



Golisano v. Turek

2015 | Cited 0 times | W.D. New York | February 2, 2015

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

_____ B. THOMAS GOLISANO, Plaintiff, vs. WALTER TUREK,
Defendant. _____ DECISION AND ORDER WALTER TUREK,
14-CV-6411-CJS Counter-Claimant, vs. B. THOMAS GOLISANO, Counter-Defendant.
_____ WALTUR TUREK, Third Party Plaintiff, vs. BLUE TIE,
INC. Third Party Defendant. _____

APPEARANCES For Plaintiff/Counter-Defendant: Glenn E. Pezzulo, Esq.

Culley, Marks, Tanenbaum & Pezzulo 36 Main Street West Suite 500 Executive Office Building
Rochester, NY 14614-1790 (585) 546-7830 For Defendant/Counter-Claimant: John G. Powers, Esq.

Daniel B. Berman, Esq. Nina I. Brown, Esq. Hancock Estabrook, LLP 1500 AXA Tower 1 100
Madison Street Syracuse, NY 13202 (315) 565-4500 INTRODUCTION Siragusa, J. This case, removed
from New York State Supreme Court on diver- sity jurisdiction, is before the undersigned on
Plaintiff s motion to remand, filed on Au- gust 11, 2014, ECF No. 7. For the reasons stated below, the
Court grants defend- ant/counter-claimant Walter Turek limited discovery on the issue of
plaintiff/counter-

BACKGROUND Plaintiff commenced this breach of contract lawsuit by filing a complaint in state
court alleging, inter alia, that defendant Wal [in] . . . i- vidual residing at . . . 1 2, Jun. 10, 2014, ECF
No. 1-2. Golisano loan at issue was made by JPMorgan Chase Bank, N.A., to BlueTie, Inc., with its princi-

pal place of business in Monroe County, New York, in the amount of \$3,500,000.00, and guaranteed
by Turek and two others. The borrower and guarantors defaulted, and guarantees.

Golisano alleges that Turek unconditionally guaranteed obligation to repay the loan, and that Turek
failed to pay his pro-rata portion of the debt, amounting to \$780,190.83. Moreover, Golisano alleges
that Turek has been unjustly enriched as well.

Turek removed the lawsuit to this Court, alleging diversity jurisdiction based on his position that at
the time the action was commenced, he was a resident of Florida, and Golisano was a resident of
New York. Notice of Removal, Jul. 22, 2014, ECF No. 1. Golisano moved to remand, alleging that he
was actually a citizen of the State of Flori- da. Mot. to Remand, Aug. 11, 2014, ECF No. 7. Golisano



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filed an affidavit swearing that [has] been since [he] filed a Declaration of Domicile in Florida in 2009 6, Aug. 8, 2014, ECF No. 7-4. Golisano also declares that he owns numerous properties in Florida, has a Florida driver's license, is registered to vote in Florida, and has a Homestead Exemption in Florida. Finally, he

Y Id.

STANDARDS OF LAW As the Second Circuit explained in *Palazzo v. Corio*, 232 F.3d 38 (2d Cir. 2000): A party's citizenship for purposes of the diversity statute, 28 U.S.C. § 1332 (1994), is a mixed question of fact and law. See, e.g., *Francis v. Goodman*, 81 F.3d 5, 7 (1st Cir.1996); *State Farm Mutual Automobile Insurance Co. v. Dyer*, 19 F.3d 514, 518 (10th Cir.1994); *Sheehan v. Gustafson*, 967 F.2d 1214, 1215 (8th Cir.1992). The legal components of the question are well established. An individual's citizenship, within the meaning of the diversity statute, is determined by his domicile. See, e.g., *Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998) (a person has his true fixed home and principal establishment, and to which, Id. at 948 (internal quotation marks omitted)). At any given time, a person has but one domicile. See, e.g., *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir.1992). Domicile is established initially at birth and is presumed to continue in the same place, absent sufficient evidence of a change. See *Linardos v. Fortuna*, 157 F.3d at 948. To effect two things are indispensable: First, residence in a new domicile; and, second, the intention to remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Id. (quoting *Sun Printing & Publishing Ass'n v. Edwards*, 194 U.S. 377, 383, 24 S. Ct. 696, 48 L. Ed. 1027 (1904)). Questions as to a person's domicile are resolved by the totality of the facts. *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 244 (2d Cir.1984). A party alleging that there has been a change of domicile has the burden of proving coupled with an actual acquisition Id. at 243-44.

