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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SHEPARD JOHNSON,

Plaintiff,

No. CIV S-10-1968 GEB GGH PS

vs.

CHESTER MITCHELL, et al.,

Defendants.

ORDER

_____/

Plaintiff first initiated this diversity action against numerous defendants for malicious prosecution and civil conspiracy to commit malicious prosecution on July 23, 2010 and is currently proceeding with the third amended complaint filed on November 6, 2011. (See Dkt. No. 119.)

Plaintiff, a citizen of California, is a real estate developer who claims that the defendants purchased lots for a planned unit development on an island in Panama. (See Third Amended Complaint, Dkt. No. 119 [“TAC”] at 2-3.) Plaintiff alleges that defendants did not want to be subject to the Conditions, Covenants, and Restrictions (“CC&Rs”) for the development, and so rather than settling the matter by way of a contract dispute, defendants “banded together and launched a barrage of deliberate falsehoods, and engaged in wrongful

1 conduct...aimed at upsetting and intimidating him, destroying his reputation and business,
2 disrupting relations with other lot owners, and discouraging prospective purchasers. (TAC at 3-
3 4.) Defendants also allegedly initiated criminal proceedings against him in the Panama courts
4 which were purportedly later dismissed, and which are the subject of plaintiff's malicious
5 prosecution and conspiracy claims. (TAC at 4-6.)

6 On December 8, 2011, defendant Martha Thomas filed a motion to dismiss
7 plaintiff's third amended complaint for lack of personal jurisdiction, currently noticed for hearing
8 on February 9, 2012. (Dkt. Nos. 131, 141.) In response to that motion, plaintiff filed a motion
9 for leave to conduct jurisdictional discovery, or in the alternative a 30-day extension to respond
10 to defendant Thomas's motion to dismiss, which came on regularly for hearing on January 26,
11 2012. (Dkt. No. 143.) A status conference in this matter was also set for and conducted on that
12 same date. (Dkt. No. 118.)

13 At the hearing on plaintiff's motion for jurisdictional discovery and the status
14 conference, plaintiff appeared pro se, John Cantor appeared via telephone on behalf of defendant
15 Martha Thomas, Kelly Pope appeared on behalf of defendants David Miner and Sarah Miner,
16 Gary Smith appeared on behalf of defendants Michael Mode and Lynn Yarrington, and Elizabeth
17 Norris appeared on behalf of defendants Todd Johnson, Viki Kiman, Efim Shargorodsky, and
18 Elena Shargorodsky. After consideration of the papers in support of and in opposition to
19 plaintiff's motion, the parties' status reports, and the parties' oral arguments, the court now
20 issues the following order.

21 Federal Subject Matter Jurisdiction

22 Even if a party does not question the court's subject matter jurisdiction, the court
23 is required to raise and address the issue sua sponte. See FW/PBS, Inc. v. City of Dallas, 493
24 U.S. 215, 230-31 (1990) ("The federal courts are under an independent obligation to examine
25 their own jurisdiction...."). Here, in the joint status report, defendants specifically indicated that
26 they dispute federal subject matter jurisdiction based on the presence of U.S. citizen defendants

1 residing abroad.

2 The United States Supreme Court held that United States citizens domiciled in a
3 foreign country cannot be parties to a diversity action in federal court. See Newman-Green, Inc.
4 v. Alfonzo-Larrain, 490 U.S. 826, 828-29 (1989). In Newman-Green, Inc., an Illinois
5 corporation brought a state-law contract action in federal district court against a Venezuelan
6 corporation, four Venezuelan citizens, and William L. Bettison, a United States citizen domiciled
7 in Venezuela. Id. at 828. The U.S. Supreme Court explained that Bettison’s presence destroyed
8 complete diversity in the action:

9 In order to be a citizen of a State within the meaning of the
10 diversity statute, a natural person must both be a citizen of the
11 United States *and* be domiciled within the State...The problem in
12 this case is that Bettison, although a United States citizen, has no
13 domicile in any State. He is therefore “stateless” for purposes of §
14 1332(a)(3). Subsection 1332(a)(2), which confers jurisdiction in
15 the District Court when a citizen of a State sues aliens only, also
16 could not be satisfied because Bettison is a United States citizen.
17 When a plaintiff sues more than one defendant in a diversity
18 action, the plaintiff must meet the requirements of the diversity
19 statute for *each* defendant or face dismissal...Here, Bettison’s
20 “stateless” status destroyed complete diversity under § 1332(a)(3),
21 and his United States citizenship destroyed complete diversity
22 under § 1332(a)(2).

17 Id. at 828-29 (emphasis in original).

18 In this case, plaintiff alleged that “defendant Maurine E. Smith is a citizen of the
19 United States and resides in the Republic of Panama, defendant Judith A. Cohen is a citizen of
20 the United States and resides in the Republic of Panama, defendant Susan Fine is a citizen of the
21 United States and resides in the Republic of Panama and possibly the state of Oregon.” (TAC at
22 2-3.) These Panama-based U.S. citizen defendants were only named as defendants after plaintiff
23 most recently amended his complaint. (Compare Dkt. Nos. 80 and 119.)

24 Generally, “a person is domiciled in a location where he or she has established a
25 fixed habitation or abode in a particular place, and intends to remain there permanently or
26 indefinitely....” Lew v. Moss, 797 F.2d 747, 749-50 (9th Cir. 1986). A person residing in a

1 given state is not necessarily domiciled there. Id. at 750. For example, a person may be residing
2 in a particular country temporarily for a specific purpose, such as a temporary work assignment.
3 Here, however, the language of plaintiff's complaint can only be fairly construed as asserting that
4 the above-mentioned defendants (at least Smith and Cohen) are residing in Panama indefinitely.
5 Indeed, plaintiff alleges no facts suggesting that defendants (at least Smith and Cohen) are only
6 in Panama on a temporary basis and intend to return to the United States. This is particularly
7 significant in light of the fact that the party asserting diversity jurisdiction – plaintiff – bears the
8 burden of alleging and proving jurisdiction. Id. at 749.

