thus, the relevant address is that of the registered owner, *i.e.*, EmeriCare. That address is in Washington.

For the foregoing reasons, Defendants have met their burden to show that EmeriCare is not a citizen of California. Therefore, there is complete diversity in this action.

IV. Conclusion

For the reasons set forth above, the Motion is **DENIED** and the Request is **GRANTED**.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
ak _____