

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK KANYUK,

Plaintiff,

v.

SHEARMAN & STERLING LLP,

Defendant.

Case No. 20-cv-03567-CM

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT
FOR LACK OF DIVERSITY JURISDICTION PURSUANT TO F.R.C.P. 12(B)(1)**

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PRELIMINARY STATEMENT

This Court should dismiss Plaintiff Mark Kanyuk's Complaint against Shearman & Sterling LLP (the "Firm") for lack of diversity jurisdiction because the parties are not diverse as a matter of law. Specifically, Plaintiff is a citizen of New Jersey and the Firm is a limited liability partnership with an equity partner who is a long-time citizen of New Jersey. The Supreme Court and Second Circuit have consistently held that a partnership, such as the Firm, is a citizen of each state in which its partners are citizens for the purposes of evaluating diversity jurisdiction. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990); *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 615 (2d Cir. 2019). As demonstrated by the declaration of Firm partner Richard F. Schwed, filed in support of this motion, Mr. Schwed is a citizen of New Jersey. Because the parties in this case are not completely diverse, the Court lacks subject matter jurisdiction over this action and Plaintiff's Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1).

STATEMENT OF FACTS

1. Plaintiff's Complaint Fails to Establish the Court's Diversity Jurisdiction Over this Action.

Because Plaintiff neither alleges a federal cause of action, nor asserts federal question jurisdiction under 28 U.S.C. § 1331, Plaintiff's sole basis for asserting that this Court has jurisdiction is diversity. To that end, Plaintiff's Complaint alleged that the "Court has diversity jurisdiction over Plaintiff's claims under 28 U.S.C. § 1332, as Plaintiff is a resident of New Jersey and Defendant is a resident of New York, and the value of Plaintiff's claims exceeds \$75,000." (ECF No. 1 (Compl.) at ¶ 7.) The Complaint further alleges that "Defendant

Shearman & Sterling LLP [] is a Delaware limited liability company^[1] with a place of business at 599 Lexington Avenue, New York, New York.” (*Id.* at ¶ 9.)

Plaintiff failed to plead *any* facts concerning the citizenship of the Firm’s partners. (*See generally id.*). Moreover, this Court’s Individual Practices and Procedures require Plaintiff to submit a letter “explaining the basis for [his] belief that diversity citizenship exists,” but Plaintiff has not submitted such a letter to the Court. (*See* Rule IV(A).)² It therefore appears that Plaintiff has made no effort whatsoever to determine whether he has properly invoked the Court’s diversity jurisdiction.

2. Mr. Schwed is a New Jersey Citizen and Firm Equity Partner, Which Renders Diversity Incomplete and Requires Dismissal of Plaintiff’s Complaint.

Richard F. Schwed is an equity partner of Shearman & Sterling LLP and serves as a Global Litigation Practice Group Leader. (Schwed Decl. at ¶ 1.) Mr. Schwed has been an equity partner of the Firm from 2004 to the present day. (*Id.* at ¶ 2.) Like the Plaintiff, he is a citizen of, and domiciled in, New Jersey for the purposes of 28 U.S.C. § 1332. Specifically, Mr. Schwed:

- is a citizen of the United States of America;
- has lived in Montclair, New Jersey from July 1999 to the present day;
- owns his home and pays taxes in New Jersey;
- does not own a home in any other state;
- has a New Jersey driver’s license and is registered to vote in New Jersey; and

¹ The Firm is, in fact, a limited liability partnership. (*See* Schwed Decl. at ¶ 2.)

² In addition, although S.D.N.Y. Local Civil Rule 26.1 permits Plaintiff to seek information from the Firm regarding the citizenship of its partners, Plaintiff has not requested any such information.

- has declared that New Jersey is his true, fixed home and, when he leaves New Jersey, he has the intention to return to it.

(*Id.* at ¶ 3.) These facts establish Mr. Schwed is a citizen of New Jersey under controlling law.³

ARGUMENT

I. 28 U.S.C. § 1332 Requires Complete Diversity Between the Parties.

Pursuant to Fed. R. Civ. P. 12(b)(1), a district court should dismiss a complaint for lack of subject matter jurisdiction if the plaintiff and defendant are not completely diverse in their citizenships. *See Platinum-Montaur Life Scis.*, 943 F.3d at 617 (“The Supreme Court has interpreted ‘citizens of different States’ to grant jurisdiction only ‘if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State.’”) (quoting 28 U.S.C. § 1332 and *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 388 (1998)).

