

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION**

DEBORAH HOROWITZ,

CASE NO: 6:06-CV-807-ORL-19KRS

Plaintiff,

vs.

**SAFECO INSURANCE COMPANY
OF AMERICA,**

Defendant.

_____ /

PLAINTIFF'S MOTION FOR REMAND

COMES NOW the Plaintiff, **DEBORAH HOROWITZ**, and by and through her undersigned attorneys, pursuant to 28 *U.S.C.* §1447 and Rule 3.01, *Rules of the U.S. District Court For The Middle District of Florida*, and files this, her Motion For Remand and supporting Memorandum of Law, and for grounds states as follows:

1. The subject action was instituted by Summons and Complaint filed In The Circuit Court Of The Ninth Judicial Circuit In And For Orange County, Florida, on or about May 9, 2006.

2. Defendant, **SAFECO INSURANCE COMPANY OF AMERICA** (hereinafter referred to as "SAFECO"), was served with Summons and Complaint herein on or about May 24, 2006.

3. Plaintiff's Complaint alleges that the Defendant is liable for damages for breaching its obligations under a homeowner's insurance policy issued to Plaintiff in Florida on

her Florida home. The allegations pertain to roof damage and damage to her dwelling from wind and rain on or about September 26, 2004.

4. The only allegation in Plaintiff's Complaint as to any amount in controversy is set forth in Paragraph 1 thereof, which alleges simply that Plaintiff's damages exceed the sum of fifteen thousand dollars (\$15,000.00), the minimum requisite amount for jurisdiction in State Circuit Court. A copy of Plaintiff's Complaint is attached to Defendant's Notice of Removal, as Exhibit A.

5. Defendant's Notice of Removal, bearing Certificate of Service of June 13, 2006, was filed with the Court on June 14, 2006. Said Notice of Removal alleges that the subject action is being removed from the Circuit Court Of The Ninth Judicial Circuit In And For Orange County, Florida to the U.S. District Court Middle District of Florida, Orlando Division.

6. Defendant's Removal Notices alleges in paragraph 4 that Defendant, SAFECO, is "a corporation organized and existing under the laws of the State of Washington, having its principal place of business in Washington."

7. As to the amount in controversy, Defendant's Notice of Removal reiterates in paragraph 3 the only allegation of amount in controversy set forth in Plaintiff's Initial Complaint, namely, that Plaintiff seeks damages in excess of fifteen thousand dollars (\$15,000.00). Defendant, Safeco, alleges further in paragraph 5 of the Notice of Removal that the "matter in controversy herein exceeds the sum of \$ 75,000 exclusive of interest and costs", alleging further that "this fact is demonstrated by the extent of damage claimed by HOROWITZ and the demand for replacement or repair of the dwelling and personal property." Defendant's Removal Notice is otherwise silent as to any allegation as to the minimum requisite amount in controversy for this Honorable Court's original jurisdiction and diversity of citizenship cases pursuant to §1332(a).

8. The Defendant has completely failed to satisfy that the requisite amount in controversy is greater than \$75,000. Given that it is Defendant's burden to establish the requisite amount in controversy pursuant to Rule 28 U.S.C. §1332, the subject action should be remanded to this State Circuit Court, in and for Orange County, Florida.

9. Plaintiff and her counsel have incurred expenses and attorneys' time and fees in defense of the Notice of Removal and in the research and preparation of this Motion to Remand and supporting Memorandum of Law.

MEMORANDUM OF LAW

It is well established that removal statutes are to be strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Burns v Windsor Ins., Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994)("[R]emoval statutes are construed narrowly; [when the parties dispute jurisdiction], uncertainties are resolved in favor of remand."). *See also, American Fire & Cas. Co. Finn*, 341 U.S. 6 (1951). The principle of strict construction of 28 U.S.C. §1441 is particularly applicable in cases involving diversity of citizenship. *Gober v Allstate Ins. Co.*, 855 F.Supp. 158 (S.D. Miss. 1995); *Robinson v Quality Ins. Co.*, 633 F. Supp 572 (S. D. Ala. 1986).

The requirement that the minimum amount in controversy for diversity of citizenship jurisdiction be met is narrowly construed so as not to frustrate the congressional purpose of keeping the diversity caseload of federal courts under some modicum of control. *Pierson v Source Perrier, S.A.*, 848 F. Supp. 1186 (E.D. Penn. 1994), *citing, Packard v Provident National Bank*, 944 F.2d 1039 (3rd Cir. 1993). All doubts concerning jurisdiction should be resolved in favor of remand. *Pierson, supra, citing, Abels v State Farm Fire & Cas. Co.*, 770 F. 2d 26 (3rd Cir. 1985).

