TEAM 1334D

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOYOLA

TODD BRUNO,

Plaintiff,

v. CASE NO.: 7:13-cv-01311-DAE-MJB

CHARLES H. ROSE, III,

Defendant.

DEFENDANT'S BRIEF IN OPPOSITION OF PLAINTIFF'S MOTION TO REMAND

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STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Loyola has jurisdiction over Plaintiff's claim pursuant to 28 §§ U.S.C. 1332, 1441, and 1446. Venue is proper in this court under Rule 1.02(c) of the Local Rules of the Middle District of Loyola.

QUESTIONS PRESENTED

I. Whether Defendant Is Domiciled In Another State When He Resides In A New State And Intends To Make That New State His Home After Incarceration In The New State.

II. Whether The Removal Period Commences On An Out-Of-State Defendant Without Proper Service of Process.

STATEMENT OF FACTS

On or about June 1, 2012, the Plaintiff, Todd Bruno, was operating a motor vehicle traveling eastbound on Gandy Boulevard, near the entrance ramp to Interstate 275 in the city of Hudson, Pinellas County, Loyola. (Compl.¶ 4, May 13, 2013). At the same date and time, the Defendant, Charles H. Rose, III, was operating his motor vehicle in the same area when an accident occurred between the Plaintiff and Mr. Rose. (Compl. ¶ 5). On May 13, 2013, the Plaintiff commenced suit in the Circuit Court of the Twenty First Judicial Circuit in Pinellas County, Loyola, against Mr. Rose for damages arising from the automobile accident. (Compl. ¶ 1).

On June 17, 2013, Mr. Rose filed a Notice of Removal to the United States District Court for the Middle District of Loyola based on diversity of citizenship pursuant to 28 U.S.C. §§ 1441 and 1446. (Def's Notice of Removal ¶¶ 5, 6, June 17, 2013). Mr. Rose asserts that he is a resident of Stetson and the Plaintiff is a resident of Loyola. (Def's Notice of Removal ¶ 4). Mr. Rose has significant past ties to Loyola by way of a house, a car that his daughter drives, a shared mailbox with his daughter, and a five-year lease on commercial property. (Stipulations of Fact ¶ 2). But for several months before the events giving rise to this suit, Mr. Rose was living in Stetson. (Stipulations of Fact ¶ 2). Furthermore, Mr. Rose married in Stetson and signed a 20-year lease on land in Stetson. (Stipulations of Fact ¶ 2).

Plaintiff served the Warden's Administrative Assistant with process on May 13, 2013. (Sherwin Aff. ¶ 2, August 5, 2013). The Assistant then proceeded to take the papers to the Defendant, but carelessly delivered them to his cellmate of similar name. (Rosenthal Aff. ¶ 8, August 5, 2013). It was impossible to deliver the papers to the Defendant because he was in the infirmary. (Rosenthal Aff. ¶ 6). On realizing the error, the cellmate sheepishly turned over the documents to the Defendant "four to five" days after he realized the Assistant's mistake. (Rosenthal Aff. ¶¶ 12, 13).

Plaintiff filed a Motion to Remand on July 1, 2013 based on allegations that the Plaintiff and Mr. Rose are both residents of Loyola, and that the Notice of Removal was untimely filed. (Pl. Mot. to Remand ¶¶ 1, 2). Mr. Rose also states that service was not perfected until around May 18, 2013. (Pl. Mot. to Remand ¶ 2). Mr. Rose is currently incarcerated, and the papers were given to his cellmate first, rather than to him. (Rosenthal Aff. ¶ 8).

SUMMARY OF THE ARGUMENT

This Court should deny the Plaintiff's Motion to Remand for two reasons. First, because there is diversity of citizenship, and second, because the defendant's Notice of Removal was timely. The court determines diversity by the citizenship of the parties at the time the suit is filed. Establishing domicile in a state establishes citizenship, and residing in a state with intent to remain there indefinitely creates domicile. Here, Mr. Rose lived in Stetson for several months prior to incarceration, and absent facts showing his intent to return to Loyola, Mr. Rose effectuated a change of domicile to Stetson prior to the commencement of the suit.

