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August 4, 2014

Via ECF and First-Class Mail

Honorable Leonard D. Wexler
United States District Court Judge
United States District Court – EDNY
100 Federal Plaza
Central Islip, NY 11722

Re: BSI Mortgage IV, LLC v. Kaushik et al.
Docket No. 14-cv-01640 (LDW)(ARL)

Dear Judge Wexler:

This firm is counsel to Vekrum Kaushik s/h/a Vekram Kaushik (“Kaushik”), defendant in the above-entitled action. On July 11, 2014, counsel for plaintiff BSI Mortgage IV LLC (“BSI”) requested a second pre-motion conference via ECF. Dckt. No. 13. On July 28, 2014, Your Honor, in denying said request, issued a Scheduling Order filed via ECF directing that counsel for the parties confer and submit a briefing schedule for Court approval within two (2) weeks.

I. Background

In its “Verified Complaint” filed on March 12, 2014, BSI, by and through its attorneys, The Margolin & Weinreb Law Group, LLP asserted it “is a Delaware Limited Liability Company with its usual place of business” in Florida. See Dckt. No. 1, ¶ 2. Plaintiff’s Verified Complaint went on to state that as “the present Action is between citizens of different states”, “jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332.” See Dckt. No. 1, ¶ 7.

Solely on this basis, Plaintiff sought to invoke diversity jurisdiction before this honorable Court. In doing so, Plaintiff BSI has mistakenly relied on the rule applied to corporations, rather

than the rule applied to limited liability companies, to determine diversity of citizenship, *infra*.

II. Differences between Corporations and LLCs in the Context of Establishing Diversity Jurisdiction

Under 28 U.S.C. §1332(c)(1), a corporation is deemed a citizen of both the state of its incorporation and the state of its principal place of business. However, the seminal decision by the United States Supreme Court, Carden v. Arkoma Associates, refused to extend the statute to unincorporated associations. 494 U.S. 185, 189 (1990). Reasoning that the use of the word “corporation” in §1332(c)(1) precluded its application to unincorporated associations, the Supreme Court held that a limited partnership did not possess citizenship independent of its members. Id. at 196-97.

Though Carden spoke directly to the citizenship of limited partnerships, U.S. Courts of Appeals have applied its rationale to other forms of unincorporated associations, including limited liability companies (“LLC”).

Since the Carden decision, all federal courts of appeals (including the Second Circuit) which have considered the question of citizenship of unincorporated associations, including LLCs, and have unanimously concluded that an LLC does not possess independent citizenship status but rather holds the citizenship of its members for purposes of diversity jurisdiction.¹

III. Proper Procedure for Establishing Diversity Jurisdiction

Where the members of an LLC are, themselves, unincorporated associations (e.g., additional LLCs or limited partnerships), whose own members also may consist of unincorporated associations, the U.S. Court of Appeals for the Second Circuit has held that the citizenship of an LLC party is determined by a complete upstream analysis of its organizational structure.

In other words, when an entity consists of multiple tiers of ownership and control, the entire structure must be considered for diversity purposes. Where an entity is comprised of multiple layers

¹ Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54-55 (1st Cir. 2006); Handelsman v. Bedford Vill. Assocs. Ltd. P'ship, 213 F.3d 48, 51-52 (2d Cir. 2000); Zambelli Fireworks Mfg. Co., Inc. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010); Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 121 (4th Cir. 2004); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077, 1080 (5th Cir. 2008); Delay v. Rosenthal Collins Grp., LLC, 585 F.3d 1003, 1005 (6th Cir. 2009); GMAC Commercial Credit, LLC v. Dillard Dep't. Stores, Inc., 357 F.3d 827, 829 (8th Cir. 2004); Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006); Rolling Greens MHP, LP v. Comcast SCH Holdings, LLC, 374 F.3d 1020, 1022 (11th Cir. 2004).

of constituent entities, the citizenship determination requires an exploration of the citizenship of the constituent entities as far down as necessary to unravel fully the citizenship of the entity before the court. Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Management, LLC, 692 F.3d 42, 49 (2d Cir. 2012).

Bayerische was a diversity action against Aladdin Capital Management LLC (“Aladdin”). 692 F.3d at 49. Aladdin's sole member was Aladdin Capital Holdings LLC (“ACH”), whose membership consisted of one limited partnership, four U.S. citizens and five corporations. The Second Circuit determined that Aladdin possessed the citizenship of ACH, which possessed the citizenship of each of its 10 members, declaring: “[D]efendant Aladdin is a citizen of the various states of the United States of which its member, ACH, is a citizen (through ACH's various members).” Id. at 51.

In a recent matter brought on the basis of diversity jurisdiction in the Southern District of New York, Quantlab Financial, LLC v. Tower Research Capital, LLC, it was determined that the sole member of plaintiff Quantlab Financial, LLC (“QLF”) was also an LLC holding company, Quantlab Holdings, LLC (“QLH”). 715 F. Supp. 2d 542 (2010).

