IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

RICHARD MALOAN, JR., ANDY LYTLE, and TERRY LYTLE,	)	
Plaintiffs,	)	
VS.	)	No. 01-1366
BANCORPSOUTH BANK, INC.,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND
AND
ORDER DENYING DEFENDANT'S MOTION TO
DISSOLVE TEMPORARY INJUNCTION

On November 14, 2001, Plaintiffs filed this action in the Chancery Court of Gibson County. In their complaint, Plaintiff's asked for a temporary injunction preventing Defendant from foreclosing on collateral or from attempting to collect a $150,000 debt that Plaintiffs admittedly owe Defendant. The Chancery Court of Gibson County granted Plaintiffs' request and issued an ex parte temporary injunction which prevented Defendant from commencing any foreclosure actions against Plaintiffs for any property or monies due. On December 10, 2001, Defendant removed the action to this court, and on January 17, 2002, Defendant petitioned this court for removal of the temporary injunction issued by the Chancery Court of Gibson County. Instead of responding to Defendant's motion to lift the

temporary injunction, Plaintiffs filed a motion to remand on February 19, 2002.

Plaintiffs allege that on February 10, 2000, they and Defendant entered into a construction loan agreement. See Complaint, ¶ 3. In exchange for a loan of $150,000 to the Plaintiffs, Defendant received a promissory note and a security interest in four parcels of land located in Crockett and Gibson Counties. See id. ¶ 4. Defendant's representative in negotiating this agreement was Todd Henderson. See id. ¶ 5. Plaintiffs allege that, before leaving employment with Defendant, Mr. Henderson orally agreed to changing the maturity date and floor plans of the house to be constructed. See id. ¶¶ 6-8. Modifications of the original contract were agreed to on October 31, 2000, and on April 8, 2001. See id. ¶ 11. Plaintiff's depleted the principal of the loan and estimate that an additional $25,000 will be necessary to bring the construction to a point suitable for sale. See id. ¶ 12. Plaintiffs allege that, due to inability to pay in a timely fashion, Plaintiffs were forced to hire different sub-contractors at an increased cost. See id. ¶ 13. Plaintiffs assert that the maximum damages which they could be awarded do not exceed $75,000 exclusive of interest and cost. See Aff. of Plaintiffs.

After removing the case to this court, Defendant asserted a compulsory counterclaim against Plaintiff. See Answer and Counterclaim. In its counterclaim, Defendant alleges that the original agreement with Plaintiffs required repayment of the principal of the loan on August 8, 2000, and repayment of the interest by an initial payoff on March 15, 2000, and payoffs every month thereafter. See id., ¶ 5. Defendant extended these deadlines twice. See

id., ¶¶ 10, 13. The final extension extended the deadline for repayment of the principal to June 8, 2001. See id., ¶ 15. Defendant alleges that as of January 6, 2002, Plaintiffs have failed to repay the principal of the loan. See Amended Counterclaim, ¶ 16. Defendant's counterclaim seeks repayment of all indebtedness of Plaintiff, which would include the $150,000 loan principal. See Answer and Counterclaim, at 7.

Pending before the court is Defendant's motion to dissolve the temporary injunction and Plaintiffs' motion to remand. Although Defendant's motion was filed first, Plaintiffs' motion is a jurisdictional matter which governs the court's authority to rule on Defendant's motion. Accordingly, the court will first address Plaintiffs' motion to remand.

Plaintiffs' Motion to Remand

Plaintiff has moved for a remand alleging that their claim does not invoke federal diversity jurisdiction. Specifically, Plaintiffs assert that they do not seek more than $75,000 exclusive of interest and cost. Defendant responds by asserting that Rule 13 of the Tennessee Rules of Civil Procedure would compel it to file a counterclaim in the state court and that its counterclaim seeks more than the jurisdictional minimum of $75,000. The court accepts as accurate the factual allegations of both Plaintiff and Defendant regarding this motion. Accordingly, the only question before the court is: whether the relief sought in a compulsory counterclaim can be considered in determining the amount in controversy for diversity

jurisdiction in a removed case. The Sixth Circuit has not ruled upon this issue.[1]

Twenty-eight U.S.C. § 1332 gives federal district courts original jurisdiction in cases where the sum in controversy exceeds $75,000 and when the suit is between citizens of different states.[2] See 28 U.S.C. § 1332. Twenty-eight U.S.C. § 1441 provides defendants with a means to remove actions filed in state court in which the "district courts of the United States have original jurisdiction." 28 U.S.C. § 1441 (a). Although the standards for removal jurisdiction in § 1441 relate back to the original jurisdiction provided by § 1332, diversity jurisdiction pursuant to an original filing in federal court under § 1332 is broader than diversity jurisdiction in a removal context pursuant to § 1441. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)(citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-290 (1938)); Hurt v. Dow Chemical Co., 963 F.2d 1142 (8th Cir. 1992) (stating that "Title 28 U.S.C. § 1441(b) makes diversity jurisdiction in removal cases narrower than if the case were originally filed in federal court by the plaintiff").