Furthermore, a prisoner is entitled to a "rebuttable presumption" of pre-incarceration domicile. Although Mr. Rose maintains that his domicile was created in Stetson before the action commenced, any presumption that his domicile was Loyola is overcome with evidence that he intends to make Stetson his indefinite home the moment he is released from incarceration. And because Mr. Rose was properly domiciled in Stetson before his incarceration and manifested his intent to be domiciled in Stetson post-incarceration, Mr. Rose has established citizenship in Stetson. Therefore, Mr. Rose is a citizen of Stetson and federal jurisdiction is appropriate based upon diversity of citizenship.

This Court should also find that the Notice of Removal was timely because the removal period did not commence until the Defendant physically received the

complaint. This rule aligns with Congressional intent, the instructive guidance of the Supreme Court, and the overwhelming persuasive authority supported by holdings of both circuit and district courts.

The Supreme Court has held that the removal period is commenced only *through* proper service. Under FRCP Rule 4(e), service can be effectuated when the plaintiff delivers a copy of the complaint to the defendant's authorized agent. Another manner of service is when the plaintiff leaves the complaint at the individual's "dwelling or usual place of abode with a resident of suitable age and discretion." Because the Defendant did not grant the Warden, his assistant, Ms. Lowery, or his cellmate authority to receive service of process on his behalf, service was not proper, and therefore Mr. Rose's Notice of Removal was timely.

ARGUMENT AND CITATIONS TO AUTHORITY

I. PLAINTIFF'S MOTION TO REMAND SHOULD BE DENIED BECAUSE DIVERSITY JURISDICTION WAS PRESENT AT THE COMMENCEMENT OF THE ACTION.

Pursuant to 28 U.S.C. §§ 1332(a) and 1441(b) a defendant may remove a case to federal court to obtain jurisdiction over a civil dispute originally filed in state court. In order to have diversity jurisdiction, the parties must be citizens of different states. 28 U.S.C. §§ 1332, 1441(b) (West 2013). The establishment of domicile in a state synonymously establishes citizenship in that state. Williamson v. Osenton, 232 U.S. 619 (1914).

Domicile is determined by coupling residence in a state and intent to remain at that residence indefinitely. Texas v. Florida, 306 U.S. 398, 424 (1939). The court must determine domicile based on relevant facts at the time a complaint was filed. Dole Food Co. v. Patrickson, 538 U.S. 468, 468 (2003); Washington v. Hosvena, 652 F.3d 340, 344 (3d Cir. 2011).

Diversity is determined when the suit is instituted, not when the cause of action arose. Smith v. Sperlin, 354 U.S. 91, 93 n. 1 (1957); Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 583 (2004), citing C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3608, p. 452 (2d ed.1984). The burden of pleading the citizenship of each and every party to the action lies with the party seeking to invoke federal diversity jurisdiction. 28 U.S.C. § 1332 (West 2013); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 215 (1990); Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 826 (1989).

Here, Mr. Rose created domicile in Stetson before the commencement of the action. He has also taken steps during his incarceration to rebut any presumption that he intends to be domiciled in Loyola. Whether the Court determines Mr. Rose's domicile at the "time the gates shut" or his intended domicile at release, he is domiciled in Stetson.

Plaintiff's Motion to Remand should be denied because Mr. Rose established domicile in Stetson before his incarceration; and in the alternative he

can rebut any presumption that he is domiciled in Loyola during the period of his incarceration. Therefore, Mr. Rose has properly removed the case to federal court under diversity of citizenship.

A. Plaintiff's Motion To Remand Should Be Denied Because Mr. Rose Was Domiciled In Stetson At The Time The Complaint Was Filed Making Federal Diversity Appropriate.

