

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

DELMAR H. LEATHERMON,)
MARGARET L. LEATHERMON,)
RHONDA WILEY,)
JOHN J. JAYNES,)
TERRY ROWLETT,)
KAREN S. ROWLETT,)

Plaintiffs,)

vs.)

NO. 4:07-cv-00137-SEB-WGH

GRANDVIEW MEMORIAL GARDENS,)
INC.,)
BENNY GARLAND,)
JIMMY W. SIMPSON,)
CARRIAGE FUNERAL SERVICES OF)
INDIANA,)
CARRIAGE CEMETERY SERVICES,)
INC.,)
CARRIAGE SERVICES, INC.,)
JAMES R. HOLT,)
MADISON FUNERAL SERVICE, INC.,)
GRANDVIEW MEMORIAL GARDENS, LLC,)

Defendants.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

DELMAR H. LEATHERMON, MARGARET)
L. LEATHERMON, RHONDA WILEY, JOHN)
J. JAYNES, TERRY ROWLETT, and KAREN)
S. ROWLETT, on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

vs.)

4:07-cv-137-SEB-WGH

GRANDVIEW MEMORIAL GARDENS,)
INC., BENNY GARLAND, JIMMY W.)
SIMPSON, CARRIAGE FUNERAL)
SERVICES OF INDIANA, CARRIAGE)
CEMETERY SERVICES, INC., a wholly)
owned subsidiary of Carriage Services, Inc.,)
CARRIAGE SERVICES, INC., JAMES R.)
HOLT, MADISON FUNERAL SERVICE,)
INC., and GRANDVIEW MEMORIAL)
GARDENS, LLC,)

Defendants.)

ORDER DENYING PLAINTIFFS' MOTION TO REMAND

This cause is before the Court on Plaintiffs' Motion to Remand [Docket No. 99], filed on July 30, 2008. The named Plaintiffs, Delmar Leathermon, Margaret Leathermon, Rhonda Wiley, John Jaynes, Terry Rowlett, and Karen Rowlett, originally filed this action in the Jefferson Circuit Court (Indiana) as a class action under Indiana Trial Rule 23, on behalf of themselves and a putative class of individuals who paid for burial goods and services at Grandview Memorial Gardens ("Grandview Cemetery"), against Defendants, various owners and operators

of Grandview Cemetery from the time of its establishment in 1969 to the filing of Plaintiffs' Complaint on August 17, 2007. Plaintiffs allege that Defendants, among other misconduct, misrepresented the cemetery services and goods that would be provided for burial and internment and failed to perform burials in accordance with the terms and conditions of the cemetery contracts to ensure proper preservation of the remains.

None of the first eight Defendants who were served, Grandview Memorial Gardens, Inc. ("Grandview, Inc."), Benny Garland, Jimmy Simpson, Carriage Funeral Services of Indiana, Carriage Cemetery Services, Inc., Carriage Services, Inc., James Holt, Madison Funeral Service, Inc., sought removal of the litigation to federal court. However, on October 15, 2007, the ninth Defendant served, Grandview Memorial Gardens, LLC ("Grandview, LLC"), filed a Notice of Removal to this Court [Docket No. 1], asserting federal subject matter jurisdiction in diversity pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). Plaintiffs in turn have moved to have the case remanded to state court, contending that Defendants' attempt to remove this action is not authorized under CAFA because, although the requirements for removal have been met, the character of the class action is nevertheless local. Thus, they argue that, pursuant to 28 U.S.C. § 1332(d)(4)(A), their action falls under the "local controversy exception" to CAFA, and, therefore, this Court must abstain from exercising jurisdiction. Defendants rejoin that Plaintiffs have failed to meet their burden of proving that the local controversy exception to federal jurisdiction applies here. For the reasons detailed in this entry, we DENY Plaintiffs' Motion to Remand.

Discussion

I. The Local Controversy Exception

CAFA provides, *inter alia*, that federal district courts have original jurisdiction over class actions where the matter in controversy exceeds \$5,000,000 and “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). Defendants may remove such cases to federal court pursuant to 28 U.S.C. § 1441, which provides that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).

However, under CAFA, a district court must abstain from the exercise of subject matter jurisdiction in some circumstances. The exception to federal jurisdiction under CAFA at issue here is the “local controversy exception,” which provides:

(4) A district court shall decline to exercise jurisdiction . . .

(A)

(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

28 U.S.C. § 1332(d)(4)(A).

The removing party has the burden of demonstrating the existence of federal jurisdiction. Hart v. FedEx Ground Package System, Inc., 457 F.3d 675, 679 (7th Cir. 2006). However, once the removing party meets its burden for removal, “the burden shifts to plaintiffs to prove that the local controversy exception to federal jurisdiction should apply.” Id. at 680. Here, the parties do not dispute that Defendants have satisfied their burden of proof on removal. The issue at bar is whether Plaintiffs have met their burden of proving that the Court must decline jurisdiction under the local controversy exception.

