UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RANDALL MEREDITH, M.D.,

Plaintiff,

v.

e-MDs, a Texas Corporation, and DOES 1-10, inclusive,

Defendants.

No. 14-cv-00899 JAM CMK

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

This matter is before the Court on Plaintiff Randall Meredith's ("Plaintiff") Motion to Remand (Doc. #6) pursuant to 28 U.S.C. § 1447(c). Defendant e-MDs, Inc. ("Defendant") opposes the motion (Doc. #7). Plaintiff has filed a Reply (Doc. #8). For the following reasons, Plaintiff's motion is GRANTED.[1]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff is a medical doctor in Trinity County, California. Compl. ¶ 1. Defendant is a Texas corporation. Compl. ¶ 2. On

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for June 4, 2014.

March 9, 2011, Plaintiff and Defendant entered into a written contract, whereby Plaintiff purchased software for use in his medical practice. Compl. ¶ 10. The total price for the software was $14,798. Compl. ¶ 11. Plaintiff alleges that the product did not perform as promised. Compl. ¶ 13. As a result, Plaintiff was forced to hire a third party IT supplier to resolve repeated problems with the software. Compl. ¶ 16. Plaintiff was billed $29,000 by the third-party IT supplier. Compl. ¶ 20. On June 28, 2013 and August 30, 2013, counsel for Plaintiff sent letters to Defendant's counsel. Griffith Declaration, Ex. 2; DeCarli Declaration, Ex. A. Each letter contains a claim for total damages in the amount of $57,130.73. Id.

On March 10, 2014, Plaintiff filed the Complaint in Trinity County Superior Court. On April 11, 2014, Defendant removed the matter to this Court on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332(a) and 28 U.S.C. § 1441(a). Plaintiff's Complaint includes the following causes of action: (1) Breach of Express Warranty; (2) Breach of the Implied Warranty of Merchantability; (3) Breach of the Implied Warranty of Fitness for a Particular Purpose; and (4) Negligent Misrepresentation. Plaintiff specifically alleges that "the sum of all relief shall be no more than $74,999.00." Compl. at 10, Prayer for Relief.

II. OPINION

A. Legal Standard

Generally, a state civil action is removable to federal court only if it might have been brought originally in federal

court. See 28 U.S.C. § 1441. The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (citing Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988); Takeda v. Northwestern National Life Insurance Co., 765 F.2d 815, 818 (9th Cir. 1985)). Thus, "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Id. (citing Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979)). "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." Id. (citing Nishimoto v. Federman-Bachrach & Associates, 903 F.2d 709, 712 n. 3 (9th Cir. 1990); Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988)).

To establish diversity jurisdiction, the defendant must show complete diversity exists among the parties and that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. A court may consider whether the amount in controversy is apparent from the face of the complaint. Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997). When the complaint affirmatively alleges an amount of damages *under* $75,000, there are competing views as to the appropriate standard of proof to which the defendant should be held. Some courts have held that, under these circumstances, the defendant must establish that the amount in controversy requirement is met by the preponderance of the evidence. See, e.g., Cagle v. C & S Wholesale Grocers, Inc., 2014 WL 651923 (E.D. Cal. Feb. 19, 2014). Conversely, some courts have held that the defendant must "prove to a legal

certainty" that the amount in controversy threshold is met, when the plaintiff has specifically alleged otherwise. See, e.g., Stelzer v. CarMax Auto Superstores California, LLC, 2013 WL 6795615 (S.D. Cal. Dec. 20, 2013). Moreover, 28 U.S.C. § 1446(c)(2) provides as follows:

> "(A) the notice of removal may assert the amount in controversy if the initial pleading seeks . . . a money judgment, but the State practice . . . permits recovery of damages in excess of the amount demanded; and (B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, *by the preponderance of the evidence*, that the amount in controversy exceeds the amount specified in section 1332(a)." (emphasis added.)

The clear and authoritative language of 28 U.S.C. 1446(c)(2) is consistent with the line of cases holding that, when the plaintiff has specifically alleged less than $75,000, the defendant seeking removal must prove the amount in controversy by the preponderance of the evidence. See, e.g., Cagle, 2014 WL 651923 (E.D. Cal. Feb. 19, 2014). Moreover, the Cagle court's thorough and sprawling analysis of the relevant Ninth Circuit case law – including its ultimate conclusion that the 'preponderance' standard is appropriate – is quite persuasive. Id. However, the Court need not reach the issue. As is discussed below, Defendant fails to meet even the preponderance of the evidence standard, and would, therefore, necessarily fail under the more demanding "legal certainty" standard as well.

B. Discussion

Plaintiff argues that Defendant cannot demonstrate, "without speculation and conjecture," that Plaintiff would be entitled to $75,000, even if he prevailed on every claim. Mot. at 1.

Plaintiff maintains that his total damages amount to $57,136.73, as reflected in his June 28, 2013 letter. Mot. at 5 (citing Griffith Declaration, Ex. 2). Moreover, Plaintiff contends that Defendant's estimate of potential attorneys' fees is too speculative to satisfy its burden. Mot. at 6. Defendant agrees that Plaintiff's total damages amount to $57,136.73, but maintains that the addition of an estimated $30,615 in attorneys' fees means that the $75,000 threshold is easily satisfied. Opp. at 4. Defendant bases this conclusion on "the reasonable estimate of tasks, hours and rate submitted by Defendant in its notice of removal, and based on Plaintiff's own representation of the attorney's fees incurred even before the preparation and filing of his complaint." Opp. at 4.

As noted above, the parties do not dispute the amount in controversy, as it pertains to Plaintiff's alleged actual damages. As evident from the June 28, 2013 and August 30, 2013 letters from Plaintiff's counsel to Defendant's counsel, Plaintiff's alleged actual and compensatory damages are $57,136.73. See Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (holding that "a settlement letter is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff's claim"); Griffith Declaration, Ex. 2; DeCarli Declaration, Ex. A.