To effectuate a change in domicile a person must be present in the new domicile and have the intent to remain there indefinitely, even in the event of a temporary absence. Sun Printing and Publishing Ass'n v. Edwards, 194 U.S. 377, 383 (1904). The establishment of a change of domicile to a new state automatically establishes citizenship in that state. Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954); Preston v. Tenet Healthsystem Memorial Medical Center, 485 F.3d 804, 814 (5th Cir. 2007). To establish intent to change domicile, courts may consider facts such as the place of residence, place of voting, and payment of taxes, although no definitive set of facts have been determined conclusive. Bank One, Texas, N.A. v. Montle, 964 F.2d 48 (1st Cir. 1992).

Mr. Rose established a new domicile in Stetson prior to the commencement of this suit as he was living in Stetson for several months before the events that gave rise to the underlying action. (Stipulations of Fact ¶ 2). No facts rebut Mr. Rose's intent to stay in Stetson indefinitely. The fact he was residing in Stetson for

several months without any information to rebut an intention to stay indefinitely should defeat any presumption that Mr. Rose intended to return to Loyola.

The exercise of civil and political rights in a place is dispositive of a change in domicile. Mitchell v. United States, 88 U.S. 350, 353 (1874). Ironically, the events that led to Mr. Rose's incarceration stand as solid evidence that he intended to remain in Stetson. After moving to Stetson, Mr. Rose began to exercise his civil and political rights. In fact, he is currently serving a 14-month prison sentence for picketing outside a VFW in Stetson. (Stipulations of Fact ¶ 2).

Additionally, Mr. Rose has petitioned the Governor of Stetson for a pardon. (Stipulations of Fact ¶ 2). In Stetson, citizens with a felony record can only vote in elections if the current Governor grants them a pardon. While pardons are rare, the fact that he has gone through the process of petitioning for a pardon bolsters Mr. Rose's contention that he intended to be domiciled in Stetson.

Mr. Rose has established his intent to remain indefinitely in Stetson by meeting the list of considerations used by courts previously such as place of residence, place of voting, and others. Bank One, 964 F.2d at 48. Therefore, the Plaintiff's assertion that Mr. Rose was domiciled in Loyola, not Stetson, at the time of the commencement of the suit is without merit. Mr. Rose's significant ties to Loyola from his previous domicile there, such as a house and lease on space in a strip mall do not negate his present intent to remain in Stetson. (Stipulations of

Fact ¶ 2). And although he has a mailbox and a registered Saab convertible in Loyola, his daughter Jean actually drives the vehicle and the mailbox is a communication medium he shares with her. (Stipulations of Fact ¶ 2).

This Court should deny the Plaintiff's Motion to Remand because Mr. Rose established residency with the indefinite intention to stay in Stetson prior to the accident, and well before the suit commenced. Consequently, he had already availed himself of citizenship of Stetson before the commencement of the Plaintiff's suit.

B. Plaintiff's Motion To Remand Should Be Denied Because Mr. Rose Has Shown That He Can Rebut Any Presumption Of Domicile In Loyola Through Evidence Of His Intent To Make Stetson His Domicile.

A change of citizenship must be for the bona fide intent of becoming a citizen of the state to which the party removes. Jones v. League, 59 U.S. 76, 76 (1855). When a party asserts that domicile has changed, there must be a concurrent showing of a physical presence at the new location combined with an intention to remain there indefinitely. McCormick v. Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002); Sun Printing and Publishing Ass'n v. Edwards, 194 U.S. at 383.

Although the domicile of a prisoner is generally presumed to be the domicile before imprisonment, the presumption is rebuttable if the prisoner takes significant steps to declare a new domicile. Stifel v. Hopkins, 477 F.2d 1116, 1124 (6th. Cir. 1973). The majority of circuits have adopted this reasoning, finding diversity when

prisoners demonstrate a bona fide intent to establish new domicile post-incarceration. See Housand v. Heiman, 594 F.2d 923, 925 (2d Cir. 1979); Roberts v. Morchower, 956 F.2d 1163, 1163 (4th Cir. 1992); Jones v. Hadican, 552 F.2d 249, 251 (8th Cir. 1977); Gonzalez v. Rubin, 225 F.3d 662 (9th Cir. 2000); Smith v. Cummings, 445 F.3d 1254, 1260 (10th Cir. 2006).

