Not Reported in F.Supp.2d, 2003 WL 21787351 (S.D.N.Y.)
(Cite as: 2003 WL 21787351 (S.D.N.Y.))

United States District Court,
S.D. New York.
Juan FERMIN, Plaintiff,
v.
James MORIARTY, Defendant.

No. 96 Civ. 3022(MBM).
Aug. 4, 2003.

Client brought diversity action against attorney, who represented him in connection with his sentencing after he was convicted of narcotics offenses, alleging breach of contract, malpractice, fraudulent misrepresentation, breach of fiduciary duty, and violation of his rights under Sixth Amendment. The District Court, Mukasey, J., held that: (1) prisoner failed to show by preponderance of evidence that he intended to remain in Pennsylvania; (2) court did not have federal question jurisdiction over prisoner's lawsuit; and (3) sufficient transactional relationship did not exist between federal criminal proceeding, and civil lawsuit brought by prisoner, to support discretionary exercise of supplementary jurisdiction over prisoner's civil lawsuit.

Complaint dismissed with leave to amend.

West Headnotes

[1] Federal Courts 170B 351

170B Federal Courts
170BV Amount or Value in Controversy Affecting Jurisdiction
170Bk350 Fictitious or Colorable Claims
170Bk351 k. Particular Claims as Fictitious or Colorable. Most Cited Cases

Federal Courts 170B 359

170B Federal Courts
170BV Amount or Value in Controversy Affecting Jurisdiction
170Bk357 Evidence
170Bk359 k. Weight and Sufficiency. Most Cited Cases

Client's claims against attorney, alleging fraud and seeking punitive damages, were sufficient to satisfy amount in controversy requirement under federal diversity jurisdiction statute, since attorney did not show to legal certainty that claim was really for less than jurisdictional amount. 28 U.S.C.A. § 1332.

[2] Federal Courts 170B 317

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(D) Evidence
170Bk317 k. Presumptions and Burden of Proof. Most Cited Cases

Although a prisoner is presumed to retain his former domicile, he can attempt to demonstrate that he has established a new domicile in his state of incarceration, for the purpose of application of the diversity jurisdiction statute. 28 U.S.C.A. § 1332.

[3] Federal Courts 170B 318

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

170BIV(D) Evidence
170Bk318 k. Weight and Sufficiency. Most Cited Cases

Prisoner incarcerated in Pennsylvania failed to show by preponderance of evidence that he intended to remain in Pennsylvania, in order for New York court to have diversity jurisdiction over lawsuit against New York attorney; although Pennsylvania was where prisoner received his mail, made his telephone calls, visited with his family, received his medical treatment, and he received educational equivalency certificate from State of Pennsylvania, prisoner was resident of New York when he was convicted and prisoner did not otherwise establish that Pennsylvania was his domicile rather than merely his residence. 28 U.S.C.A. § 1332; Fed.R.Civ.P. 12(b)(1), 28 U.S.C.A.

[4] Federal Courts 170B 175

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(B) Cases Arising Under the Constitution
170Bk175 k. Particular Constitutional Guaranties in General. Most Cited Cases

District court did not have federal question jurisdiction over prisoner's lawsuit against attorney alleging violation of his Sixth Amendment rights, although attorney represented prisoner in federal criminal case, since attorney was not state actor. U.S.C.A. Const.Amend. 6; 28 U.S.C. § 1331; 42 U.S.C.A. § 1983.

[5] Federal Courts 170B 192

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk192 k. Particular Cases and Questions. Most Cited Cases

District court did not have federal question jurisdiction over prisoner's lawsuit against attorney alleging breach of contract and malpractice, although complaint alleged wrongs that occurred during ongoing federal case; attorney's representation of defendant in federal criminal case did not transform his breach of contract and malpractice claims into claims under federal law. 28 U.S.C.A. § 1331.