Accordingly, Defendant must establish that, should Plaintiff prevail on all of his claims, he would be entitled to at least $17,863.27 in attorneys' fees. Potential attorneys' fees may be included in the amount in controversy, where an award of such fees is authorized by an underlying statute or contract. Galt

G/S v. JSS Scandinavia, 142 F.3d 1150, 1156 (9th Cir. 1998); Richmond v. Allstate Ins. Co., 897 F. Supp. 447, 450 (S.D. Cal. 1995)). The contract between Plaintiff and Defendant provides for an award of attorneys' fees to the prevailing party. DeCarli Declaration, Ex. A.

In its Notice of Removal, Defendant contends that "an extremely conservative estimate of the attorneys' fees for preparing and presenting plaintiff's case to a jury totals $30,615." Notice of Removal at 5. Defendant arrived at this figure by multiplying the estimated number of hours Plaintiff's attorneys would spend on the case (157) by an hourly rate of $195. Notice of Removal at 6-7. Plaintiff argues that this figure is "pure speculation." Mot. at 6. Plaintiff notes that his legal services agreement is a "contingency fee agreement" and that Defendant's estimate assumes that the case "will be taken all the way through trial." Mot. at 6-7.

The Court finds that Defendant's estimate of Plaintiff's eventual attorneys' fees is highly speculative, for a number of reasons. First, Plaintiff is not entitled to attorneys' fees on all of his claims. Specifically, Plaintiff is not entitled to attorneys' fees on his negligent misrepresentation claim, as there is no statutory provision authorizing such an award. Compl. ¶¶ 48-54. Of course, for purposes of determining the amount in controversy, the Court must assume that Plaintiff will prevail on all of his claims, including those which support an award of attorneys' fees. Kenneth Rothschild Trust v. Morgan Stanley Dean Witter, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). However, it is impossible to predict what percentage of the work

done by Plaintiff's counsel would be in furtherance of his contractual claims versus his negligent misrepresentation claim. Therefore, it is unduly speculative to predict whether Plaintiff would be entitled to attorneys' fees for the entirety of the work performed by his counsel. Several other courts have granted a motion to remand for this very reason. See Conrad Associates v. Hartford Acc. & Indem. Co., 994 F. Supp. 1196, 1200 (N.D. Cal. 1998) (noting that "defendant has not attempted to demonstrate which percentage of those [attorneys'] fees were incurred to recover contract damages . . . and which percentage of those fees were expended to seek extra-contractual damages"); see Burk v. Med. Sav. Ins. Co., 348 F. Supp. 2d 1063, 1068-69 (D. Ariz. 2004) (noting that "it is unclear what portion of those [attorneys' fees] would be recoverable as fees incurred to obtain contract benefits").

Second, Defendant's estimate assumes that the case will proceed to trial. Notice of Removal at 6-7. Even if the case cannot be resolved through a voluntary settlement, it may well be resolved at the summary judgment stage. Using Defendant's estimate, resolution prior to trial would eliminate at least 54 of the 157 attorney hours (34%) predicted by Defendant. This uncertainty is precisely why a number of courts have held that attorneys' fees incurred *after* the date of removal are not included in the amount in controversy. See, e.g., Stelzer v. CarMax Auto Superstores California, LLC, 2013 WL 6795615 (S.D. Cal. Dec. 20, 2013). Although other courts have held that the amount in controversy includes forecasted attorneys' fees for the duration of the case, the Court need not address this issue at

this time. See, e.g., Brady v. Mercedes-Benz USA, Inc., 243 F. Supp. 2d 1004, 1011 (N.D. Cal. 2002). It merely notes that, even considering potential attorneys' fees for the duration of Plaintiff's case, the speculative nature of such a figure is only exacerbated by the uncertainty of the case's ultimate lifespan.

Third, as noted by Plaintiff, the hourly rate used by Defendant in its attorneys' fee calculation is taken from a previous case handled by the *law firm* representing Plaintiff in the case at bar, not the individual attorneys handling Plaintiff's case. Mot. at 7. Significantly, these rates were those billed by a partner and a senior associate at the firm. Notice of Removal at 6. Defendant makes no showing that Plaintiff's current attorney is billing at a similar rate in this case. Therefore, any prediction based on the hourly rate of $195 is unsupported by sufficient proof to draw a reliable conclusion.

Finally, the Court acknowledges Plaintiff's argument that this case is being handled on a contingency fee arrangement, but notes that this fact is of little import. Mot. at 7. Irrespective of the contingency fee agreement, Plaintiff would still be eligible for reasonable attorneys' fees under his contract with Defendant. Traditionally, statutory/contractual attorneys' fees are calculated using the "lodestar" calculation, which Defendant has used. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). Accordingly, the existence of a contingency fee arrangement does not negate Defendant's attempts to calculate likely attorneys' fees using the lodestar method.

Nevertheless, for the reasons noted above, the Court

concludes that Defendant's estimate is too speculative to establish, by the preponderance of the evidence *or* to a legal certainty, that Plaintiff would be entitled to at least $17,863.27 in attorneys' fees. Therefore, Defendant has not satisfied its burden in establishing that the $75,000 amount in controversy requirement is met, and Plaintiff's Motion to Remand is GRANTED.

III. ORDER

For the reasons set forth above, the Court GRANTS Plaintiff's Motion to Remand. Consistent with this Order, Defendant's Motion to Dismiss (Doc. #4) is terminated and the June 18, 2014 hearing date is vacated.

IT IS SO ORDERED.

Dated: June 11, 2014