Defendants have a right by statute to remove in certain circumstances. However, Plaintiff is still the master of her own claim. Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994). As such, the Defendant's right to remove and Plaintiff's right to choose her forum are not equal; removal statutes are construed narrowly and when a dispute arises as to jurisdiction, uncertainties should be resolved in favor of remand. *Id.* at 1097. In determining whether a claim exceeds the jurisdictional limit, the standard to be used, when measuring the damages sought and amounts in controversy, is an objective one wherein the subjective intent or belief of the parties is not a proper measure. Burns v. Windsor Ins. Co., *supra*. A removing party has the burden of proving that federal jurisdiction exists by preponderance of the evidence and the removing party must present facts establishing its right to remove. If the removing party fails to meet this burden, the case must be remanded. Williams v Best Buy Company, Inc., 269 F. 3d 1316 (11th Cir. 2001). *See also*, Libhart v Santa Monica Dairy Co., 592 F. 2d 1062 (9th Cir. 1979).

The Defendant has completely failed to satisfy its burden of establishing that the requisite minimum amount in controversy of seventy-five thousand dollars (\$75,000.00), is established in the subject action. Where, as in the case at bar, a Plaintiff makes an unspecified demand for damages in a state court complaint, the removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the jurisdictional requirement. Tapscott v. M.S. Dealer Service Corp., 77 F. 3d 1353 (11th Cir. 1996), overruled on other grounds, by Cohen v Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000). *See also*, Singer v State Farm Mut. Auto. Ins. Co., 116 F. 3d 373 (9th Cir. 1997); Golden v Dodge-Markham Co., Inc., 1 F. Supp 2d 1360 (M.D. Fla. 1998); Gober, *supra*. . A removing party has the burden of proving that federal jurisdiction exists by preponderance of the evidence and the removing party must present facts establishing its right to remove. If the removing party fails to

meet this burden, the case must be remanded. *Williams v Best Buy Company, Inc., supra.* *See also, Libhart v Santa Monica Dairy Co., supra.*

For example, while a defendant's use of plaintiff's settlement demand as notice that a case could be removed to federal court is proper, a settlement offer made prior to the initiation of litigation standing alone is insufficient to meet the Defendant's burden that the amount in controversy exceeds \$75,000.00. In *Golden v. Dodge-Markham Co., Inc.*, 1 F.Supp.2d 1360 (M.D. Fla. 1998), the Court was confronted with an action originally brought in state court based on wrongful termination. The defendant removed the action to Federal Court and as grounds for removal relied upon a pre-suit demand letter as evidence of the amount in controversy. To meet its burden, the defendant brought forward no objective evidence of the amount in controversy, instead relying only upon the pre-suit demand and its subjective evaluation of the amount of compensatory damages, which could be awarded if Plaintiff prevailed. The court found Defendant did not meet its burden. In doing so, the court rejected the Defendant's reliance on plaintiff's pre-suit demand/settlement offer and subjective evaluation of damages and stated:

“Compensatory damages are extremely nebulous. Making a general blanket statement that, if Plaintiff prevails, compensatory damages could certainly entitle him to thousands of dollars, does not rise to the levels of proving, by a preponderance of the evidence, that the amount in controversy exceeds \$75,000.00.” *Golden* at 1360.

In the instant case, Defendant asserts as a basis for its assertion of jurisdiction merely that “the extent of damage claimed by HOROWITZ and the demand for replacement or repair of the dwelling and personal property” demonstrate that the jurisdictional minimum amount has been met. As this only allegation regarding the amount in controversy asserted in the Notice of Removal is speculation, the Defendant has failed to meet its burden to establish Federal Diversity Jurisdiction.

Another example is found in *Williams v Best Buy Co., Inc., supra*, where it was not facially apparent from plaintiff's complaint in the underlying state court action that the amount in controversy exceeded the requisite minimum jurisdictional amount of \$75,000.00. There, plaintiff's complaint demanded general, special and punitive damages for permanent physical and mental injuries, as well as substantial medical expenses, lost wages and diminished earning capacity for an indefinite period of time. In that case, the removing defendant's conclusory allegations that the jurisdictional amount was satisfied, without setting forth underlying facts to support that assertion, was deemed insufficient to meet defendant's burden of establishing federal court jurisdiction.

In *Navarro v LTV Steel Co.*, 750 F. Supp 930 (N.D. Ill. 1990) plaintiff filed a wrongful death action in Illinois State Court. Plaintiff's complaint did not set out a specific *ad damnum*, but rather, set forth only a minimum jurisdictional amount for the Cook County, Illinois Circuit Court. The court noted the "special difficulty" these facts presented in determining whether federal jurisdiction existed, noted further that it was unclear whether the requisite minimum amount in controversy for federal jurisdiction was satisfied, and determined that, rather than engage in guesswork as to whether the amount in controversy requirement was met, remand was appropriate. *See also, Gober*, 855 F. Supp at 160, *citing, Coleman v Southern Norfolk*, 734 F.Supp. 719 (E.D. LA. 1990), and *Cole v Great Atlantic & Pacific Tea Co.*, 728 F. Supp 1305 (E.D. Ky. 1990).