[6] Federal Courts 170B 20.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk20 Ancillary and Incidental Jurisdiction
170Bk20.1 k. In General. Most Cited Cases

District court could, in its discretion, exercise ancillary jurisdiction over prisoner's lawsuit against attorney alleging breach of contract and malpractice, for attorney's representation of prisoner in federal criminal proceeding in same district where civil lawsuit was brought, although supplementary jurisdiction statute did not apply to controversy. 28 U.S.C.A. § 1367(a).

[7] Federal Courts 170B 20.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk20 Ancillary and Incidental Jurisdiction
170Bk20.1 k. In General. Most Cited Cases

Ancillary jurisdiction may be exercised over a fee

dispute arising out of a criminal case in federal court. 28 U.S.C.A. § 1367(a).

[8] Federal Courts 170B 15

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction
170Bk15 k. Federal Question Cases in General, Claims Pendent To. Most Cited Cases

Sufficient transactional relationship did not exist between federal criminal proceeding, and lawsuit brought by prisoner against his attorney alleging fraud, malpractice, and breach of contract in his representation of prisoner, to support discretionary exercise of supplementary jurisdiction over prisoner's civil lawsuit; although prisoner's criminal case remained before court for purpose of resentencing, prisoner's claims against attorney did not affect resentencing proceeding, judge did not have any special familiarity with subject matter of prisoner's suit, and litigation of case in federal court would have been inconvenient, inter alia, because case involved complex issue of state law.

Gregory Antollino, New York, NY, for Plaintiff.

James T. Moriarty, New York, NY, pro se.

OPINION AND ORDER

MUKASEY, J.

***1** Juan Fermin, convicted in this court of narcotics offenses, sues James Moriarty, the attorney who represented him in connection with his sentencing, for breach of contract, malpractice, fraudulent misrepresentation, and breach of fiduciary duty, and for violating his rights under the Sixth Amendment. Moriarty moves to dismiss the complaint for lack of subject matter jurisdiction. In the alternative, Moriarty moves for summary judgment dismissing Fermin's claims. For the reasons set forth below, the complaint is dismissed with leave to amend.

I.

The facts alleged in the complaint are as follows: Juan Fermin is incarcerated in Allenwood, Pennsylvania. James Moriarty is an attorney licensed to practice law in the State of New York and, at the time of the events at issue, was a member of the bar of this court. (Compl.¶¶ 3–4)

On June 22, 1992, Moriarty and Fermin entered into a contract. (*Id.* ¶ 6) The contract, which was signed by Moriarty and Fermin's stepfather Juan Guzman, described itself as "a draft of a retainer agreement between James Moriarty and Juan Guzman on behalf of Juan Fermin" that would be "more formally drafted" within ten days. (*Id.* Ex. 1) Under the terms of the contract, Moriarty promised to "represent Juan Fermin with regard [sic] his sentencing before the United States District Court" and "in the United States Circuit Court for the Second Circuit with regard the appeal of his coinviction [sic] on the above indictment." (*Id.*) Fermin, in turn, agreed to pay Moriarty "at least $20,000 and up to $25,000" for his services, "depending on the total amount of work involved as well as the expenses of printing the appellate brief and appendix." (*Id.*)

Over several months, Fermin paid Moriarty a total of $25,000. (*Id.* ¶¶ 8–14) However, Moriarty refused to perfect Fermin's direct appeal, forcing Fermin to retain substitute counsel at an additional cost of $35,000. (*Id.* ¶¶ 15–16) In order to procure the $35,000, Fermin had to sell real property that he otherwise would have continued to manage. (*Id.* ¶ 17) Despite repeated requests, Moriarty has refused to return the unused portion of the $25,000 or even to respond to Fermin's letters or telephone calls. (*Id.* ¶¶ 17–19)

II.