Relevant factors to consider when determining whether a prisoner has overcome the presumption of prior domicile are the prisoner's declaration of intent, possibility of parole, the manner in which the prisoner has ordered his or her affairs, and any other factors that might corroborate the prisoner's assertion. Hall v. Curran, 599 F.3d 70, 72 (1st Cir. 2010). Mr. Rose married in Stetson and has access to his financial accounts there. (Stipulations of Fact ¶ 2). After he married in Stetson, he signed a long-term lease on property there in preparation for his timely release. (Stipulations of Fact ¶ 2). To be sure, Mr. Rose has established significant ties to his new home, the state of Stetson. (Stipulations of Fact ¶ 2).

Although Mr. Rose changed his domicile in good faith, it is important to note that a change in domicile is permissible even when the motive for the change is to remove a case to federal court on the ground of diverse citizenship. Williamson v. Osenton, 232 U.S. at 625. Even if Mr. Rose instituted a domicile change for the purpose of creating diversity, that action would not be a bar to

federal jurisdiction. Id. The defendant's motivation for creating domicile is simply irrelevant.

Should the Court find that Mr. Rose was domiciled in Loyola at the time of his incarceration, Mr. Rose has incontrovertibly established his intent to make Stetson his domicile, post-incarceration. Although Mr. Rose contends that he was already a citizen of Stetson before his incarceration, his intention to be a resident of Stetson on his release is manifest.

Mr. Rose has not laid out mere unsubstantiated declarations of his intent to be domiciled in Stetson, but rather he has ordered his affairs in a manner that corroborates his contention that he is a citizen of Stetson. In addition to the facts listed above, the mere filing of the Notice of Removal is evidence that Mr. Rose considers himself a citizen of Stetson and not a citizen of Loyola. Mr. Rose intends for Stetson to be his domicile after release from prison as evidence by his assertion to do so and his citizenship, remarriage in Stetson, lease of land, access to financial accounts, and application for a gubernatorial pardon, all of which have successfully overcome any presumption that he is domiciled in Loyola.

Because Mr. Rose was in Stetson with the intent to remain indefinitely before incarceration, he created domicile in Stetson pre-incarceration. Furthermore, Mr. Rose has taken steps while in prison to display his intent to remain in Stetson indefinitely. And because Mr. Rose was a citizen of Stetson and Mr. Bruno was a

citizen of Loyola, both pre- and post-incarceration at the time of this suit, diversity jurisdiction is appropriate, and the Motion to Remand must be denied.

II. THIS COURT MUST DENY PLAINTIFF'S MOTION TO REMAND BECAUSE THE DEFENDANT WAS NOT PROPERLY SERVED AND ONLY PROPER SERVICE COMMENCES THE REMOVAL PERIOD BETWEEN DIVERSE PARTIES.

A defendant may remove a case filed in state court to federal court within 30 days after the case becomes removable. 28 U.S.C. §§ 1441, 1446(b) (West 2013). Federal courts have original jurisdiction over actions between citizens of different states under the notion of diversity jurisdiction. 28 U.S.C. § 1441. The removal statute states that the removal period commences when the individual named as defendant or an agent authorized to receive service of process receives a copy of the initial pleading "by service or otherwise." 28 U.S.C. § 1446(b).