When seeking to remove a case, a Defendant shoulders the burden of proving original jurisdiction in the federal court. See Long v. Bando Mfg. of America, Inc., 201 F.3d 754 (6th Cir. 2000). When the amount in controversy is in dispute in a removed case, there is a strong presumption that the plaintiff has not asserted a claim in excess of the jurisdictional

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[1] It appears that no United States Court of Appeals has ruled upon this issue. This is not surprising since 28 U.S.C. § 1447 (d) significantly restricts appellate jurisdiction in appeals from a district court's order remanding an action to state court. See 28 U.S.C. § 1447 (d).

[2] The parties have not raised any issue concerning the diversity of the parties. However, it appears that the parties are diverse. See Complaint, ¶¶ 1,2. Since the citizenship of the parties is not disputed, the court will not address the citizenship of the parties.

minimum. See St. Paul Mercury, 303 U.S. at 288-90.[3] Accordingly, it is incumbent upon the defendant to prove, by a preponderance of the evidence, that the amount in controversy requirement of diversity jurisdiction is met. See Hayes v. Equitable Energy Resources Co., 266 F.3d 560, 573 (6th Cir. 2001).

At the outset, the court notes that there is a split of authority among the courts which have ruled on the specific issue presented to this court. The majority of the courts have held that a federal court should not assess the value of a defendant's compulsory counterclaim in the determination of the amount in controversy. See Rla v. Cape Cod Biolab Corp., 2001 WL 1563710 (N.D. Cal. 2001); Al-Cast Mold & Pattern, Inc. v. Perception, Inc., 52 F.Supp.2d 1081, 1082-83 (D. Minn.1999); Mesa Indus., Inc. v. Eaglebrook Prods, Inc., 980 F.Supp. 323, 324-26 (D. Ariz.1997); see also 14B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 3d § 3706 (collecting cases). A minority of courts have used a compulsory counterclaim in the computation of the amount in controversy in a removed case. See Swallow & Associates v. Henry Molded Prod., Inc., 794 F.Supp. 660 (E.D. Mich. 1992); 14B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 3d § 3706 (collecting cases). No federal Court of Appeals has ruled on this specific issue, but various federal Courts of Appeal have ruled on similar issues.

Several federal Courts of Appeal have held that a compulsory counterclaim can be

[3] In St. Paul Mercury, the Court also noted that in a diversity action originally filed in federal court, the defendant must prove to a legal certainty that the amount in controversy is less than the jurisdictional minimum in order for the court to dismiss for lack of jurisdiction. See St. Paul Mercury, 303 U.S. at 288-90, see also Gafford v. General Elec. Co., 997 F.2d 150, 157 (6th Cir. 1993).
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considered as part of the amount in controversy in actions originally filed in federal court. See Spectacor Management Group v. Brown, 131 F.3d 120, 126 (3rd Cir. 1997); Geoffrey E. MacPherson v. Brinecell, 98 F.3d 1241 (10th Cir. 1996); Fenton v. Freedman, 748 F.2d 1358 (9th Cir. 1984); Roberts Mining & Milling Co. v. Schrader, 95 F.2d 522 (9th Cir. 1938) (decided before the adoption of the federal rules of civil procedure); see also Motorists Mut. Ins. Co. v. Simpson, 404 F.2d 511 (7th Cir. 1968) (holding that compulsory counterclaim cannot be considered part of the amount in controversy if defendant objects before filing counterclaim). The logic of these cases is disputed. At least one Circuit has held that it is improper to include the value of a compulsory counterclaim as a part of the amount in controversy in a case originally filed in federal court. See St. Paul Reinsurance Co. Ltd. v. Greenburg, 134 F. 3d 1250, 1254 (5th Cir. 1998). Although these cases present issues similar to the issue at hand, they do not address the specific issues involved with removal jurisdiction.