To avail themselves of the local controversy exception, Plaintiffs first must show that greater than two-thirds of the proposed class members were Indiana citizens as of August 17, 2007, the date on which Plaintiffs filed their Complaint in this action. See 28 U.S.C. § 1332(d)(7) (“Citizenship of the members of the proposed plaintiff classes shall be determined . . . as of the date of the filing of the complaint.”). In this case, the putative class includes: “All persons who purchased burial, final disposition, and internment services, and cemetery goods and merchandise, including vaults, crypts, markers, bases and monuments at Grandview Cemetery.” Compl. § 13. Grandview Cemetery is located at 9306 North U.S. 421 in Madison, Jefferson County, Indiana.

In attempting to satisfy their burden of demonstrating that more than two-thirds of the

putative class members are Indiana citizens, Plaintiffs rely heavily on their asserted proposition that, “no more than common sense and experience are necessary to conclude that a very high percentage of purchasers of cemetery lots are extremely likely to be domiciled in the vicinity of the cemetery they have chosen as their final resting place.” Pls.’ Resp. at 6. In support of this contention, Plaintiffs have supplied the Court with PDF images of 5,190 index cards¹ that they received from representatives of Grandview, LLC, which contain, among other summary data, the names and addresses of individuals who dealt with Grandview Cemetery. After removing the duplicates (in some cases, the same individual was listed on multiple cards because he or she had completed multiple transactions with Grandview Cemetery), Plaintiffs determined that the 5,190 index cards represent 3,629 individual customers. Out of those 3,629 total customers,² 186 have addresses outside of Indiana and 3,443, or 94.87%, listed addresses within Indiana.³ Schell

¹ One of Plaintiffs’ attorneys, Merrill Schell, made arrangements with an outside vender, IKON, who scanned images of the index cards and entered the pertinent information appearing on the index cards (the name and address of each individual) into a Microsoft Access database, which enabled the information to be more easily analyzed. IKON then executed queries on the data in order to determine the total number of Grandview Cemetery customers and the percentage of those customers who had Indiana addresses versus non-Indiana addresses. Merrill Schell Affidavit (“Schell Aff.”) ¶¶ 3-8.

² The queries performed revealed that there were thirty-nine individuals for whom no state was provided in the address. Of those thirty-nine, Plaintiffs contend that it is apparent from the city given for twenty-nine of them that they are Indiana residents. The remaining ten individuals provided neither a city nor a state on their cards, and so, for purposes of calculating residency, they were treated as non-Indiana persons. Schell Aff. ¶ 7.

³ In addition to the above data, on July 21, 2008 (approximately ten days before Plaintiffs filed their motion to remand), Plaintiffs received six CD’s during discovery containing PDF images of individual files for each Grandview Cemetery customer. Although Plaintiffs had not had the opportunity to fully review and analyze the new information at the time this motion was briefed, their preliminary review of the materials revealed approximately 833 additional customers, bringing the total customer count to 4,462. According to Plaintiffs, after their initial review of the materials, the percentage of Indiana addresses among the 833 new customers

(continued...)

Aff. ¶¶ 5-9. Plaintiffs contend that this evidence is more than sufficient to establish that greater than two-thirds of the putative class members are citizens of Indiana.

Defendants rejoin that, at most, the index cards presented by Plaintiffs show *residency* in Indiana, not *domicile*, and because it is domicile that controls citizenship, Plaintiffs have failed to meet their burden of proof. They further contend that even if residency were sufficient to demonstrate citizenship, the addresses on the index cards only establish residency at the time the individuals entered into contracts with Grandview Cemetery, not at the time this action was filed. Defendants concede that that fact might not be significant if the period of time between the signing of the contracts and the filing of the complaint was relatively brief. However, they argue that, here, Plaintiffs have proposed a class period of approximately thirty-eight years (the putative class consists of all individuals who purchased cemetery and burial goods and services at Grandview Cemetery from its establishment in 1969 to August 17, 2007, the day the complaint was filed) and, given the passage of so long a period of time, there is no basis for assuming the class members' residence remained the same.

