



Alabama Concrete Co., Inc. et al v. Argos Cement, LLC et al

2015 | Cited 0 times | N.D. Alabama | September 29, 2015

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ALABAMA CONCRETE CO., INC. MARY JANE MITCHELL, and MIRIAM MITCHELL ROLAND,
Plaintiffs, v. ARGOS CEMENT, LLC, and L. BRUCE ABLES,

Defendants.

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Case No.: 5:14-cv-01940-MHH

MEMORANDUM OPINION AND ORDER Plaintiffs Alabama Concrete Co., Inc., Mary Jane Mitchell, and Miriam Mitchell Roland have filed a motion to remand this declaratory judgment and tort action to state court. Defendant Argos Cement, LLC and former defendant L. Bruce Ables removed the action to federal court on the basis of diversity jurisdiction. 1

The plaintiffs argue that complete diversity of citizenship is lacking and that Argos and Mr. Ables did not establish by a preponderance of the evidence that more than \$75,000 is in controversy. The Court disagrees and denies the

1 The plaintiffs voluntarily dismissed their claims against Mr. Ables on September 25, 2015. (Docs. 26, 27).

FILED 2015 Sep-29 PM 01:06 U.S. DISTRICT COURT

N.D. OF ALABAMA

I. FACTUAL AND PROCEDURAL BACKGROUND This case is a business dispute concerning the right to buy shares of Alabama Concrete. The plaintiffs filed this lawsuit in the Circuit Court of Madison County, Alabama on September 8, 2014. (Doc. 1, p. 23). Assuming the truth of the allegations in the complaint for purposes of this motion to remand, the record demonstrates that Mr. Ables is the former CEO and President of Alabama Concrete. He also was a director of the company.



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(Doc. 1, p. 23, ¶ 5). Currently, Mr. Ables is the sole trustee of the Woodfin G. Mitchell Testamentary Trust and personal representative of the Last Will and Testament of Woodfin G. Mitchell. (Doc. 1, p. 24, ¶ 5). Ms. Mitchell and Ms. Roland, each own at least 37.5% of the stock of Alabama Concrete. (Doc. 1, p. 23, ¶¶ 3-4; Doc. 1, p. 26, ¶ 18). 2 On June 29, 2012, purportedly acting as president of Alabama Concrete and as a stockholder in his capacity as personal representative of the Estate of W. Gowen Mitchell, Mr. Ables executed a right of first refusal agreement in favor of Argos Cement. (Doc. 1, pp. 24-25, ¶¶ 9, 12; Doc. 1, pp. 40-43). The agreement gives Argos Cement the right of first refusal to purchase outstanding shares of 2 Mr. Mitchell bequeathed to his daughters, Ms. Mitchell and Ms. Roland, equal shares of all of the stock in Alabama Concrete that Mr. Mitchell owned at his death. (Doc. 1, p. 26, ¶ 17). Mr. Ables purports to own 5% of the stock of Alabama Concrete. (Doc. 1, p. 24, ¶ 5). Ms. Mitchell and Ms. Roland have filed a separate state court action in which they seek a declaration that Mr. Ables does not own an interest in Alabama Concrete. In that action, Ms. Mitchell and Ms. Roland ask the state court to remove Mr. Ables as trustee of the ersonal . (Doc. 1, p. 24, n.1).

Alabama Concrete on the same terms and conditions as any bona fide offer that Alabama Concrete shareholders receive and find acceptable. (Doc. 1, pp. 24-25, ¶ 10; Doc. 1, p. 40). Before he signed the agreement with Argos Cement, Mr. Ables did not present the agreement or its terms to the directors or shareholders of Alabama Concrete, and the directors and shareholders of Alabama Concrete did not ratify or agree to the terms of the right of first refusal. (Doc. 1, p. 25, ¶ 14). The plaintiffs allege that Mr. Ables had no authority to bind Alabama Concrete or to burden the Alabama Concrete stock that Ms. Mitchell and Ms. Roland currently own. (Doc. 1, p. 25, ¶¶ 14-15). The plaintiffs contend Right of Refusal has impeded and harmed Alabama Concrete and its stockholders