(internal quotation marks omitted). *Palazzo*, 232 F.3d at 42. Of course, if this case lacks complete diversity, this Court is without jurisdiction and would be required to grant Golisano's application to remand it to state court. 28 U.S.C.A. § 1442. In resolving a motion to remand, courts must be mindful of considerations of federalism and the limited jurisdiction conferred on subject matter jurisdiction courts and should strictly construe[] the federal removal statute, resolving all doubts in favor of remand. *Vasura v. Acands*, 84 F. Supp. 2d 531, 533 (S.D.N.Y. 2000) (quoting *Miller v. First Security Investments, Inc.*, 30 F. Supp. 2d 347, 350 (E.D.N.Y. 1998) (internal quotation marks omitted)).

ANALYSIS Turek argues in his memorandum in opposition to Golisano's motion, and an affi-

burden to demonstrate a change of domicile necessary to justify remand of this case to state court. s Mem. of Law 1. Turek has included news articles showing Golisano or pledged in excess of \$24 million to organizations serving Rochester and the sur-

Id. Further, Turek points out that Golisano purchased the Buffalo- potential bid to buy the Buffalo Bills, [t]he important thing is someone buys (the team) and keeps it in western New York. Id. (quoting



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Berman Decl. ¶ 11, Ex. 6, Aug. 25, 2014, ECF No. 10-2). Turek also points out that even Golisano's affidavit, claiming Florida is his domicile, was made in Monroe County, New York. Id. 3.

Turek relies in part on *Ceglia v. Zuckerberg*, 772 F. Supp. 2d 453, 456 (W.D.N.Y. 2011). In that case, the Honorable Richard Arcara of this Court wrote concerning Mark Zuckerberg's claim that his domicile had changed from New York to California. After affirming the burden of proving it by (citation omitted), Judge Arcara stated,

Courts consider the following objective indicators to ascertain domiciliary intent:

current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration [and] payment of taxes. See *Connolly v. Spielman*, 999 F. Supp. 270, 272-73 (N.D.N.Y. 1998) (citing 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3612, (2d ed. 1984)). No single factor is conclusive and the determination is made based upon the totality of the circumstances. Turek argues that unlike the situation in *Zuckerberg*, Golisano still maintains a residence in New York, built his fortune and maintains business interests in New York, used his New York residence when he filed the action that started this case, and used his New York address for notices to be provided to him under the contract that is at issue in this case. Turek Mem. of Law 45, Aug. 25, 2014, ECF No. 10. Further, Turek points out that unlike *Zuckerberg*, who stated that he spent no more than ten days in New York, Golisano claims to have spent only the time in Florida necessary to avoid New York income tax-

Id. 5. Golisano is chairman of the company he founded, which is in New York, unlike Facebook, founded by Zuckerberg, which is located in California. Turek also points out that Golisano's affidavit is silent with respect to the other factors considered by Judge Arcara in *Zuckerberg*, such as:

the location of his brokerage and bank accounts; membership in churches, clubs, and other associations; the location of his physician, accountant, lawyers (other than the Rochester New York lawyer who brought this action), or dentist, all of which are factors to be considered by courts looking at the totality of the circumstances. *Ceglia*, 772 F. Supp. 2d at 456; see also, *Pacho*, 510 F. Supp. 2d at 333. Interestingly, while Plaintiff points out that he is registered to vote in Florida (*Golisano Dec.* ¶ 6), he makes no mention of having exercised this franchise. Id. Turek also addresses the fact that Golisano pays no New York taxes arguing that this does not foreclose a finding that New York is his domicile. In support, he cites to *Pacho v. Enterprise Rent-A-Car*, 510 F. Supp. 2d 331, 333 (S.D.N.Y. 2007), which emphasizes in determining one's domicile. While the Court is certainly aware of the need to respect the doctrine of comity, 1

see *Pacho*, 510 F. Supp. 2d at 334 (citing *Horton v. Bank One, N.A.*, 387 F.3d 426, 435-36 (5th Cir.), cert. denied, 546 U.S. 1149 (2006); *Rishell v. Jane Phillips Episcopal Medical Ctr.*, 12 F.3d 171, 172 (10th



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Cir. 1993), cert. denied, 520 U.S. 1166 (1997); *Rodriguez Diaz v. Sierra Martinez*, 853 F.2d 1027, 1030 (1st

1 The cases the Court's research found addressing comity in the tax realm concern taxpayer suits to en-join the collection of taxes by the state. Cir. 1988); 15 James Wm. Moore, et. al., *Moore's Federal Practice*, § 102.34[3][a] (3d ed.2007)).

