

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER BENNETT,
Plaintiff,
v.
ANSEL D. KINNEY, et al.,
Defendants,

Case No. 15-cv-02200-JSW
**ORDER GRANTING MOTION TO
DISMISS AND ADDRESSING
COUNTERCLAIMS; AND VACATING
CASE MANAGEMENT CONFERENCE**
Re: Docket Nos. 33, 49, 50

Now before the Court for consideration is the motion to dismiss, filed by Defendants Ansel D. Kinney and the Law Offices of Ansel D. Kinney (collectively “the Kinney Defendants”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it **HEREBY GRANTS** the Kinney Defendants’ motion to dismiss Plaintiff’s Second Amended Complaint (“SAC”) in its entirety.

In light of this ruling, the Court: (1) dismisses, without prejudice, the counter and cross-claims filed on November 5, 2015 by Defendant Cynthia Voss (“Voss”); (2) denies as moot, and without prejudice, the motion to dismiss filed by Karl Signaporita, and **VACATES** the hearing scheduled for December 11, 2015; (3) denies as moot, and without prejudice, the motion to dismiss filed by Plaintiff, Peter Bennett (“Bennett”), and **VACATES** the hearing scheduled for December 18, 2015; and (4) **VACATES** the case management conference scheduled for December 18, 2015. The Court will reschedule the case management conference once it is clear that it has jurisdiction over this action and the case is fully at issue.¹

¹ The Kinney Defendants argue that the Court should impose sanctions under Federal Rule of Civil Procedure 11. That request is **DENIED**. If Bennett files an amended complaint and the Kinney Defendants believe it violates Rule 11, they may renew their request by way of a properly noticed motion, which shows they complied with Rule 11(c)(2).

BACKGROUND

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2 On May 15, 2015, Bennett filed his original complaint against the Kinney Defendants,
3 Interstate Deposition Subpoena Service, Inc. (“Interstate”), Attorney Service of San Francisco
4 (“ASSF”), and Tony Klein (“Klein”). (Docket No. 1.) Bennett asserted a claim under the Fair
5 Debt Collection Practices Act (“FDCPA”), which provided the Court with jurisdiction over the
6 action. Bennett also alleged that he was an individual currently residing in London, United
7 Kingdom. (Compl. ¶ 1.)

8 On June 18, 2015, Bennett filed an Amended Complaint, in which he added Cynthia Voss
9 (“Voss) as a defendant. (Docket No. 10, Amended Complaint (“AC”).) Bennett re-asserted the
10 FDCPA claim, and he continued to allege that he was an individual residing in London. (*See* AC
11 ¶¶ 1, 7.)

12 On August 5, 2015, the Court granted, in part, the Kinney Defendants’ motion to dismiss
13 the FDCPA claim. (Docket No. 24, Order Granting, in Part, Motion to Dismiss (“Order
14 Dismissing AC”).) In that Order, the Court reserved ruling on the state law claims, because it was
15 not clear that diversity jurisdiction existed. (Order Dismissing AC at 2:22-4:3.)

16 On August 29, 2015, Bennett filed his Second Amended Complaint (“SAC”). Bennett
17 now asserts state law claims against the Kinney Defendants and Voss for breach of fiduciary duty,
18 breach of contract, aiding and abetting a breach of fiduciary duty, third party legal malpractice,
19 and abuse of process.² (SAC ¶¶ 54-87.) In brief, these claims arise out of alleged legal advice that
20 the Kinney Defendants provided to Voss and out of their efforts to collect a judgment that Voss
21 obtained against Bennett. (*Id.* ¶¶ 14-52.)

22 Because Bennett dropped the FDCPA Claim, he contends that the Court has diversity
23 jurisdiction. (*Id.* ¶ 7.) To support that contention, he alleges that he “is an individual currently
24 residing in London, United Kingdom. He is a dual citizen of the United States and the United
25 Kingdom. He holds a Utah driver’s license, and his wife owns a house in Utah.” (*Id.* ¶ 1.)
26 Bennett also alleges that “on information and belief, Defendant Kinney resides in this District,”

27
28 ² Bennett voluntarily dismissed his claims against Interstate, ASSF, and Klein on September 23, 2015. (Docket No. 43.)

1 that the Law Offices of Ansel D. Kinney is a “law firm whose principal place of business is in this
2 District,” and that Voss “resides in this District.” (*Id.* ¶¶ 2-3, 12.) It is undisputed that the amount
3 in controversy exceeds \$75,000.