in their efforts to explore opportunities for the sale of Alabama Concrete to a third (Doc. 1, p. 27, ¶¶ 24-25). According to the plaintiffs, Argos Cement has used the right of first refusal to demand a lower price per share than Alabama Concrete and its shareholders otherwise could obtain in the absence of the right of first refusal. (Doc. 1, p. 27, ¶ 26). In their complaint, the plaintiffs request a declaration that right of first refusal is invalid and unenforceable under Alabama law. The plaintiffs also assert claims for tortious interference with business and/or contractual relations, conspiracy, and breach of fiduciary duty. (Doc. 1, pp. 27-30). As relief for this

alleged tortious conduct, t

Pursuant to 28 U.S.C. § 1446(b), Argos filed a notice of removal on October 10, 2014, within thirty days of service. (Doc. 1). In its notice of removal, Argos asserts that the Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332. (Doc. 1, p. 1). Argos attached to its notice of removal the following evidence in support of diversity of citizenship and the amount in controversy: (1) a declaration from Argos Cement District Sales Manager Judith Funderburke, (Doc. 2, pp. 5-20), and (2) a declaration from Mr. Ables, (Doc. 1, pp. 86-88). Mr. Ables consented to removal. (Doc. 1, p. 102). The plaintiffs have asked the Court to remand this action to the Circuit Court of Madison County,



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Alabama. (Doc. 13). In support of their motion, the plaintiffs have Testament and certified copies of various filings associated with the probate of

, (Doc. 13-1); (2) copies of a state court complaint and related ad litem in , (Doc. 13-2); (3) a copy of an order ad litem, (Doc. 13- purchase of a home in Huntsville, Alabama on May 3, 2013, (Doc. 13-4); and (5)

counsel, (Doc. 13-5; Doc. 13-6).

The Court heard oral argument from the parties on December 10, 2014. During a supplemental hearing on January 12, 2015, Mr. Ables testified under oath regarding his citizenship. 3

II. DISCUSSION

which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States

28 U.S.C. § 1441(a). After a defendant removes an action to federal court, the Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th

Cir. 1999). One basis for federal jurisdiction matter in controversy exceeds the sum or value of \$75,000, exclusive of interest

and costs, and is between [] citizens of a different States 28 U.S.C. § 1332(a)(1); on v. Osting-Schwinn, 613 F.3d 3 Court reporters recorded both hearings, and transcripts are available upon request.

must be completely diverse, and the amount in controversy must exceed \$75,000,

(citations omitted). The plaintiffs concerns both the amount in controversy and the citizenship prongs of § 1332(a).

The Court examines them in turn.

A. Amount in Controversy § 1446(c)(2)(B) Dart Cherokee Basin Operating Co., LLC v. Owens, 135

S. Ct. 547, 553- the evidence, whether the amount-in-controversy require Id. at 554. Id. (quoting H.R. Rep. No. 112 10, p. 16 (2011)).

The preponderance of the evidence standard does not require a removing dPretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 754 (11th



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Cir. 2010); see also Dart, 135 S. Ct. at 554 (quoting H.R. Rep. No. 112 10, p. 16 (2011)). What counts is the amount in

S. Fla. Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312, 1315 (11th Cir. 2014). In conducting its analysis, the district court may reasonable deductions, reasonable inferences, or other reasonable common sense in determining whether the case stated in a complaint meets federal jurisdictional Pretka, 608 F.3d at 754; Dudley v. Eli Lilly & Co., 778 F.3d 909, 917 (11th Cir. 2014) (citing S. Fla. Wellness, 745 F.3d at 1315); Roe v. Michelin North America, Inc., 613 F.3d 1058, 1062

S. Fla. Wellness, 745 F.3d at 1317.

e or declaratory relief is the value of the object of the litigation pers Id. at 1315-16 (quoting Morrison v. Allstate Indem. Co., 228 F.3d

