

**STEVE SILVER COMPANY, Plaintiff, vs. ROBERT CREAMER, d/b/a CREAMER FURNITURE, Defendants.**

**CA 3:02-CV-2411-R**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION**

**August 20, 2003, Decided**

**August 20, 2003, Filed**

**DISPOSITION:** Plaintiff's motion to remand granted and case remanded.

<sup>1</sup> See *Joint Status Report*

<sup>2</sup> See *Defendant's Answer to Plaintiff's Second Amended Complaint* at P 10.

**COUNSEL:** For Steve Silver Company, Plaintiff: Ronald Z Aland, LEAD ATTORNEY, Law Office of Ronald Z Aland, Dallas, TX.

For Robert Creamer, Defendant: Shayne Daniel Moses, LEAD ATTORNEY, Cantey & Hanger, Fort Worth, TX.

**JUDGES:** JERRY BUCHMEYER, JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS.

**OPINION BY:** JERRY BUCHMEYER

**OPINION**

<sup>3</sup> See *Plaintiff's Response to Notice of Removal; Motion to Remand; and Brief.*

**MEMORANDUM OPINION AND ORDER**

Now before this Court is Plaintiff Steve Silver Company's ("SSC") **MOTION TO REMAND** (filed December 16, 2002). After careful consideration of the pleadings and the applicable law, Plaintiff's Motion is **GRANTED**.

Accordingly, this Court is called upon to determine whether Creamer's removal of this action to federal court was proper, e.g. whether the proper amount in controversy exceeds \$ 75,000.

**II. ANALYSIS**

**I. FACTUAL BACKGROUND**

SSC is a Texas corporation with its principal place of business in Forney, Kaufman County, Texas. Defendant Robert Creamer d/b/a/ Creamer Furniture ("Creamer") has its principal place of business in Shreveport, Louisiana. In July 1999, SSC and Creamer entered into an agreement whereby Creamer agreed to purchase from SSC at a 65% discount "seconds" furniture, on the condition that SSC would provide (free of additional charge) replacement parts missing from the boxes purchased by Creamer, and Creamer agreed to purchase any additional parts that were not in the boxes. <sup>1</sup> According to Creamer, SSC also agreed to accept return of furniture which was damaged beyond repair and furniture for which repair parts were not available. <sup>2</sup>

**A. Removal Jurisdiction**

Under 28 U.S.C. § 1441(a), a civil action may be removed if jurisdiction would have been originally proper in federal court. Any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court. *Cross v. Bankers Multiple Line Ins. Co.*, 810 F. Supp. 748, 750 (N.D. Tex. 1992). The removing party bears the burden of establishing the existence of federal jurisdiction. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir.); see also *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998).

A district court may exercise removal jurisdiction in one of two ways: (1) the existence of a federal question and (2) if there is complete diversity of citizenship among the parties. 28 U.S.C. §§ 1331, 1332. An exami-

nation of the pleadings reveals that this case presents no federal question. Therefore, this Court cannot exercise federal question jurisdiction. However, this Court may properly exercise diversity jurisdiction if: (1) the plaintiff and defendant do not share citizenship and (2) the amount in controversy exceeds \$ 75,000.

In removal actions, if the plaintiff's complaint does not mention a sum of damages, the removing defendant must demonstrate by a preponderance of the evidence that "the amount in controversy exceeds the jurisdictional amount." *St. Paul*, 134 F.3d at 1253; see *De Aguilar*, 47 F.3d at 1409; *Luckett v. Delta Airlines, Inc.* 171 F.3d 295, 298 (5th Cir. 1999). The defendant meets this burden if: "it is apparent that from the face of the petition that the claims are likely to exceed \$ 75,000, or, alternatively, (2) the defendant sets forth 'summary judgement type of evidence' of facts in controversy that support a finding of the requisite amount." *Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) (citing *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999)).