Until recently, courts have split over the timing of the removal period commencement under 28 U.S.C § 1446(b); some courts determined the removal period commenced at proper service, and some at receipt of the complaint. Love v. State Farm Mutual Automobile Insurance Co., 542 F. Supp. 65, 65 (N.D. Ga. 1982); Tyler v. Prudential Ins. Co. of Am., 524 F. Supp. 1211, 12122 (W.D. Pa. 1981. In 1999, the Supreme Court resolved the conflict by holding that the removal period is commenced only *through* proper service. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 344 (1999) (holding that the 30-day removal period begins: (1) when the summons and complaint are served together; (2) when

defendant receives complaint if summons was served first; (3) on the date the complaint is made available through filing, if summons is served first and the complaint is filed in court in jurisdictions where the complaint is not required under local rules; and (4) when the summons is served if the complaint is filed in court prior to any service). The Court based its holding on the limits of a court's reach, and the fact that courts cannot exercise power over an out-of-state defendant without proper service. Id. at 346, 350; Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 97 (1987). As such, the 30-day removal period does not begin until the defendant is properly within the power of the court. Murphy Bros. at 346.

The Court's holding in Murphy Bros. supports adequate notice "[t]o ensure that the defendant has access to the complaint before commencement of the removal period." 526 U.S. at 351. The holding also represents a departure from resolving every doubt concerning the propriety of removal against the removing party. Clinton v. Hueston, 308 F.2d 908, 910 (5th Cir. 1962); Walters v. Grow Group, Inc., 907 F. Supp. 1030, 1032 (S.D. Tex. 1995); Burr v. Choice Hotels Int'l, Inc., 848 F. Supp. 93, 94–95 (S.D. Tex. 1994).

Incarcerated persons are under no exemption against the service of process in a civil suit. Greene v. Weatherington, 301 F.2d 565, 567 (D.C. Cir. 1962); Steindler Paper Co. v. Charlevoix Circuit Judge, 234 Mich. 288, 289 (1926); Green

v. Boney, 233 S.C. 49, 66 (1958). In fact, personal service is both necessary and proper to afford prisoners due process of law. White v. Underwood, 125 N.C. 25, 34 (1899); Merch.'s Adm'r v. Shry, 116 Va. 437, 437 (1914).

The Defendant did not grant anyone authority to receive service of process on his behalf and service was not perfected on the Defendant or any resident at his dwelling. Therefore, service was not proper, and the removal period has not yet commenced. Because the removal period has not commenced, the Defendant's Notice of Removal was timely and this Court must deny the Plaintiff's Motion to Remand.

A. This Court Must Deny Plaintiff's Motion to Remand Because The Warden's Assistant Was Not The Defendant's Authorized Agent.

Under FRCP 4(e), one way service can be effectuated is if the plaintiff delivers a copy of the complaint to the defendant's authorized agent. Fed. R. Civ. P. 4. But when an agent is appointed, the requirements are more stringent. Garcia v. Garcia, 712 P.2d 288, 290 (Utah 1986). In fact, the agent typically must have been appointed specifically to receive process. Id.

On May 13, 2013, Vicky Lowery, the Warden's assistant, signed a document provided by the Plaintiff's process server. (Sherwin Aff. ¶ 2). Ms. Lowery is a member of the correctional staff at the prison. (Sherwin Aff. ¶ 2). The Defendant signed SDOC Form #1401, *Search of Inmate's Legal Mail*, which waived his in-person inspection of legal mail. (Sherwin Aff. ¶ 2). But that waiver did not grant

the prison facility the authority to receive service of process on his behalf. In fact, the definition of legal mail given in the policy manual does not even include "service of process." (Ex. A. ¶ 2, Mar. 9, 2013). Furthermore, the policy states that the Warden shall have a mailroom officer *inspect* all incoming mail. (Ex. A. ¶ 3). The policy mentions nothing about handing out legal mail to prisoners other than the one specified as the recipient.

Mr. Rose's cellmate did not have authority to accept service on his behalf either. While the Defendant appears to have agreed to his cellmate's nickname, which closely resembles his own, this agreement in no way granted the cellmate authority to accept service of process or any other legal mail on the Defendant's behalf.