The complaint is not a model of clarity. In the "facts" section of the complaint, Fermin places his specific allegations under two headings: breach of contract and legal malpractice. Then, in the "claims for relief" section of the complaint, Fermin adds three additional claims, namely (i) that Fermin "violated his fiduciary duty as plaintiff's agent"; (ii) that Fermin "created a tort of misrepresentation"; and (iii) that Fermin "violated Plaintiff's Sixth Amendment guarantee of effective assistance of counsel as this right is interpreted by the laws of the United States." (Compl.¶¶ 37–38) Construing the complaint liberally, as I must when the plaintiff appears *pro se*,[FN1] *see* *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Fermin thus brings five claims against Moriarty: breach of contract, malpractice, fraudulent misrepresentation, breach of fiduciary duty, and violation of the Sixth Amendment.

FN1. When he filed his complaint, Fermin was not yet represented by counsel.

***2** Fermin seeks several remedies. First, Fermin seeks a declaration that Moriarty's conduct amounts to breach of contract, legal malpractice, misrepresentation, a violation of the Code of Professional Responsibility, and a Sixth Amendment violation. Second, Fermin requests $60,000 in compensatory damages and $40,000 in punitive damages. Finally, Fermin asks the court to discipline Moriarty.

III.

[1] Moriarty moves to dismiss Fermin's complaint for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). At the time this action was commenced, the United States Code conferred jurisdiction upon district courts if a suit was between citizens of different states and the matter in controversy exceeded $50,000. *See* 28 U.S.C. § 1332(a) (1996). Moriarty claims first, without citing any evidence in the record or case law, that there is no diversity of citizenship in this case because both parties are domiciled in New York. (*See* Moriarty's Mem. of L. at 1) Despite Moriarty's cursory treatment of the issue, I agree with him. Although the complaint adequately alleges that the amount in controversy is sufficient to confer jurisdiction on this court,[FN2] it does not adequately allege diversity of citizenship.

FN2. Moriarty makes a far more extensive argument regarding the amount in controversy than he does regarding diversity. Specifically, Moriarty argues that because Fermin has not stated a cognizable malpractice claim or a cognizable claim for punitive damages, the amount in controversy does not exceed $50,000. That argument is based on a fundamental misconception about when and how the amount in controversy is determined. Contrary to Moriarty's view, "[t]he amount in controversy is determined at the time the action is commenced." *Tongkook Am., Inc. v. Shipton Sportswear Co. .*, 14 F.3d 781, 784 (2d Cir.1994). Moreover, "[i]t is well settled that 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." ' *Chase Manhattan Bank, N.A. v. Am. Nat. Bank and Trust Co. of Chicago*, 93 F.3d 1064, 1070 (2d Cir.1996) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89, 58 S.Ct. 586, 82 L.Ed. 845 (1938)). Finally, "if punitive damages are permitted under the controlling law, the demand for such damages may be included in determining whether the jurisdictional amount is satisfied." *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82, 87 (2d Cir.1991). Here, Fermin has alleged fraud against Moriarty, and conceivably could be entitled to punitive damages if he proved that claim. That the fraud claim or another claim might not survive a motion to dismiss or a motion

> for summary judgment is irrelevant, because "[l]egal certainty is analyzed by what appears on the face of the complaint; subsequent events—such as a valid defense offered by the defendant ..., 'do ... not show [plaintiff's] bad faith or oust the jurisdiction." ' *Wolde–Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 63 (2d Cir.1999) (quoting *St. Paul*, 303 U.S. at 289). The Second Circuit "recognizes a rebuttable presumption that the face of the complaint is a good faith representation of the actual amount in controversy." *Id.* Moriarty has done nothing to overcome that presumption.

For the purpose of § 1332(a), an individual's citizenship is determined by domicile. *Williamson v. Osenton*, 232 U.S. 619, 624–25, 34 S.Ct. 442, 58 L.Ed. 758 (1914). A party's domicile is established at the time a case is filed, *Freeport–McMoRan v. KN Energy, Inc.*, 498 U.S. 426, 428–29, 111 S.Ct. 858, 112 L.Ed.2d 951 (1991), and it is determined by the party's place of residence and his intent to remain in that place indefinitely, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