In Fenton, the Ninth Circuit decided that a defendant's compulsory counterclaim could be taken as part of the amount in controversy when the plaintiff originally filed in federal court and the defendant acquiesced in the jurisdiction. See Fenton, 748 F.2d at 1359. Subsequent courts have noted that the Fenton court was not faced with the strong presumption against federal jurisdiction that attaches to removed actions. See e.g., Spectacor, 131 F.3d at 126. Further, it should also be noted that the assertion of jurisdiction in Fenton did not deprive the plaintiff of the forum of their choice. Since Fenton and its

progeny do not deal with removal issues, the court finds these cases unpersuasive.[4]

Defendant argues for the application of Swallow & Associates v. Henry Molded Products, Inc., 794 F.Supp. 660 (E.D. Mich. 1992). In Swallow, the court held that the value of defendant's compulsory counterclaim could be used to meet the amount in controversy requirements of diversity jurisdiction in a removed case. This court respectfully disagrees with the court in Swallow.

As the court in Swallow noted, this specific issue presents a district court with a dilemma. See Swallow, 794 F.Supp. at 662-63. If the court remands a case, the court has essentially deprived the defendant of a federal forum which they would have obtained had the defendant filed its counterclaim initially. See id. Thus, granting remand would make federal jurisdiction dependant upon a race to the courthouse, certainly an undesirable result.

Competing with the race to the courthouse concern is the Congressional intent to limit removal jurisdiction. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109 (1941). It is well established that federal courts are to interpret removal statues narrowly to protect not only a plaintiff's choice of forum, but also to protect the state courts from

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[4] These cases also seem to be in conflict with the well established rule that subject-matter jurisdiction cannot be waived by the parties. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (stating that "no action of the parties can confer subject-matter jurisdiction upon a federal court"). Despite clear precedents, the Fenton line of cases has allowed parties to affect the jurisdiction of federal courts. For example, Spectacor held that a compulsory counterclaim could be a part of the amount in controversy because the defendant "submitted his compulsory counterclaim to the district court thereby putting the amount of that counterclaim in controversy." Spectacor, 131 F.3d at 126. Although the court explicitly denied that it was allowing the parties to consent to federal court jurisdiction, that is exactly what the court allowed. Had the defendant in Spectacor filed a 12 (b)(1) motion to dismiss before asserting its counterclaim, it would have undoubtedly been dismissed for lack of jurisdiction. Thus, the court's subject-matter jurisdiction is dependant on a defendant's decision on whether to file a 12 (b)(1) motion to dismiss.

usurpation by federal courts. See id.

Also completing with the race to the courthouse concern is clear Sixth Circuit precedent. The removal statute provides for removal of cases in which the federal court would have had original jurisdiction. See 28 U.S.C. § 1441. When interpreting this phrase, the Sixth Circuit has on numerous occasions noted that "[g]enerally, a civil case brought in a state court may be removed by a defendant to federal court if it could have been brought there originally." See e.g., Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000). Whether an action could have been bought in federal court originally is determined by the amount in controversy at the time of removal. See id., at 872. Since Defendant's counterclaim was not presented before removal, the Defendant's counterclaim, could not be considered as part of the amount in controversy.[5]

The court finds the cases granting remand to be more persuasive. Accordingly, the amount in controversy in this case is $75,000 or less, exclusive of interest and cost, and this court lacks diversity jurisdiction pursuant to 28 U.S.C. § 1332. Pursuant to 28 U.S.C. § 1447 (c), Plaintiff's motion to remand is GRANTED.

Defendant's Motion to Dissolve the Temporary Injunction

This court is without jurisdiction to rule on Defendant's motion to dissolve the temporary injunction. As a result, Defendant's motion must be DENIED.

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[5] The Swallow case also stands in stark contrast with clear Sixth Circuit precedent holding that the amount in controversy is determined by the complaint. See Klepper v. First American Bank, 916 F.2d 337(6th Cir. 1990); Worthams v. Atlanta Life Ins. Co., 533 F.2d 994, 997 (6th Cir.1976) (stating that "[t]he amount in controversy for federal diversity jurisdiction purposes is determined as of the time the action is commenced").

Conclusion

The court finds that it lacks diversity jurisdiction over this action since the amount in controversy is $75,000 or less, exclusive of interest and cost. Accordingly, the court must GRANT Plaintiffs' motion to remand. Since the court lacks jurisdiction, it cannot rule on Defendant's motion to dissolve the temporary injunction imposed by the Chancery Court of Gibson County. As a result, Defendant's motion to dissolve the temporary injunction is DENIED. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE

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