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MARYLAND INVESTMENT, LLC, Plaintiff, v. MARK N. PAK, Defendant.

1:10-cv-1383-WSD

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
GEORGIA, ATLANTA DIVISION**

2010 U.S. Dist. LEXIS 104822

September 29, 2010, Decided

September 29, 2010, Filed

COUNSEL: [*1] For Maryland Investment, LLC, Plaintiff: James Edward Bischoff, LEAD ATTORNEY, Bischoff & White, Fayetteville, GA; Julia Ann Merritt, David J. Hungeling, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For Mark N. Pak, Defendant, Counter Claimant: James Bradley McClung, LEAD ATTORNEY, Carol Clark Law, Atlanta, GA.

For Maryland Investment, LLC, Counter Defendant: James Bradley McClung, LEAD ATTORNEY, Carol Clark Law, Atlanta, GA; David J. Hungeling, Law Office of David J. Hungeling, P.C., Atlanta, GA.

JUDGES: WILLIAM S. DUFFEY, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM S. DUFFEY, JR.

OPINION

OPINION AND ORDER

This matter is before the Court on Plaintiff Maryland Investment, LLC's ("Maryland Investment" or "Plaintiff") Motion to Remand [11].

I. BACKGROUND

This is a breach of contract action relating to a promissory note Defendant Mark N. Pak ("Pak" or "Defendant") signed in connection with a purchase of real property and which became due on October 11, 2007. Maryland Investment, assignee of the rights under the promissory note, initially filed this action in the Superior Court of Henry County, Georgia.

On May 7, 2010, Defendant removed the case to this court on the basis of diversity jurisdiction. Defendant [*2] is a resident of Florida. Defendant asserts that Patricia L. Collier, the sole member of Maryland Investment, is domiciled in Georgia. Mrs. Collier contends that she is domiciled in Florida. The parties do not dispute that diversity jurisdiction in this action is present only if Mrs. Collier is a domiciliary of Georgia. See *Rolling Greens MHP, L.P. v. Comcast SCH Holdings, LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004) (holding that a limited liability company is a citizen of any state of which a member of the company is a citizen).

Plaintiff submitted an affidavit from Mrs. Collier in which she states she resides in Volusia County, Florida at 3145 S. Atlantic Avenue, in Daytona Beach Shores, Florida, and that this residence is her primary residence and has been since July 2005. Mrs. Collier also states that she owns property in Georgia, but that her Georgia home is not her primary residence. Plaintiff also submitted evidence that Mrs. Collier is registered to vote in Florida, has a Florida driver's license, has a vehicle registered in

Florida, receives a Florida homestead tax exemption, and lists her Florida residence on her federal income tax return.

Defendant submitted an affidavit from [*3] Neal Tanner, who resides near Mrs. Collier's house in Georgia, and is socially acquainted with her. Mr. Tanner states that he met Mrs. Collier at a social gather at Defendant Pak's house, that he sees Mrs. Collier "approximately once every two weeks driving her Mercedes Benz" near her home in Georgia, that he recently saw her at a local restaurant, and that from 2006 to 2007, when he was a member of the Gold's Gym in Stockbridge, Georgia, he "routinely on Friday mornings" saw Mrs. Collier attending a spinning class. Mr. Tanner also states that Mrs. Collier's husband is an Atlanta area real estate developer and that the Collier's children attend a private school in Henry County, Georgia, and completed the 2009-10 school year there. Defendant also submitted evidence that Mr. Collier's business activities are conducted in Georgia. Defendant observes that Mrs. Collier's affidavit was notarized by a notary public commissioned in Clayton County, Georgia.

II. DISCUSSION

A. Removal and Diversity Jurisdiction

Under the removal statute "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal [*4] court. 28 U.S.C. 1441(a). The burden of showing that removal is proper is on the removing party. *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001). "[U]ncertainties are resolved in favor of remand." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994).

28 U.S.C. § 1332 provides for original federal jurisdiction of "all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). "Diversity jurisdiction, as a general rule, requires complete diversity -- every plaintiff must be diverse from every defendant." *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1564 (11th Cir. 1994). For diversity purposes, the Eleventh Circuit has held that a limited liability company is deemed to be a citizen of any state of which a member of the LLC is a citizen. *Rolling Greens*, 374 F.3d at 1022. "Citizenship for diversity

purposes is determined at the time the suit is filed." *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005).