Applying the same upstream analysis, the Southern District of New York stated that QLF's citizenship “depends on the citizenship of its sole member, [QLH], and, in turn, on the citizenship of [QLH's] members.” In determining the citizenship of QLH's members, and thus the citizenship of QLF, the court evaluated the citizenship of ten (10) layers of QLF's organizational hierarchy, ultimately finding that the parties lacked complete diversity. Id. at 546, 549.

IV. Attempts by Counsel for Defendant Kaushik to Ascertain Membership Information of Plaintiff BSI Mortgage IV LLC

On the date of the pre-motion conference, May 28, 2014, and prior to meeting with Your Honor, your undersigned inquired of counsel for BSI as to BSI's membership information. Opposing counsel responded that he could not disclose this information.

When counsel for the parties appeared *in camera* before Your Honor on May 28, 2014, your undersigned raised the issue of the membership information of Plaintiff BSI. At the conclusion of the pre-motion conference, counsel for BSI and myself informed Your Honor that the parties would shortly thereafter confer to determine whether a resolution of this matter could be achieved. Counsel for the parties thereafter communicated via email to coordinate such a meeting.

On May 30, 2014, this office electronically transmitted a letter to counsel for BSI relating to the scheduling of the aforementioned meeting and requested that prior to said meeting, opposing counsel provide this office with “basic information about the entity which has brought this action,” including “the legally authorized party(ies) that control its decision-making.” See Exhibit 1, annexed hereto.

In this letter, this office also requested clarification of the status of one Mr. Elon Lebovitch a/k/a Allen Lebo, who would be attending the meeting and his relationship to Plaintiff BSI. In an effort to achieve judicial economy with respect to the limited resources of this Court, while demonstrating professional courtesy and comity, this office proceeded with the meeting on June 9, 2014, where Defendant Kaushik was present. This was done without having been provided with the identity information of Plaintiff BSI.

In the interim, neither this Court nor this office has not received a full and complete accounting of the membership of Plaintiff. Therefore, any foray into motion practice must be moot since proper jurisdiction has yet to be established by Plaintiff, who has invoked subject matter jurisdiction and therefore bears the burden of proof in establishing said jurisdiction before this Court. “A court lacks discretion to consider the merits of a case over which it is without jurisdiction.” Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981).

V. Privacy Concerns

While various state legislatures have decided to permit the members of LLCs to remain anonymous to the public at large, Congress has not created an exception to the requirements of diversity jurisdiction which would allow the members of LLCs to remain anonymous in federal court. See Carden, 494 U.S. 185, 196 (1990) (in discussing the citizenship of non-corporate artificial entities for diversity purposes, the Court noted that “[t]he resolutions we have reached . . . can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.”).

Ultimately, the limitations that Congress has placed on federal courts’ diversity-based jurisdiction require certain LLCs to decide between maintaining their members’ anonymity and having their cases heard in federal court. Were LLCs permitted to preserve the anonymity of their members, the principal rationale for diversity-based jurisdiction would not apply. Diversity jurisdiction is intended “to prevent apprehended discrimination in state courts against those not citizens of the state.” Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938). An entity made up of anonymous members could hardly argue that it faces unfair hometown prejudice in state court when the entity’s hometown is unknown.

As Counsel for Plaintiff BSI has not informed this Court of the members of BSI and declined to provide this information to this office, it is not possible “to litigate under the diversity jurisdiction with details kept confidential from the judiciary.” Belleville Catering v. Champaign Market Place, 350 F.3d 691, 693 (7th Cir. 2003).

The identity of the members of a privately-held LLC is not publicly available, making it impossible for Court or this office, on behalf of Defendant Kaushik, to forthrightly determine whether diversity jurisdiction has been properly established.

VI. Application to Present Case

Plaintiff's Verified Complaint invoked subject matter jurisdiction without even a cursory recitation of its members or an awareness of the fundamental precepts of corporate citizenship as applied by all federal courts which have considered this issue, *supra*.

Since filing the Verified Complaint, Plaintiff has sought two (2) pre-motion conferences. As a result of the second request for a pre-motion conference, the Court has directed the parties to enter into a briefing schedule even though Plaintiff has failed to account for, understand the significance of, or even mention the citizenship of its members.

Without establishing citizenship of Plaintiff's members, this honorable Court cannot exercise jurisdiction absent such an accounting. See Ashcroft v. Iqbal, 556 U.S. 662, 671, 129 S. Ct. 1937, 1945, 173 L. Ed. 2d 868 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.") (citations omitted); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted) ("It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.")

Moreover, this Court has the obligation to determine subject matter jurisdiction, sua sponte, even if the parties do not bring the issue to their attention. Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006) ("Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," and "when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); See Also Sharkey v. Quartantillo, 541 F.3d 75, 87-88 (2d Cir. 2008).

This office respectfully requests that Your Honor direct Plaintiff to disclose the relevant information in order to ascertain whether this Court possesses jurisdiction in this matter. Thank you for your courtesies.

Very truly yours,



Spencer Sheehan

Attachment

cc: Alan Weinreb, Esq.
The Margolin & Weinreb Law Group, LLP

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