In the seminal decision *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990), the Supreme Court held that a federal court must evaluate the citizenship of each of the partners in a limited partnership for the purposes of determining whether diversity jurisdiction exists. *Carden*’s holding has been consistently applied by both the Supreme Court and the Second Circuit and remains controlling law that requires dismissal of Plaintiff’s Complaint. *See, e.g., Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1015 (2016) (“For these unincorporated entities, we too have adhere[d] to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all [its] members.”) (quoting

³ Because diversity jurisdiction is lacking where even a single partner of the Firm is a citizen of New Jersey, the Firm has not presented declarations from additional partners who are citizens of New Jersey. The Firm is willing to provide such additional information to the Court promptly upon request, if necessary.

Carden, 494 U.S. at 195–96) (internal quotations omitted and brackets in original); *Herrick Co. v. SCS Commc 'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001) (“[F]or purposes of establishing diversity, a partnership has the citizenship of each of its partners.”); *Platinum-Montaur Life Scis.*, 943 F.3d at 615 (same); Wright & Miller, 13F Fed. Prac. & Proc. Juris. § 3630.1 (3d ed.).

“The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it”—here, the Plaintiff. *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010). Moreover, in deciding a Fed. R. Civ. P. 12(b)(1) motion, a district court may consider evidence outside of the pleadings, such as by declaration or otherwise, which is pertinent to the question of the court’s subject matter jurisdiction. *See Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000).

II. The Court Should Dismiss Plaintiff’s Complaint Because the Parties Are Not Completely Diverse.

As established by his declaration, Mr. Schwed is an equity partner of the Firm and a citizen of New Jersey. The Second Circuit has explained: “An individual’s citizenship, within the meaning of the diversity statute, is determined by his domicile. . . . Domicile is the place where a person has his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” *Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000) (internal quotation marks and citation omitted). Diversity of citizenship is measured as of the filing date—here, May 7, 2020. *See Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 570 (2004).

Mr. Schwed has affirmed the facts relied upon by district courts to evaluate an individual’s domicile—he: (i) is a citizen of the United States; (ii) has lived in Montclair, New Jersey since July 1999; (iii) owns a home and pays taxes in New Jersey; (iv) has a New Jersey driver’s license; (v) is registered to vote in New Jersey; and (vi) has specifically affirmed that New Jersey is his true, fixed home and, when he leaves New Jersey, he has the intention to return

to it. *See* Schwed Decl. at ¶ 3; *Pacho v. Enter. Rent-A-Car*, 510 F. Supp. 2d 331, 333 (S.D.N.Y. 2007) (discussing factors considered by courts in evaluating domicile); *Bell v. Gordon*, No. 05-cv-2163-NRB, 2005 WL 2087822, at *2 (S.D.N.Y. Aug. 30, 2005) (“The place where a person lives is taken to be his domicile until facts adduced establish the contrary.”) (citation omitted). “In the Second Circuit, ‘a sworn statement regarding citizenship will be a strong factor in favor of a similar judicial finding’” *Morton v. Citibank, N.A.*, No. 18-cv-9048-JPO, 2019 WL 3066412, at *3 (S.D.N.Y. July 12, 2019) (quoting *Chevalier v. USA Exp. Moving & Storage Inc.*, No. 03-cv-9059-PKL, 2004 WL 1207874, at *2 (S.D.N.Y. June 2, 2004)).

Because Plaintiff also is a citizen of New Jersey (*see* Compl. at ¶ 7), the parties are not completely diverse and thus the Court lacks subject matter jurisdiction. *See, e.g., Kenyon & Kenyon v. Advanced Eng'g Research & Dev. Corp.*, No. 97-cv-5909-DC, 1998 WL 318712, at *1 (S.D.N.Y. June 16, 1998) (dismissing lawsuit involving law firm partnership for lack of diversity jurisdiction); *Schlichtmann v. Ivey & Ragsdale*, 352 F. Supp. 2d 6, 7 (D. Me. 2005) (granting law firm partnership’s motion to dismiss for lack of diversity jurisdiction, upon affidavit by partner averring he was a citizen of the same state as the plaintiff).

For these reasons, controlling law requires the dismissal of Plaintiff’s Complaint for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Shearman & Sterling LLP respectfully requests that the Court grant its motion to dismiss and order such other relief as the Court may deem just and proper.

Dated: New York, New York
July 1, 2020

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