1255, 1268 (11th Cir. 2000), in turn quoting Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc., 120 F.3d 216, 218 20 (11th Cir. he monetary value of the benefit that would flow to the plaintiff if the [relief the plaintiff Id. at 1316 (quoting Morrison, 228 F.3d at 1268 declar satisfy the amount-in- Id. (quoting Morrison, 228 F.3d

at 1269); see also Morrison, 228 F.3d at 1268-69 (district the benefits resulting from an injunction are not counted where they are so

uncertain that the court cannot reasonably determine whether the amount of money

would flow to the prong for diversity

jurisdiction. The plaintiffs seek this relief because they claim that the right of first [them] in their pursuit of opportunities to sell Admittedly, the record contains no evidence of a present offer to purchase Alabama Concrete stock at any price or of the lowest price Alabama Concrete shareholders would accept in exchange for their stock. Still, the Court has little trouble reasonably inferring that the benefit that would flow to the plaintiffs from the declaratory relief sought has a monetary value that exceeds \$75,000. It strains credulity to believe that the plaintiffs would

reduced the sales price of Alabama Concrete by \$75,000 or less.

This is not mere guesswork. In February 2014, Argos offered to buy Alabama Concrete for \$10,500,000 to \$11,500,000. (Doc. 2, pp. 9, 12). Believing that Alabama Concrete is worth more, the plaintiffs counter-offered a purchase price of \$14,000,000. (Doc. 2, p. 8, ¶ 13; Doc. 2, p. 9). The parties executed a letter of intent under which Argos would purchase Alabama Concrete for of the shares of Alabama Concrete. (Doc. 2, p. 8, ¶¶ 13-14). The plaintiffs



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contend that the right of first refusal has: (1) diminished the value of Alabama Concrete stock; and (2) depressed the market for Alabama Concrete stock. (Doc. 1, p. 27, ¶ 26). Given that Alabama Concrete has been valued at more than \$10 million dollars, the value of the benefit that would flow to the plaintiffs if the Court \$75,000.

And the plaintiffs are not seeking only declaratory relief. They also are pursuing claims for compensatory and punitive damages under a variety of tort he value of the damages claims must be aggregated with that of the Hardy v. Jim Walter Homes, Inc., 2007 WL 1889896, at *4 (S.D. Ala. June 28, 2007); see also Exxon Mobile Corp. v. Allapattah Servs., Inc. Case 5:14-cv-01940-MHH Document 28 Filed 09/29/15 Page 9 of 17 determining whether the amount-in-controversy requirement has been satisfied, a single plaintiff may aggregate two or more claims against a single defendant, even Common sense dictates that more than \$75,000 is in controversy. See Roe, 613 F.3d at 1062. B. Diversity of Citizenship MacGinnitie v. Hobbs Group, LLC, 420

F.3d 1234, 1239 (11th Cir. 2005) (per curiam), abrogated on other grounds by Hertz Corp. v. Friend, 559 U.S. 77 (2010); see also 28 U.S.C. § 1332(a). existed at the time of filing. Grupo Dataflux v. Atlas Global Group, L.P., 541

U.S. 567, 570 (2004) (internal citation omitted). 4

The burden to show the jurisdictional fact of diversity of citizenship is on the party that removed the action to federal court. See Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001). The plaintiffs are Alabama citizens. (Doc. 1, p. 23). Argos Cement is a Virginia citizen. (Doc. 1, p. 23). Had the plaintiffs sued Mr. Ables only in his

4 Although Mr. Ables no longer is a party to this action, the Court still must determine whether it had jurisdiction over the action when Argos and Mr. Ables removed the lawsuit to federal court. See Simmons v. Skyway of Ocala jurisdiction are determined on the basis of the facts at the time the suit was filed, and subsequent facts or changes in the domicile of either party do not Smith v. Sperling, 354 U.S. 93, 91 (1957)).

capacity as personal representative of Mr. Mitchel would be considered an Alabama citizen, and his presence would destroy diversity of citizenship. 5

28 U.S.C. § 1441(b)(2) prohibits a resident defendant from removing a case to federal court. The Court is not satisfied, though, stated a claim against Mr. Ables in plaintiffs have sued Young Apartments, Inc. v. Town of Jupiter,

Fla., 529 F.3d 1027, 1047 (11th Cir. 2008). have a duty to Id. (quoting Colvin v. McDougall, 62 F.3d 1316, 1318 (11th Cir. 1995)). does not designate Mr. Ables as a defendant to this action estate. The caption refers only plaintiffs