In the subject action, Plaintiff's Complaint alleges only that the amount in controversy exceeds the sum or value of fifteen thousand dollars (\$15,000.00), the minimum requisite jurisdictional amount for state circuit court in Florida. Plaintiff's Complaint alleges only that there was damage to Plaintiff's dwelling ad personal property, and contains no specified amount

of said damages.¹ Defendant has only speculatively alleged in the Notice of Removal, with no support whatever, that the “matter in controversy herein exceeds the sum of \$ 75,000 exclusive of interest and costs” and that this “fact is demonstrated by the extent of damage claimed by HOROWITZ and the demand for replacement or repair of the dwelling or property.” In fact, Plaintiff has alleged only damage to the dwelling, particularly its roof, and personal property in an unspecified amount.

In Stemmons v Toyota Tsusho America, Inc., 802 F. Supp. 195 (N.D. Ill. 1992), plaintiff’s complaint sought judgment for a sum in excess of \$30,000.00, and contained no allegations as to loss of sight or other serious injury (the minimum amount in controversy for diversity of citizenship jurisdiction at that time was \$50,000.00). Defendant there filed a Notice of Removal, claiming that the minimum amount in controversy requirement was met based on an informal telephone conversation with plaintiff’s counsel, during which plaintiff’s counsel indicated that the plaintiff may have lost sight in his eye. Interestingly, plaintiff there did not contest removal and actually wanted the federal court to assume jurisdiction. The federal court, *sua sponte*, remanded the action, and noted that “... an allegation in a notice of removal based on an assertion from opposing counsel during a phone conference will not suffice to confer jurisdiction for removal purposes. Stemmons, 802 F. Supp at 199, *citing*, Navarro v Subaru of Am. Operations Corp., 802 F. Supp. 191 (N.D. Ill. 1992).

Plaintiff submits that a review of the Complaint, Defendant’s Notice of Removal and a review of the well-established principle that the removal and remand statutes are to be strictly construed against removal, with all uncertainties to be resolved in favor of remand, compel

¹ While it is not Plaintiff’s burden, counsel for Plaintiff will represent to this Court that, to date, the only damage estimates or appraisals of which he is aware for this damage, range in value from approximately seven thousand and 00/100 (\$ 7,000.00) dollars to forty three thousand and 00/100 (\$ 43,000.00) dollars, well below the jurisdictional minimum required for diversity of citizenship. As it is not Plaintiff’s burden to establish the jurisdictional amount, no supporting documents are being filed herein, unless the Court so requests.

remand of the subject action. Again, it is the removing Defendant's burden to establish that the requisite minimum amount in controversy is met for diversity of citizenship removal jurisdiction. Given the general nature of Plaintiff's damage allegations, as well as the absence of any specified amount of damages in Plaintiff's *ad damnum* clauses, it is clear that the removing Defendant in the subject action has not met its burden of proving, by a preponderance of the evidence, that the requisite minimum amount for diversity of citizenship jurisdiction has been met in the subject action. Indeed, this very court has held that were the basis for federal jurisdiction is not apparent from the face of a complaint, a petition (now Notice), for removal cannot supply those bases. *Carroll Construction Co. v. Reneau*, 279 F. Supp. 715 (N.D. Fla. 1968). Accordingly, the subject action should be remanded to the state court.

ATTORNEYS FEES

Plaintiff seeks attorneys' fees and expenses of bringing this motion pursuant to 28 U.S.C. §1447. Absent unusual circumstances, courts may award attorney fees under the attorney fee provision of the removal statute only where the removing party lacked an objectively reasonable basis for seeking removal; conversely, when an objectively reasonable basis exists, fees should be denied *Martin v. Franklin Capital Corp.*, 126 S.Ct. 704 (2005). Plaintiff submits that Defendant, SAFECO, has demonstrated no objectively reasonable basis for seeking removal; therefore, this Court should award both expenses and attorneys' fees associated with opposing the Notice of Removal.

WHEREFORE, for all the foregoing reasons, Plaintiff, **DEBORAH HOROWITZ**, respectfully prays that this Honorable Court inquiry into this Motion for Remand, and enter an Order remanding the subject action to the State Court, in and for Orange County, Florida,

pursuant to 28 U.S.C. §1447, and further, for an award of just costs and actual expenses, including attorneys' fees incurred as a result of the removal pursuant to 28 U.S.C. §1447 (c).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2006, I electronically filed the foregoing Motion To Remand with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Andrew P. Rock, Esq., 2300 Maitland Center Parkway, Suite 101, Maitland, FL 32751.

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