Following oral argument of the motion, Golisano filed additional evidence. ECF No. 21. Included were the following:

1. Florida Declaration of Domicile (Acknowledged May 6, 2009); 2. Florida Department of Revenue Application for Ad Valorem Tax exemption (signed May 6, 2009); to Town of Mendon (May 8, 2009); 5. Florida Voter Registration (dated May 6, 2009); 6. Copies (2 pages) Last Will and Testament (dated March 9, 2010); 7. Letter from Timothy Noonan, who represented Mr. Golisano with respect to proceedings in front of the New York State Tax Department on the issue of New York State Department of Taxation Proceedings (w/o exhibits); 8. Domicile Summary prepared by Timothy Noonan, Esq.; 9. Copy of NY Tax Law §605(c) - charitable giving not factored into domicile determination. Letter of Glenn E. Pezzulo to the Court, Sept. 30, 2014, ECF No. 21. Turek addressed the supplemental submissions, arguing they were insufficient to establish a change of domicile by clear and convincing evidence:

Following the Court's invitation to submit additional proof of his change of domicile, the Plaintiff submitted a copy of his driver's license [Dkt. 21-4], an unsigned and undated voter registration form [Dkt. 21-5], as well as tax documents by which Mr. Golisano terminated the STAR exemption on his real property in Fishers, New York [Dkt. 21-3], and claimed a homestead exemption in Florida [Dkt. 21-2].² He did not provide any information with respect to other factors previously identified by Defendant that courts have held to be indicative of domicile, including, the location of his brokerage and bank accounts; membership in churches, clubs, and other associations; the location of his physician, accountant, lawyers (other than the Rochester New York lawyer who brought this action), or dentist. See *Ceglia v. Zuckerburg*, 772 F. Supp. 2d 453, 456 (W.D.N.Y. 2011); *Pacho v. Enterprise Rent-A-Car*, 510 F. Supp. 2d 331, 333 (S.D.N.Y. 2007). points out that as with the plaintiff in *Gold v. Katz*, No. 90 Civ. 7726 (RLC), 1991 WL 237807 (S.D.N.Y. Nov. 4, 1991), still retains a New York home, which was originally his primary residence under the contract in dispute here, and used his New York residence when filing the

present lawsuit in state court. Compl. ¶) & Ex. D (Loan Sale Agreement

¶ 10). In *Gold* the factors pertaining to domicile weigh nearly equally in favor of Gold, 1991 WL 237807, at *3, but ruled that he was a New York domiciliary. However, in *Gold*, it was only months before the lawsuit began that the plaintiff averred he became a Florida domiciliary. Here, Golisano



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maintains that he established his domicile in Florida in 2009, several years prior to the commencement of the subject lawsuit.

by his attorney, who relies on facts to establish domicile in Florida to his satisfaction. However, Golisano has not established a Florida domicile by clear and convincing evidence. While Turek asks the Court to simply declare Golisano's domicile is New York, the Court is not persuaded that it can make the factual determinations necessary on the record before it. Consequently, the Court will grant Turek's alternative request for relief that he be permitted to conduct discovery was commenced. Following such limited discovery, the Court will schedule a hearing for

the purpose of taking testimony and receiving evidence in order to make the factual determinations necessary to decide whether Golisano was a domiciliary of New York, or was a domiciliary of Florida, at the time the action was commenced. *Badilla v. National Air Cargo, Inc.*, No. 12-CV-1066A, 2013 WL 5723324, at *11 (W.D.N.Y. Oct. 21, 2013) pertinent facts bearing on the question of jurisdiction are controverted ... or where a more satisfactory showing of the facts is necessary, jurisdictional discovery should be granted. *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2006 WL 708470, *6 (S.D.N.Y.2006)).

CONCLUSION For the reasons stated above, the Court grants Turek's request for limited discovery as outlined above. In that regard, Turek is directed to settle an order with Golisano and present the same to the Court for consideration no later than February 13, 2015. Once such discovery is completed, the parties are directed to notify the Court in writing, and the Court will then set a hearing date for the receipt of evidence on the question of Golisano's domicile.

IT IS SO ORDERED. Dated: February 2, 2015 Rochester, New York /s/ Charles J. Siragusa CHARLES J. SIRAGUSA United States District Judge