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sued Mr. Ables based on conduct in which he engaged in his capacity as president and CEO of Alabama Concrete or in his capacity as the personal representative of . 5 Mr. Mitchell was a citizen of Alabama when he died. Mr. Ables filed a petition for probate of of -1). § 1332(c)(2).

does not mention representative capacity. (Doc. 1, p. 45). t attempt to serve Mr. Ables failed, the plaintiffs . (Doc. 1, p. 69). Ms. Mitchell and Ms. Roland previously sued Mr. Ables in a separate state court action in the Circuit Court of Madison County, Alabama. 6

The caption to that complaint identifies Mr. Ables as a defendant in his personal representative capacity. (Doc. 1, p. 90). The preamble to that complaint states . . . file this action against [Ables] individually, and in his capacity . . . as the Personal Representative of the Last Will and Testament of Woodfin G. Mitchell . . . Doc. 1, pp. 90-91). The plaintiffs knew how to sue Mr. Ables in his capacity as personal representative they failed to do so here. Therefore, the Court must determine whether Mr. Ables, in his individual capacity, is a citizen of Alabama or Tennessee. domicile for purposes of diversity Simpson v. Fender, 445 Fed. Appx. 268, 270 (11th Cir. 2011)

6 That action is styled The Woodfin G. Mitchell Testamentary Trust, et al. v. L. Bruce Ables, et al., 47-CV-2014-901446.00. The record is available on the Alacourt website. The Court takes judicial notice of that record. See Horne v. Potter, 392 Fed. Appx. 800, 802 (11th Cir. 2010) (district court properly took judicial notice of documents related to the plaintiff ting Fed. R. Evid. 201(b); other internal

citations omitted).

(quoting McCormick v. Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002)). 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 Id. (internal citation and quotation marks omitted). change of domicile requires . . . (1) physical presence at the new location with (2) an Id. (internal citation and quotation marks omitted). Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1346 (11th

Cir. 2011). e facts, no single one Slate v. Shell Oil Co., 444 F. Supp. 2d 1210, 1215 (S.D. Ala. 2006) (internal citations omitted).

Among the objective facts that point to whether an individual has established a domicile include: location of employment; home ownership and ownership of other s household furnishings s automobiles; s licensing; voter registration; payment for utilities; banking; acquiring a telephone number and listing it; receiving mail; and establishing membership in local, professional, civic, religious, or social organizations. In addition to these objective criteria, the domicile s subjective statements of intent, though they are not dispositive.



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Lee v. Airwalk Alabama, LLC, 2013 WL 4482613, at *3 (N.D. Ala. Aug. 19, 2013) (citing Audi Performance & Racing, LLC v. Kasberger, 273 F. Supp. 2d 1220, 1226-27 (M.D. Ala. 2003)). The plaintiffs maintain that Mr. Ables is domiciled in Alabama for three reasons: (1) Mr. Ables is a long-time resident of Madison County, Alabama; (2) Mr. Ables has practiced law in Huntsville, Alabama for nearly 50 years; and (3) Mr. Ables and his wife recently bought a house in Huntsville, on which the couple claim a homestead tax exemption. (Doc. 13, p. 5). The evidence demonstrates that all of that is true, 7

but the plaintiffs in the record.

Mr. Ables has substantial and more permanent ties to Tennessee. Mr. Ables was a resident of Madison County, Alabama until 2001 when Mr. Ables built a house on land in Tennessee where he was born and raised. (Tr. pp. 6, 37). Since 2001, Mr. Ables has lived in Tennessee even though he continued to work in Alabama. (Doc. 1, p. 87; Tr. p. 37). For seven or eight years, Mr. Ables filed non-