B. An Individual's Citizenship

"Citizenship is equivalent to 'domicile' for purposes of diversity jurisdiction." [*5] *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002). "A person's domicile is the place of 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom" *Id.* at 1257-58 (quoting *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.1974), cert. denied, 419 U.S. 842, 95 S. Ct. 74, 42 L. Ed. 2d 70 (1974)). Residence in a state, by itself, is insufficient. *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954).

"'Domicile' is not necessarily synonymous with 'residence' . . . and one can reside in one place but be domiciled in another. For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Choctaw Indians Band v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). A presumption exists that a person's domicile continues until that party proves that his domicile has changed. *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353, 22 L. Ed. 584, 10 Ct. Cl. 120 (1874).

In determining domicile, a court should consider both positive evidence and presumptions. *Mitchell*, 88 U.S. (21 Wall.) at 352. One presumption is that the state in which a person resides at any given time is also that [*6] person's domicile. *District of Columbia v. Murphy*, 314 U.S. 441, 455, 62 S. Ct. 303, 86 L. Ed. 329 (1941); *Stine*, 213 F.2d at 448. But because changes in residence are so common, there is also a presumption that once an individual has established a domicile, he remains a citizen there until he satisfies the mental and physical requirements of domicile in a new state. *McDougald v. Jenson*, 786 F.2d 1465, 1483 (11th Cir. 1986).

No single factor is conclusive and courts looks to the "totality of evidence." *Jones v. Law Firm of Hill and Ponton*, 141 F. Supp. 2d 1349, 1355 (M.D. Fla. 2001). Therefore, the defendant may produce such factors as "payment of taxes, procurement of driver's license, exercise of voting rights, moving of personal belongings, ownership or rental of property, location of family, or place of employment." *Duff v. Beaty*, 804 F. Supp. 332,

335 (N.D. Ga. 1992). No single factor is of overriding importance and the court should examine the entire course of person's conduct in determining domicile. Duff, 804 F. Supp. at 335.

C. Analysis

It is Defendant's burden to demonstrate that removal was proper. McCormick, 293 F.3d at 1257 ("the party invoking the court's jurisdiction bears the burden of proving, by [*7] a preponderance of the evidence, facts supporting the existence of federal jurisdiction.").

Defendant argues that Mrs. Collier has established that she has a "paper presence" in Florida, but that her physical presence is in Georgia, where her husband works and her family lives, most persuasively demonstrated by the fact that her children are enrolled in school in Georgia. Plaintiff argues that "it is not uncommon for spouses to have different domiciles" and that the fact that Mrs. Collier's husband may be a domiciliary of Georgia and that her children attend school in Georgia is not determinative of Mrs. Collier's domicile.

In light of the evidence presented, and considering the totality of the circumstances, the Court concludes that Defendant has failed to provide sufficient evidence that Mrs. Collier is domiciled in Georgia. Defendant's evidence demonstrates only that Mrs. Collier spends time in Georgia at her Georgia residence. The Court finds that this evidence is outweighed by Mrs. Collier's sworn testimony that she is domiciled in Florida and the substantial evidence that she has maintained her status as a Florida domiciliary, including the facts that she has a Florida driver's [*8] license, is registered to vote in

Florida, and files her taxes from Florida. The fact that Mrs. Collier's family appears to reside in Georgia, and specifically that her children are enrolled in school in Georgia, may or may not suggest an intent to establish a Georgia domicile. While a close call, the Court finds that the evidence presented is not sufficient to establish Mrs. Collier's state of mind concerning her intent to remain indefinitely in Georgia or to establish a domicile here. See Holyfield, 490 U.S. at 48. Instead, the Court finds the preponderance of the evidence establishes that Mrs. Collier is domiciled in Florida.

Having found that Mrs. Collier is domiciled in Florida and is a citizen of Florida, Plaintiff Maryland Investment, LLC is thus a citizen of Florida for the purposes of diversity jurisdiction. Because both Plaintiff and Defendant are citizens of Florida, diversity jurisdiction is absent and this action must be remanded to state court.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiff Maryland Investment, LLC's Motion to Remand [11] is **GRANTED**. The Clerk of Court is **DIRECTED** to **REMAND** [*9] this action to the Superior Court of Henry County, Georgia.

SO ORDERED this 29th day of September, 2010.

/s/ William S. Duffey, Jr.

WILLIAM S. DUFFEY, JR.

UNITED STATES DISTRICT JUDGE