[2] It is well-established that a prisoner does not acquire a new domicile when he is incarcerated in a state different from his previous domicile. Instead, the prisoner retains his preincarceration domicile. *See* 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 102.37[8][a] (3d ed.1999) (collecting cases). In some jurisdictions, the rule that prisoners retain their former domicile has taken the form of an irrebuttable presumption. *See id.* ¶ 102.37 [8][b]. However, in the Second Circuit, along with three other circuits, the presumption is rebuttable; thus, although a prisoner is presumed to retain his former domicile, he can attempt to demonstrate that he has established a new domicile in his state of incarceration. *See Housand v. Heiman*, 594 F.2d 923, 925 n. 5 (2d Cir.1979) (embracing the "more recent trend ... in the direction of allowing a prisoner to try to show that he has satisfied the prerequisites for establishing domicile in his place of incarceration"); *see also Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir.1991) (Posner, J.) ("The presumption is rebuttable—a prisoner might for example decide he wanted to live in another state when he was released and the federal prison authorities might therefore assign him to a prison in that state, and that would be the state of his domicile."); *Jones v. Hadican*, 552 F.2d 249, 251 (8th Cir.1977) ("While retaining the usually valid presumption that a prisoner retains his pre-incarceration domicile, [the rebuttable presumption rule] is sufficiently flexible to allow a prisoner to show truly exceptional circumstances which would justify a finding that he has acquired a new domicile at the place of his incarceration."); *Stifel v. Hopkins*, 477 F.2d 1116, 1126 (6th Cir.1973) ("We recognize the importance of considering physical or legal compulsion in determining whether domicile is gained or lost, but we limit the application of involuntary presence to its operation as a presumption ordinarily requiring more than unsubstantiated declarations to rebut.").

***3** On its face, Fermin's complaint does not adequately allege diversity of citizenship. In order for a prisoner to establish diversity jurisdiction based on the theory that his place of incarceration is his domicile, "the complaint must allege facts sufficient to raise a substantial question about the prisoner's intention to acquire a new domicile." *Jones*, 552 F.2d at 251. Like the plaintiff in *Housand*, who was also suing his former attorney for malpractice, Fermin "does not make clear in his pleadings on what facts his diversity claim is based." *Housand*, 594 F.2d at 925. Although he lists 28 U.S.C. § 1332 as a basis for federal jurisdiction, Fermin alleges only that he is confined in Pennsylvania. In the absence of additional facts demonstrating an intent to remain in Pennsylvania indefinitely, that fact alone does not confer jurisdiction on this court.

[3] Even if the complaint were not facially inadequate, Fermin's claims would still have to be dis-

missed under Fed.R.Civ.P. 12(b)(1), because Fermin has not shown by a preponderance of the evidence that he intends to remain in Pennsylvania. "Once a plaintiff's allegations of diversity are challenged by a defendant, plaintiff must prove by a preponderance of the evidence that diversity in fact exists." *Bevilaqua v. Bernstein*, 642 F.Supp. 1072, 1073 (S.D.N.Y.1986) (Weinfeld, J.). Here, plaintiff has not met that burden. In his Reply, Fermin declares that he lives in Pennsylvania; that he receives his mail in Pennsylvania; that he makes his telephone calls from Pennsylvania; that Pennsylvania is where he sees his family; that he receives medical treatment in Pennsylvania; and that he received an educational equivalency certificate from the State of Pennsylvania. (*See* Reply at 5) However, these facts establish only that, at the time Fermin filed his complaint, he was incarcerated in Pennsylvania. Fermin has not established that Pennsylvania is his domicile rather than merely his residence.

IV.

[4] The complaint alleges the presence of a federal question as an alternative basis for subject matter jurisdiction over this case. (*See* Compl. ¶ 1) Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). Fermin offers two separate theories to support federal question jurisdiction. First, in his complaint, Fermin asserts that this court has jurisdiction over his claims as a result of his "civil rights claim" against Moriarty. (*Id.*) Second, in his Reply, Fermin claims that although the breach of contract and malpractice claims arise out of state law, those claims will be evaluated under federal law, because Moriarty represented Fermin in a federal criminal case. Neither theory supports federal question jurisdiction here.