#### B. The Amount in Controversy

In this instance, the parties do not dispute that complete diversity exists. However, the parties are in dispute as to whether the amount in controversy exceeds \$ 75,000. Specifically, SSC argues that this Court lacks jurisdiction because Creamer has not established an amount in controversy in excess of \$ 75,000.<sup>4</sup> On the other hand, Creamer argues that the amount in controversy exceeds \$ 75,000 because his damages will far exceed that amount.<sup>5</sup>

<sup>4</sup> See *Plaintiff's Response to Notice of Removal; Motion to Remand; and Brief* at 2-3.

<sup>5</sup> See *Defendant's Notice of Removal* at 3.

In examining SSC's Original Complaint, this Court notes that it does not include a monetary request for damages. Therefore, in accordance with the aforementioned legal standards, Creamer must establish by a preponderance of evidence that his damages exceed \$ 75,000. Creamer's initial Notice of Removal contains only a conclusory allegation that the amount in controversy exceeds \$ 75,000. Specifically, Creamer states that:

The amount in controversy in this action exceeds, exclusive of interests and costs, the sum of \$ 75,000.00. [Plaintiff's Original Complaint] does not claim a specific amount of damages; however, should Plaintiff prevail on its claim, Defendant would be damaged greatly in excess of the \$ 75,000.00.<sup>6</sup>

<sup>6</sup> *Id* (emphasis added).

According to the Fifth Circuit, "when a defendant seeks to remove a case, the question of whether jurisdiction exists is resolved by looking at the complaint at the time the petition for removal is filed." *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990); see also, *Dallas County v. Teter*, No. 3:03-CV-1564-H, 2003 U.S. Dist. LEXIS 13414, at \*4 (N.D. Tex. Aug. 1, 2003). As noted above, at the time of Creamer's petition for removal, he merely states that his damages would exceed \$ 75,000. Creamer's Second Supplement to his Notice of Removal includes an affidavit, wherein Creamer offers a sworn statement mentioning that, "[at] issue [in the present action] are invoices totaling over \$ 100,000. . . and SSC's breach of [the] agreement has forced [him] to incur landfill costs, disposal costs, rent and legal fees that otherwise would not have occurred."<sup>7</sup> Essentially, Creamer's post-removal affidavit purports to elaborate on the amount in controversy, which was not specified in his Notice of Removal. Regarding such post-removal evidence, the Fifth Circuit, in *Allen v. R & H Oil & Gas Co.*, explained that:

Removal, however, cannot be based simply upon conclusory allegations. . . under any manner of proof, *the jurisdictional facts that support removal must be judged at the time of the removal*, and any post-petition affidavits are allowable only if relevant to that period of time.

<sup>63</sup> F.3d 1326, 1335 (5th Cir. 1995) (citations omitted) (emphasis added).

<sup>7</sup> See *Index to Second Supplement to Defendant's Notice of Removal, Affidavit of Robert N. Creamer* at 2.

Accordingly, the Court notes that the affidavit is relevant, but not dispositive. In fact, judging the jurisdictional facts at the time of removal, this Court concludes that they do not lend much support to Creamer's position that jurisdiction exists. That is, Creamer's claim that his damages *would be in excess of* \$ 75,000 appears too speculative, thereby presenting this Court with 'guesstimation' rather than 'affirmation.' "At this stage of the litigation, the Court is not inclined to speculate or assume the amount in controversy so as to improvidently confer jurisdiction in this case." See *Rodriguez v. Conagra Foods, Inc.*, No. 4:02-CV-752-A, 2002 U.S. Dist.

*LEXIS 21894, at \* 4 (N.D. Tex. Nov. 12, 2002)*. Therefore, Creamer has not established by preponderance of the evidence that the amount in controversy exceeds \$ 75,000, and an exercise of subject matter jurisdiction by this Court is improper.

### **III. CONCLUSION**

For the reasons stated above, Plaintiff's Motion is hereby **GRANTED** and this case is **REMANDED** to the **County Court at Law # 1, Kaufman County, Texas**.

It is so **ORDERED**.

**SIGNED:** August 20, 2003.

**JUDGE JERRY BUCHMEYER**

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF TEXAS**