Additionally, without a relevant statute, prison officials are generally not agents authorized to receive service of process on prisoners. Garcia,712 P.2d at 290. Although some courts have permitted prison officials to satisfy notice requirements in forfeiture proceedings, no court has authorized agency status to prison officials absent statutory authority. Dusenbery v. U.S., 534 U.S. 161, 161 (2002); Chairez v. U.S., 355 F.3d 1099, 1099 (7th Cir. 2004); Nunley v. Dep't of Justice, 425 F.3d 1132, 1132 (8th Cir. 2005) (holding that "[t]he due process clause does not require that the interested party receive actual notice of an administrative forfeiture action").

Because the Defendant did not authorize the Warden, his assistant, Ms. Lowery, or his cellmate authority to receive service of process on his behalf, and because there is no relevant statute granting the warrant such authority, service was not proper. Because the removal period cannot commence absent proper service, this Court must deny the Plaintiff's Motion to Remand.

B. This Court Must Deny Plaintiff's Motion to Remand Because The Defendant's Cellmate Is Not A Resident Of Suitable Age And Discretion.

Another way service can be effectuated is when the plaintiff leaves the complaint at the individual's "dwelling or usual place of abode with a resident of suitable age and discretion." Fed. R. Civ. P. 4. Some jurisdictions permit service on an incarcerated person at his or her residence or usual place of abode. Appeal of Dunn, 35 Conn. 82, 84 (1868); Bull v. Kistner, 257 Iowa 968, 971 (1965); Walker v. Stevens, 52 Neb. 653, 654 (1897). But many of these jurisdictions have held that a prisoner's usual place of abode is their pre-incarceration domicile, not the penitentiary, for purposes of service of process. U.S. v. Mensik, 57 F.R.D. 125, 125 (M.D. Pa. 1972); Bohland v. Smith, 7 F.R.D. 364, 364 (E.D. Ill. 1947); U.S. v. Davis, 60 F.R.D. 187, 188 (D. Neb. 1973).

Mr. Rose's pre-incarceration domicile was his residence in Stetson, not Stetson's prison in Indian River County. Due process requires notice to be "reasonably calculated, under all circumstances, to apprise interested parties of the

pendency of the action." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Leaving service of process at a prison facility with no attempt to make delivery actual is far from "reasonably calculated," and resulted in Mr. Rose being completely unaware of the pendency of the action.

With respect to a "person of suitable age and discretion," that person does not have to be a family member, but courts have only permitted service to persons voluntarily sharing a resident with the named defendant in the complaint. F. I. Du Pont, Glore Forgan & Co. v. Chen, 396 N.Y.S.2d 343, 364 (1977). And while a person charged with the duty, by reason of his control of the entrance to and exit from the building to receive mail, is of suitable age and discretion, absent express authority, the suitability of their age and discretion is worthless. Spear & Co. v. De Luque, 194 N.Y.S. 433, 433 (1922).

There is nothing in the record to indicate that the Warden, Ms. Lowery, or the Defendant's cellmate was not of suitable age. But because Ms. Lowery received and signed the initial complaint without authority, service of process was not proper and the removal period did not commence.

Charles M. Rosenthal was the Defendant's cellmate when the correctional staff delivered the complaint. (Rosenthal Aff. ¶ 1). When the documents were delivered to the Defendant's cell, he was not present. (Rosenthal Aff. ¶ 2). But his cellmate mistakenly accepted the papers because he thought they were meant for

him. (Rosenthal Aff. ¶ 2). Mr. Rose should not be punished for the loose procedures of the prison and the mistake of his cellmate.

Because the Defendant did not grant the Warden, Ms. Lowery, or his cellmate authority to receive service of process on his behalf and because there is no relevant statute granting the warrant such authority, service was not proper. Because the removal period cannot commence absent proper service, this Court must grant the Plaintiff's Motion to Remand.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court deny the Plaintiff's Motion to Remand this action.

Respectfully Submitted,

/s/ Team 1334D

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF STETSON

TODD BRUNO,

Plaintiff,

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CHARLES H. Rose, III,

Defendant.

DEFENDANT'S BRIEF IN OPPOSITION OF PLAINTIFF'S MOTION TO REMAND