A. Sixth Amendment Claim

First, Fermin's Sixth Amendment claim does not confer federal question jurisdiction over this action, because the claim cannot rest upon 42 U.S.C. § 1983. Section 1983 permits any person to recover damages or other relief from another who has deprived him of his constitutional rights "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory." 42 U.S.C. § 1983 (2000). Moriarty, a private attorney, cannot be regarded as a state actor for the purposes of § 1983. *See Housand*, 594 F.2d at 924–925 (concluding that even "public defenders or court-appointed defense attorneys do not act 'under color of law" ').[FN3] Because Fermin has no cognizable Sixth Amendment claim against his private attorney, that claim cannot serve as the basis for federal jurisdiction over this case. *See id.* at 925 (affirming dismissal of complaint where plaintiff had no cognizable § 1983 claim against his attorney); *Seedman v. Stanley Roy Root & Assocs.*, No. 99 Civ. 4234, 2000 WL 290345, at *2 (S.D.N.Y. Mar.20, 2000) (federal question jurisdiction lacking over action against private attorney); *D'Ottavio v. Depetris*, No. 91 Civ. 6133, 1991 WL 206278, at *1 (S.D.N.Y. Sept.26, 1991) (same).

FN3. Moriarty also cannot be considered a state actor under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), which permits suits against federal officers. *See Housand*, 594 F.2d at 924 n. 1 (noting that "a *Bivens*-type suit requires federal action in the same manner as § 1983 requires state action").

B. Federal Law

***4** [5] Furthermore, that Moriarty represented Fermin in a federal criminal case does not transform his breach of contract and malpractice claims against Moriarty into claims that satisfy the requirements of § 1331. "Federal question jurisdiction exists where a well-pleaded complaint 'establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." ' *Greenberg v.*

Bear, Stearns & Co., 220 F.3d 22, 25 (2d Cir.2000) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). Thus, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Rather, a district court must "look to the nature of the federal question raised in the claim to see if it is sufficiently substantial to warrant federal jurisdiction." *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 570 (2d Cir.1995).

The Supreme Court's decision in *Merrell Dow* indicates that a federal question is substantial enough to warrant federal jurisdiction only when a federal law that creates a cause of action is an essential component of the plaintiff's state law claim. *See* Erwin Chemerinsky, *Federal Jurisdiction* 281 (3d ed.1999) (describing *Merrell Dow'* s holding). In *Merrell Dow*, the plaintiffs asserted a negligence claim which included, as an element, a rebuttable presumption of negligence created by the defendants' alleged misbranding of drugs in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). *See Merrell Dow*, 478 U.S. at 805–06. However, because neither the FDCA nor any other federal law provided a cause of action for misbranding, *see id.* at 810–11, the Court concluded that federal question jurisdiction over the plaintiff's negligence claim was lacking. *See Merrell Dow*, 478 U.S. at 814 (deferring to Congress's own determination that "the presence of a claimed violation of [the FDCA] as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction").

Here, the complaint does not allege that a federal law that creates a cause of action is an essential component of either the malpractice claim or the breach of contract claim. Indeed, the complaint does not raise any federal issue at all. The most that can be said about the complaint is that it alleges wrongs that occurred during an ongoing federal case.

V.

[6] Fermin argues in his Memorandum in Opposition that even if diversity jurisdiction is lacking,[FN4] the court should, in its discretion, exercise ancillary jurisdiction over this case. As a threshold matter, it is unclear if, or to what extent, criminal ancillary jurisdiction survived the enactment of 28 U.S.C. § 1367(a). That statute states that "in any civil action over which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (2000); *see also* 16 James Wm. Moore et al., *Moore's Federal Practice* ¶ 106.03[1] (3d ed. 1999) ("Supplemental jurisdiction is a statutory term that is generally viewed by the courts and commentators as encompassing both what courts previously referred to as 'pendent' jurisdiction and 'ancillary' jurisdiction."). By its own terms, the statute applies to civil cases only. Here, the underlying action was a criminal case; therefore, the statute does not apply.