7 Mr. Ables practiced law with the Huntsville, Alabama law firm of Ables Baxter & Parker P.C. <http://www.ablesbaxter.com/Attorneys/L-B-Ables.shtml> (last visited September 29, 2015)). Mr. Ables is a member of the Alabama Bar Association. (Tr. p. 5). As recently as 2010, Mr. Ables was the president of Alabama Concrete, a company located in Madison County, Alabama. (Tr. p. 8). Mr. Ables received income from Alabama Concrete until June 2014. (Tr. p. 40). In May 2013, Mr. Ables and his wife bought a house on Adams Street in Huntsville, Alabama. (Tr. p. 5). Mr. Ables benefits from a homestead exemption that his wife filed on that property, and the -4, pp. 2-3; Tr. p. 4, 9-10, 27). In 2008, Mr. Ables completed a notary application which indicated that he resided in Huntsville, Alabama. (Tr. pp. 19-

resident tax returns for income he earned in Alabama. (Tr. pp. 18, 39). Mr. Ables and his wife bought the Adams Street house in Huntsville so that his wife could have a home closer to her children who live in Alabama. (Tr. pp. 3, 37). Typically, Mr. Ables spends two nights per week at the Huntsville house and three nights per week and all weekends and holidays at his home in Tennessee. 8

(Tr. p. 4). Mr. Ables testified that he intends to live out his days on his property in Tennessee. Mr. Ables is registered to vote in Tennessee, and he receives mail at his house in Tennessee. (Doc. 1, p. 87; Tr. p. 32). Mr. Ables has a Tennessee (Doc. 1, p. 87; Tr. p. 32). 9

phone number begins with a Tennessee area code. (Tr. p.

8 The plaintiffs served Mr. Ables with a copy of the summons and complaint by leaving the document the house in Tennessee. (Doc. 1, p. 80, ¶ 2; see also Doc. 1, pp. 69-70). According to Alabama Rule of Civil Procedure 4, the plaintiffs believed the house in Co indicative of domicile. But the Supreme Court of Alabama has recognized that the terms suggest some degree of permanence. See *Allsopp v. Bolding*, 86 So. 3d 952, 961-62 (Ala. 2011). 9 The plaintiffs cite *Las Vistas Villas v.*



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Peterson, 778 F. Supp. 1202, 1205 (M.D. Fla. 1991), , 13 F. 3d 409 (11 license and voter registration are not determinative of domicile. The facts of Las Vistas Villas are distinguishable from the facts of this case. The defendant in Las Vistas Villas was a law student. Las Vistas Villas, 778 F. Supp. at 1205. The court stated:

Students who reside in a state while pursuing an education can be expected to bank accounts, or having mail delivered to a local address. These acts do not evince an intent to change domicile, where a student has no postgraduation commitment to the state.

36). Mr. Ables has a Tennessee hunting license, and his two hunting dogs live at equipment are registered in Tennessee. (Tr. p. 54). Mr. Ables is a member of the

-Op and Tennessee Farm Bureau. (Tr. p. 5). Mr. Ables shops for groceries physicians are located in Tennessee. (Tr. p. 35). Mr. Ables avers that he has no

plans to move to Alabama or any other state. (Doc. 1, p. 87). Because McDonald v. Equitable Life Ins. Co. of Iowa, 13 F. Supp. 2d 1279, 1281 (M.D.

Ala. 1998). The totality of the evidence demonstrates that Tennessee is the place true, fixed, and permanent home and principal establishment, and to which he has the i Simpson, 445 Fed. Appx. at 270. with Alabama is not objective and subjective permanent connecti McNeal v.

Workmaster, No. 2:09cv758, 2009 WL 4508545, at *3 (M.D. Ala. Nov. 30, 2009).

Id. Mr. Ables is not a student. Mr. Ables built a house in Tennessee 14 years ago, and he has demonstrated his intent to remain indefinitely in Tennessee, despite his ties to Alabama. Therefore, Las Vistas Villas is unpersuasive.

Therefore, the Court finds that Mr. Ables is domiciled in Tennessee and is a Tennessee citizen for purposes of diversity jurisdiction. 10 IV. CONCLUSION For the reasons discussed above, the Court finds that the parties are completely diverse and that more than \$75,000 is in controversy. Therefore, the Court DENIES On or before October 12, 2015, the parties shall con meeting pursuant to Federal Rule of Civil Procedure 26(f).

DONE and ORDERED this September 29, 2015.

DISTRICT JUDGE MADELINE HUGHES HAIKALA UNITED STATES

10 In their motion to remand, the plaintiffs request an opportunity to conduct jurisdictional (Doc. 13, p. 6). The record before the Court is sufficient for the Court to determine that Mr. Ables is domiciled



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in Tennessee. Therefore, no jurisdictional discovery is necessary.