9 Therefore, it would appear that these U.S. citizen defendants in Panama destroy
10 complete diversity. Without complete diversity, this court has no subject matter jurisdiction.
11 Thus, the court indicated that plaintiff may have to dismiss the U.S. citizens domiciled abroad to
12 cure the jurisdictional defects¹ or dismiss the action and pursue his claims in state court.

13 At the status conference, plaintiff requested an opportunity to research and further
14 brief the issue of subject matter jurisdiction. In light of this request, the court will grant plaintiff
15 until **February 16, 2012** to:

16 (a) file a brief, limited to 10 pages, addressing the propriety of subject matter jurisdiction
17 in this case, or

18 (b) move to dismiss the U.S. citizens domiciled abroad pursuant to Fed. R. Civ. P. 21.

19 Any other party may also file a brief, limited to 10 pages, concerning subject matter jurisdiction
20 by February 16, 2012.

21 While the issue of subject matter jurisdiction remains unsettled, the court will
22 nevertheless address a few other scheduling issues raised at the conference in the interests of
23 moving the case along in the interim.

24
25 ¹ The court may, in the absence of prejudice to the other parties, dismiss dispensable
26 nondiverse parties pursuant to Fed. R. Civ. P. 21 to cure the jurisdictional defects. Newman-
Green, Inc., 490 U.S. at 833, 837-38.

1 Personal Jurisdiction

2 As discussed above, defendant Thomas's motion to dismiss for lack of personal
3 jurisdiction is currently noticed for hearing on February 9, 2012. (Dkt. No. 141.) The court will
4 vacate that hearing and grant plaintiff an opportunity to respond to the motion by **February 16,**
5 **2012.** If plaintiff elects to oppose the motion, the opposition brief shall set forth any facts and/or
6 evidence plaintiff *currently* has showing that this court may exercise specific personal
7 jurisdiction over defendant Thomas. Defendant Thomas may file a reply brief to any opposition
8 by **February 23, 2012,** after which the motion will be submitted on the record without oral
9 argument. Plaintiff's pending motion for jurisdictional discovery regarding defendant Thomas is
10 taken under submission.

11 According to the joint status report, several other defendants also intend to file
12 motions to dismiss for lack of personal jurisdiction. Because the court determines that hearing
13 all these additional motions together would promote efficiency and judicial economy, any motion
14 to dismiss for lack of personal jurisdiction shall be filed by **March 22, 2012** and noticed for
15 hearing on **April 19, 2012** at 10:00 a.m. before the undersigned. Briefing deadlines shall be in
16 accordance with E.D. Cal. L.R. 230.

17 The court notes that defendant Ford Hermansen has already filed a motion to
18 dismiss for lack of personal jurisdiction on January 23, 2012, noticed for hearing on February 23,
19 2012. (Dkt. Nos. 151, 152.) The court will vacate that hearing and re-set the motion for hearing
20 on **April 19, 2012.** The briefing deadlines pursuant to E.D. Cal. L.R. 230 will be based on this
21 new hearing date.

22 Service of Process

23 According to the joint status report, all named parties have been served with
24 process, except for defendants Rogelio Arosemena, Manuel Berrocal, Peter Reinhold, Ann
25 Michelle Wand, Maurine E. Smith, Susan Fine, Kim Parsons, and Solarte Inn Corporation.
26 Based on a review of the docket, it appears that defendant Wand has already been served with

1 process given that she filed an answer. (See Dkt. No. 123.)

2 In its November 3, 2011 order, the court directed plaintiff to complete service of
3 process within 28 days. (Dkt. No. 118 at 3.) Plaintiff indicated that he attempted to serve the
4 above-mentioned defendants via US mail and electronic mail, but that they have not returned an
5 acknowledgement of receipt. Plaintiff has not indicated what further efforts were made to
6 complete service pursuant to Fed. R. Civ. P. 4. Therefore, plaintiff will be required to show
7 cause in writing by **February 16, 2012** why the above-mentioned defendants (except defendant
8 Wand) should not be dismissed pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute and
9 failure to follow court orders. In this regard, plaintiff must submit a declaration outlining the
10 specific efforts made to locate and serve these defendants.

11 Miscellaneous

12 Discovery in this matter will remain stayed pending final resolution of the issue of
13 subject matter jurisdiction, as well as any motions to dismiss for lack of personal jurisdiction,
14 after which the court may set a further status conference to schedule appropriate deadlines in this
15 matter, if appropriate.

16 CONCLUSION

17 Accordingly, for the reasons outlined above, IT IS HEREBY ORDERED THAT:

18 1. Plaintiff shall either (a) file a brief, limited to 10 pages, addressing the
19 propriety of subject matter jurisdiction in this case, or (b) move to dismiss the U.S. citizen
20 defendants domiciled abroad pursuant to Fed. R. Civ. P. 21, no later than February 16, 2012.
21 Any other party may also file a brief, limited to 10 pages, concerning the issue of subject matter
22 jurisdiction by February 16, 2012.

23 2. The February 9, 2012 hearing on defendant Martha Thomas's motion to
24 dismiss (dkt. no. 131, 141) is vacated. Plaintiff shall file a response to the motion no later than
25 February 16, 2012. Defendant Thomas may file a reply by February 23, 2012, after which the
26 motion will be submitted on the record without oral argument.