FN4. Notably, Fermin no longer claims that federal question jurisdiction exists.

***5** Notwithstanding the language of 28 U.S.C. § 1367(a), one court in this district has concluded that ancillary jurisdiction still may be exercised over disputes related to criminal cases. In *United States v. Weissman*, No. S2 94 CR. 760, 1997 WL 334966 (S.D.N.Y. Jun.16, 1997), a jury convicted Jerry Weissman on two counts of perjury and one count of obstruction of justice. After the verdict but before post-trial motions and sentencing, Weissman's former employer, Empire Blue Cross/Blue Shield ("Empire"), informed Weissman that it would not advance funds to cover either future legal costs or recently incurred costs. *Id.* at *1, 7. Weissman moved to compel Empire to continue to advance the funds necessary for his defense and to pay the legal bills he

had already submitted. The Court exercised jurisdiction over the application, and rejected Empire's argument that Congress "did away with ancillary jurisdiction in criminal proceedings." *Id.* at *4. Judge Haight noted that "ancillary jurisdiction in criminal proceedings never derived from any particular statutory authority," *id.*, and then "look[ed] to analogous situations in the civil context to determine if the exercise of ancillary jurisdiction [was] proper," *id.* Based on civil cases holding that district courts may exercise ancillary jurisdiction over fee disputes between a party and his counsel, *e.g.*, *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841 (2d Cir.1977), the Court concluded that it had jurisdiction over Weissman's claim.

No other courts in this district have addressed the issue squarely, but a court in another district has criticized and departed from *Weissman.* In *United States v. Polishan*, 19 F.Supp.2d 327 (M.D.Pa.1998), a criminal defendant moved to compel his former employer and its insurer to pay defense costs. The Court held that it did not have ancillary jurisdiction over the action. According to the Court, unlike a fee dispute between a party and his lawyer, where the parties to the dispute have already submitted themselves to the jurisdiction of the court, and unlike a case where contested property is in the court's control, the defendant's motion did not arise out of the same nucleus of operative fact as the criminal action. *See id.* at 332 ("Although Polishan's conduct while Leslie Fay's chief financial officer is related to these claims in a peripheral manner, it cannot be reasonably maintained that his motion arises out of the same nucleus of operative facts underlying the prosecution.").

According to the *Polishan* Court, "the major flaw in *Weissman* is the court's failure to address the constitutional limitations of ancillary jurisdiction." *Id.* at 333. The Court explained:

> The threshold inquiry ... must concern consistency with constitutional limits of federal judicial power. This is what the [common nucleus of operative facts] test seeks to attain. It is not just a matter of fostering judicial economy, minimizing litigants' costs, or protecting court officers. It is, on the contrary, a matter of ensuring that federal judicial power is exercised only in a case or controversy within a federal court's limited subject matter jurisdiction. The existence of a common nucleus of operative facts, court control over property, *or the presence of parties to a fee dispute* are precisely the type of factors that assures that the vague concept of ancillary jurisdiction does not overwhelm the boundaries of federal judicial authority.
>
> ***6** *Id.* (emphasis added).

[7] Thus, although the *Polishan* Court repudiated *Weissman* insofar as it refused to adjudicate a criminal defendant's suit against a third-party insurer, the Court agreed with *Weissman* that a federal court may exercise criminal ancillary jurisdiction over a fee dispute. Without delineating the precise boundary of criminal ancillary jurisdiction, I too conclude that ancillary jurisdiction may be exercised over a fee dispute arising out of a criminal case. As a threshold matter, I refuse to read 28 U.S.C. § 1367 to abolish criminal ancillary jurisdiction. First, as Judge Haight noted, the Second Circuit has acknowledged the existence of criminal ancillary jurisdiction since Congress passed the Judicial Improvement Act of 1990, now codified in 28 U.S.C. § 1367. *See Rufu v. United States*, 20 F.3d 63, 65 (2d Cir.1994); *Soviero v. United States*, 967 F.2d 791, 792 (2d Cir.1992); *Mora v. United States*, 955 F.2d 156, 158 (2d Cir.1992).[FN5] Second, as Judge Haight noted also, Congress passed the current version of 28 U.S.C. § 1367 in order to overrule *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), which limited the exercise of pendent-party jurisdiction. *See Weissman*, 1997 WL 334966, at *4 (collecting cases and examining legislative history). There is no reason to conclude that, in restoring the pre-*Finley* status quo, Congress intended to abrogate a separate, longstanding basis for federal