4 The Court shall address additional facts as necessary in the remainder of this Order.

5 **ANALYSIS**

6 **A. Applicable Legal Standards.**

7 The Kinney Defendants move to dismiss, in part, on the basis that the Court lacks subject
8 matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). A motion to dismiss for lack of subject matter
9 jurisdiction under Rule 12(b)(1) may be “facial or factual.” *Safe Air for Everyone v. Meyer*, 373
10 F.3d 1035, 1039 (9th Cir. 2004). When a defendant raises a facial challenge to subject matter
11 jurisdiction, a court “must accept as true all material allegations in the complaint, and must
12 construe the complaint in” a plaintiffs’ favor. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598
13 F.3d 1115, 1121-22 (9th Cir. 2010).

14 However, where, as here, a defendant raises “factual attack,” the moving party questions
15 the veracity of the plaintiff’s allegations that “would otherwise invoke federal jurisdiction.” *Safe*
16 *Air for Everyone*, 373 F.3d at 1039. The plaintiff’s allegations are questioned by “introducing
17 evidence outside the pleadings.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). “When
18 the defendant raises a factual attack, the plaintiff must support ... jurisdictional allegations with
19 ‘competent proof,’ under the same evidentiary standard that governs in the summary judgment
20 context.” *Id.* (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010)). While the plaintiff
21 typically has the burden of proof to establish subject matter jurisdiction, “if the existence of
22 jurisdiction turns on disputed factual issues, the district court may resolve those factual disputes
23 itself.” *Id.* at 1121-22 (citing *Safe Air for Everyone*, 373 F.3d at 1039-40).

24 **B. Bennett Has Not Met His Burden to Show Complete Diversity Exists.**

25 The Kinney Defendants argue that Bennett cannot establish complete diversity, because he
26 has not shown, and cannot show, that he is a citizen of Utah. In order to “demonstrate citizenship
27 for diversity purposes a party must be a citizen of the United States, and (b) be *domiciled* in a state
28 of the United States.” *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir. 1986) (emphasis added); *see also*

1 *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 828 (1989) (emphasis in original); *Turan*
2 *Petroleum, Inc. v. Lentin*, 482 F. Supp. 2d 1170, 1171 (C.D. Cal. 2007) (“[I]t has been held
3 consistently that a diversity suit may not be maintained under 28 U.S.C. § 1332(a)(1) by or against
4 a United States citizen who is domiciled in a foreign country, for a resident of a foreign country is
5 not necessarily a citizen thereof.”) (quoting *inter alia*, *Coury v. Prot*, 85 F.3d 244, 249-50 (5th Cir.
6 1996)). Thus, citizenship is determined by domicile, not residence. *Kanter v. Warner-Lambert*
7 *Co.*, 265 F.3d 853, 857 (9th Cir. 2001).³

8 “A person’s domicile is [his] permanent home, where [he] resides with the intention to
9 remain or to which [he] intends to return.” *Kanter*, 265 F.3d at 857 (citing *Lew*, 797 F.2d 747, 749
10 (9th Cir. 1986)). Courts may consider a variety of factors to determine domicile, including:

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

16 *Lew*, 797 F.2d at 750 (and noting that no one factor controls determination).

17 In support of their motion, the Kinney Defendants submit an Income and Expense
18 Declaration that Bennett filed in the Superior Court of the State of California for the City and
19 County of San Francisco (“San Francisco Superior Court”). (Mot., Ex. A.)⁴ That declaration
20 shows that Bennett has paid taxes in the United Kingdom, where Bennett admits he currently
21 resides and works. Those facts, coupled with Bennett’s allegations of residence, support an
22 inference that Bennett was domiciled in London at the time he filed this suit and at the time he
23 filed the SAC.

24 Bennett has not put forth any evidence regarding domicile to rebut the Kinney Defendants’
25 factual showing. Instead, he relies on the allegations in the SAC that he holds a Utah driver’s

26 ³ Although the Kinney Defendants have not disputed that they are citizens of California, the
27 Court notes that there are no allegations in the SAC that demonstrate where Voss is *domiciled*.
28 That omission also is “fatal to [Bennett’s] assertion of diversity jurisdiction.” *Kanter*, 265 F.3d at
858. Accordingly, if Bennett files the amended complaint permitted by this Order, he must allege
facts that show he is domiciled in a state different from all other named defendants.