It is well-established under Seventh Circuit law that citizenship of a natural person for diversity purposes is determined, not by residency, but by the individual's domicile, which means the state where the person is physically present and intends to remain indefinitely. Dausch v. Rykse, 9 F.3d 1244, 1245 (7th Cir. 1993). Thus, allegations of residence are not the same as allegations of citizenship and "are insufficient to establish diversity jurisdiction." Tylka v. Gerber Products Co., 211 F.3d 445, 448 (7th Cir. 2000). However, Plaintiffs contend that,

³(...continued)
appears to be 95%, roughly the same as was found on the index cards.

while not determinative, evidence of residence in a particular state nevertheless creates a rebuttable presumption of domicile in that state. In support of this proposition, Plaintiffs cite to the Southern District of Illinois's decision in Kitson v. Bank of Edwardsville, 2006 WL 3392752 (S.D. Ill. November 22, 2006). In Kitson, the plaintiffs provided the court with a spreadsheet containing the last known addresses of each and every one of the prospective class members, ninety percent of whom had Illinois addresses. There, the court held that, because the defendants had failed to present evidence that the prospective class members were not domiciled at their Illinois mailing addresses, the court was entitled to assume that they were for purposes of the citizenship requirement of the local controversy exception. Id. at *6.

We find the facts at bar to be distinguishable from the facts in Kitson, however. In Kitson, the court made special note of the fact that, because the case was at a procedurally advanced stage, the plaintiffs had been able to provide the court with reliable and extremely specific information concerning the membership of the class. Both the plaintiffs and the defendants provided the court with substantially identical lists of class members and their last known addresses, information which class counsel had used to give notice to the members of the class of the pendency of the action. Presumably, the court was therefore satisfied that the Illinois addresses presented by the plaintiffs were more likely than not the accurate addresses of the prospective class members *at the time the action was filed*. Additionally, the Kitson defendants conceded “the overwhelming likelihood that substantially more than two-thirds of class members are Illinois citizens.” Id. Thus, the moving party did not prevail merely because the opposing party failed to present rebuttal evidence, but only after “the court considered the entire record to determine whether the evidence of residency was simultaneously sufficient to establish

citizenship.” Preston v. Tenet Healthsystem Memorial Medical Center, Inc., 485 F.3d 793, 800 (5th Cir. 2007) (analyzing the ruling in Kitson).

A review of the entire record here does not permit a finding similar to that reached in Kitson. Although Plaintiffs have presented addresses for a number of potential class members, the number of class members yet unaccounted for remains unclear and, more importantly, the addresses that have been provided are far too old to support a presumption that they were still accurate at the time this action was commenced. As Defendants highlight, the addresses Plaintiffs have presented are merely the addresses the individuals provided at the time they entered into contracts with Grandview Cemetery, which, in most cases took place twenty, thirty, or almost forty *years* before Plaintiffs filed their complaint in this action.⁴ There is no basis for the Court to assume, based on this evidence alone, that the residencies of the members of the class remained the same throughout that extended period of time. See Nichols v. Progressive Direct Ins. Co., 2007 WL 1035014, *3 (E.D. Ky. March 31, 2007) (holding that the plaintiffs’ proposed statewide class was insufficient to prove two-thirds citizenship because the proposed class period was five years and it would be “sheer speculation” for the court to conclude that two-thirds remained citizens of the state throughout that period). Thus, we are unable to conclude that Plaintiffs have provided adequate proof of residency *at the time the complaint was filed* in order to avail themselves of the rebuttable presumption of citizenship applied in Kitson.

In sum, while this class action lawsuit indisputably appears to be local in character, CAFA sets forth objective requirements that must be met before an action can be remanded to

⁴ Performing their own inspection of Plaintiffs’ data, Defendants report that no contracts for goods or services were executed after 1991, and most of the contracts were entered into during the 1970s and 1980s. Exh. 1; Affidavit of Jimmy Simpson.

state court under the local controversy exception, one of which unequivocally requires that two-thirds of the prospective class members in this case be Indiana citizens. For the reasons discussed above, we are unable to find that Plaintiffs have presented sufficient evidence to demonstrate that they have met that requirement and therefore we must DENY Plaintiffs' Motion to Remand.⁵

II. Conclusion

For the foregoing reasons, Plaintiffs have failed at least so far⁶ to provide sufficient evidence to demonstrate that greater than two-thirds of the prospective class members are Indiana citizens and thus are unable to avail themselves of the local controversy exception to federal jurisdiction pursuant to CAFA. Accordingly, we DENY Plaintiffs' Motion to Remand.

IT IS SO ORDERED.

Date: _____

⁵ Because we deny Plaintiffs' motion on grounds that they have not met the citizenship requirement, we need not address Defendants' other arguments opposing remand contained in their briefing on this motion.

⁶ Although, at this juncture, we have concluded that Plaintiffs have not satisfied their burden with respect to citizenship of the class, we leave open the possibility that Plaintiffs might file another motion to remand under § 1332(d) (which imposes no time limit on such a motion), once the case has been further developed. See Hart, 457 F.3d at 682 (“[T]he plaintiffs have the right, through appropriate discovery, to explore the facts relevant to the court’s jurisdiction as the case progresses.”).

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