jurisdiction.

> FN5. The criminal cases in which the Second Circuit has affirmed the exercise of ancillary jurisdiction involved the return of property seized from criminal defendants; thus, the subsidiary controversies in those cases "ha[d] direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton Nat'l Bank of Atlanta v. Hozier*, 267 U.S. 276, 280, 45 S.Ct. 261, 69 L.Ed. 609 (1925). However, the Supreme Court has indicated that ancillary jurisdiction extends beyond cases in which the court controls the funds at issue. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (characterizing the language in *Fulton Nat'l Bank* as an "excessively limited description of the doctrine" of ancillary jurisdiction).

Once it is established that a district court may exercise ancillary jurisdiction in criminal cases, the question presented is simply whether there is a sufficient transactional relationship between a primary and a subsidiary controversy to support the exercise of supplementary jurisdiction over the latter. With respect to fee disputes between a party and his attorney, the Second Circuit has already answered that question in the affirmative. *See Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir.1988) (" 'It is well settled that [a] federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes ... between litigants and their attorneys when the dispute relates to the main action ...." ' (quoting *Petition of Rosenman Colin Freund Lewis & Cohen*, 600 F.Supp. 527, 531 (S.D.N.Y.1984)). Like the plaintiff in *Cluett*, plaintiff in this case claims that his former attorney defrauded him and that he has been charged excessively for the services rendered by the attorney.[FN6] Thus, as in *Cluett*, it is within this court's discretion to exercise ancillary jurisdiction over the subsidiary dispute between Fermin and his former attorney.

> FN6. Notably, in his response to Moriarty's motion to dismiss, Fermin concedes that "this is strictly a breach of contract and misrepresentation case." (Mem. in Opp. at 8)

VI.

[8] Although I could exercise ancillary jurisdiction over this action, I decline to do so. In *Cluett*, the Second Circuit identified four factors to be considered in deciding whether to exercise ancillary jurisdiction over a fee dispute: (1) the trial court's familiarity with the subject matter of the suit and the work performed by the law firm in connection with the lawsuit; (2) the Court's responsibility to protect its own officers in such matters as fee disputes; (3) the convenience of litigating in federal court as opposed to state court; and (4) considerations of judicial economy. *Id.* Additionally, courts have emphasized that, before exercising ancillary jurisdiction, "[m]ost important, [a court] must determine whether the exercise of jurisdiction is necessary to provide a fair resolution of the underlying matter, and to allow the court to administer its proceedings." *Weissman*, 1997 WL 334966, at *6; *see also Kalyawongsa v. Moffett*, 105 F.3d 283, 287 (6th Cir.1997) (noting that resolution of fee disputes is "often required to provide a full and fair resolution of the litigation").

***7** Here, the subsidiary dispute between Fermin and Moriarty does not bear on the underlying criminal case against Fermin in the same way that the fee dispute in *Weissman* bore on the case against Weissman. In *Weissman*, the Court concluded that the fee dispute between Weissman and his attorneys was "intimately intertwined with the comportment of the [criminal] case" because the dispute threatened to affect the timing of post-trial motions and sentencing. *Weissman*, 1997 WL 334966, at *7. Here, on the other hand, although Fermin's criminal case remains before this court for the purpose of resentencing, Fermin's claims

against Moriarty will in no way affect the resentencing proceeding.