⁴ Bennett has not objected to any of the exhibits attached to the Kinney Defendants’ motion.

1 license and his wife owns a home there. He also relies on arguments that are unsupported by
2 evidence. The Court concludes that Bennett has not met his burden to show, by a preponderance
3 of the evidence, that he is domiciled in Utah. *Leite*, 749 F.3d at 1121.

4 Bennett also argues that he is a dual citizen of the United States and the United Kingdom.
5 He thus argues that this allegation would provide the Court with jurisdiction pursuant to 28 U.S.C.
6 section 1332(a)(2). Bennett’s allegation that he is a dual citizen does not establish diversity
7 jurisdiction. *Cf.*, *Brady v. Brown*, 51 F.3d 810, 815 (9th Cir. 1995); *Mutuelles Unies v. Kroll &*
8 *Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992) (“only the American nationality of the dual citizen
9 should be recognized” for purposes of Section 1332(a)(2)) (quoting *Sadat v. Mertes*, 615 F.2d
10 1176, 1187 (7th Cir. 1980)).

11 Accordingly, the Court GRANTS, IN PART, the Kinney Defendants’ motion to dismiss.
12 Because the Court cannot say it would be futile to grant Bennett leave to amend to cure the defects
13 identified by this Order, it will permit him one final opportunity to amend. *See Carolina Casualty*
14 *Ins. Co. v. Team Equipment, Inc.*, 741 F.3d 1082, 1086-88 (9th Cir. 2014). If Bennett can, in good
15 faith and in compliance with his obligations under Rule 11, amend to cure these defects, he may
16 file a third amended complaint by no later than **December 11, 2015**.⁵ The Court advises the
17 parties that if the Kinney Defendants move to dismiss on the basis that the Court lacks jurisdiction
18 and they believe that jurisdictional discovery would be appropriate, the Court will look favorably
19 on such a request.

20 **C. Instructions Regarding Ms. Voss’ Counter and Cross-Claims.**

21 At the time the Kinney Defendants filed their motion, Voss had not yet appeared.
22 However, on November 5, 2015, Voss, acting *pro se*, filed an answer and counterclaims and, as
23 set forth above, Karl Signaporia and Bennett have moved to dismiss the claims she asserts against
24 them. It still is not clear whether all parties are diverse. Accordingly, the Court shall dismiss the
25 SAC in its entirety. If Bennett chooses to amend his complaint, he must include allegations

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27 ⁵ The Court notes that, on June 25, 2014, Bennett filed a lawsuit against Voss in San
28 Francisco Superior Court and alleged he was an individual residing in the County of Marin. (*See*
Docket No. 13-1, Declaration of Ansel D. Kinney, ¶ 3, Ex. A (Complaint ¶ 2).)

1 showing that he is diverse from *all* named defendants.

2 Because it is not clear whether the Court has subject matter jurisdiction over the action,
3 and because the Court has dismissed the SAC in its entirety, the Court dismisses Voss'
4 counterclaims without prejudice, and denies Mr. Signaporia's and Bennett's motions to dismiss as
5 moot and without prejudice.

6 The Court HEREBY ADVISES Voss that a Handbook for Pro Se Litigants, which contains
7 helpful information about proceeding without an attorney, is available through the Court's website
8 or in the Clerk's office. The Court also advises Voss that she also may wish to seek assistance
9 from the Legal Help Center. Voss may obtain a free appointment with an attorney who may be
10 able to provide basic legal help, but not legal representation, by calling the Legal Help Center at
11 415-782-8982, or by signing up for an appointment at: (1) Room 2796, United States District
12 Court for the Northern District of California, 450 Golden Gate Avenue, 15th Floor, San Francisco,
13 California; or (2) Room 470-S, United States District Court for the Northern District of California,
14 1301 Clay Street, 4th Floor, Oakland, California.

15 **CONCLUSION**

16 For the foregoing reasons, the Court GRANTS the Kinney Defendant's motion to dismiss,
17 DISMISSES, WITHOUT PREJUDICE, Voss' counter and cross-claims, DENIES, AS MOOT,
18 AND WITHOUT PREJUDICE, Signaporia's and Bennett's motions to dismiss, and VACATES
19 the case management conference.

20 **IT IS SO ORDERED.**

21 Dated: November 9, 2015

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23 JEFFREY S. WHITE
24 United States District Judge
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