Further, this court has no special familiarity with the subject matter of Fermin's suit. I did not preside over Fermin's trial, nor did I conduct the sentencing hearing at which Moriarty represented Fermin. *See Riva Techs. v. Zack Elecs., Inc.*, 2002 WL 1559584, at *7 (N.D. Ill., Jul 15, 2002) (declining to exercise ancillary jurisdiction when "what few court proceedings took place in the case were conducted by the district judge then presiding in the case, and occurred long before the parties first appeared before this Court").

Finally, litigating the case in federal court would be inconvenient, *inter alia*, because the case involves a complex issue of state law. A review of the complaint for factual allegations that would support a claim for fraudulent misrepresentation shows that Fermin has alleged only that Moriarty entered into a contract with the undisclosed intent to breach that contract. (*See* Compl. ¶ 30 (alleging that Moriarty "never intended to execute his appellate responsibility"); *see also* Mem. in Opp. at 3 (defending plea for punitive damages on the ground that "Moriarty entered into the contract knowing he would not undertake an appeal"))

Under New York law as interpreted by the Second Circuit, Fermin's allegation is insufficient to support a fraud claim. The Circuit has repeatedly held that, as a general rule, the allegation that a party entered into a contract intending to breach that contract is insufficient to support a claim for fraud under New York law. *See Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 401 (2d Cir.2001); *Bridgestone/Firestone, Inc., v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19–20 (2d Cir.1996). Nevertheless, there is substantial confusion in the New York case law regarding the rule adhered to in *Manning* and *Bridgestone/Firestone.* One district court explained: "The rule derives from a very long and very puzzling line of New York cases. On at least four occasions, New York's Court of Appeals has expressly held that 'a contractual promise made with the undisclosed intention not to perform it constitutes fraud.' At the same time, however, there are numerous Appellate Division cases that state precisely the opposite rule." *Cougar Audio, Inc. v. Reich*, No. 99 Civ. 4498, 2000 WL 420546, at *6 n. 4 (S.D.N.Y. Apr.18, 2000) (citation omitted); *see also Marriott Intern., Inc. v. Downtown Athletic Club of New York City, Inc.*, No. 02 Civ. 3906, 2003 WL 21314056, at *6–7 (S.D.N.Y. Jun.09, 2003) (discussing the New York case law in detail). Were I compelled to do so, I would, of course, adhere to the Second Circuit's interpretation of New York law; however, the better approach in this case is to allow a state court to adjudicate Fermin's claims.[FN7]

FN7. Although this court acknowledges its responsibility to protect its officers in fee disputes, Moriarty does not seek the protection of the court. In any event, the other factors control.

VII.

***8** Because the complaint is dismissed for lack of subject-matter jurisdiction, I need not address Moriarty's motion for summary judgment. For future reference, the parties are reminded that Local Rule 56.1 requires the party moving for summary judgment to file a statement setting forth the material facts that are allegedly undisputed, S.D.N.Y. & E.D.N.Y. R. 56.1(a), and the non-moving party to file a statement setting forth the material facts that it contends are in dispute, *id.* 56.1(b). Both parties to this case failed to comply with Local Rule 56.1.

Consistent with *Housand* and other cases in which prisoners have failed adequately to allege diversity jurisdiction, I dismiss Fermin's complaint with leave to amend. *See, e.g., Housand*, 594 F.2d at 926 (remanding the case "with instructions to allow amendment of the complaint within a reasonable time to state a claim, if any exists, under diversity jurisdiction"). Plaintiff may file an amended complaint alleging diversity of citizenship within forty-five (45)

days of the date of this order. In considering whether to file an amended complaint, and what to include in that complaint should he file one, plaintiff should bear in mind that a prisoner must offer more than "unsubstantiated declarations" to rebut the presumption that he retains his pre-incarceration domicile. *Stifel*, 477 F.2d at 1126.

SO ORDERED:

S.D.N.Y.,2003.
Fermin v. Moriarty
Not Reported in F.Supp.2d, 2003 WL 21787351 (S.D.N.Y.)

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