

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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GEORGE M. FEDOR, :
Plaintiff, : **MEMORANDUM DECISION**
 : **3: 01 CV 795 (GLG)**
-against- :
 :
AMICA MUTUAL INSURANCE CO., :
Defendant, :
 :
-against- :
 :
CAROL GORMAN, :
Third Party Defendant. :
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The plaintiff, George M. Fedor, filed the present action in federal court based upon an insurance policy that he had with the defendant, Amica Mutual Insurance Company. The plaintiff is seeking \$52,305.10. for the loss of certain personal property. Almost half of that amount specifically relates to a loss of jewelry. The plaintiff's insurance policy, however, limits his recovery for such losses to \$1,000. As a result the plaintiff's maximum claim would probably be only \$28,305.10. The defendant moves to dismiss this action for lack of subject matter jurisdiction. [Doc. #22]

Pursuant to 28 U.S.C. § 1332(a), "[f]ederal courts have subject matter jurisdiction based on diversity of citizenship if the suit is between citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs." Devit v. Continental Gen. Ins. Co., No CIV.A.3-02-CV-270JCH,

2002 WL 1000079 (D.Conn. Apr. 12, 2002) (quotation marks omitted). We now address whether the plaintiff's claim satisfies the requirements for diversity jurisdiction.

The plaintiff, a resident of Connecticut, filed his original complaint against the defendant, a Rhode Island corporation. Thereafter, the defendant impleaded as a third-party defendant, the plaintiff's former wife, who purportedly was residing in the house when the losses occurred. Subsequently, the plaintiff asserted a claim against her. While the defendant insurance company alleges that this destroys diversity jurisdiction since both the plaintiff and third-party defendant are citizens of Connecticut, it is clear that diversity jurisdiction is established on the original pleadings and is not affected by impleaders. Freeport-McMoRan Inc., v. K N Energy, Inc., 498 U.S. 426, 428 (1991) (holding that diversity of citizenship is assessed at the time the action is filed and jurisdiction may not be divested by subsequent events).

We now reach the principal grounds for considering this motion to dismiss, which is the matter of the sum at issue and whether it exceeds \$75,000. The party invoking the jurisdiction of the federal court has the burden of proving to a "reasonable probability that the claim is in excess of the statutory jurisdictional amount." Devit, 2002 WL 1000079, at *1 (quoting Tongkook America, Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d. Cir. 1994)). When

jurisdictional facts are challenged, "the party asserting jurisdiction must support those facts with 'competent proof' and justify [its] allegations by a preponderance of the evidence." United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Prop. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994). Further, when the pleadings are inconclusive as the amount in controversy, the Court may look outside the pleadings to other evidence in the record. Devit, 2002 WL 1000079, at *1.

Because the plaintiff's actual damages claim amounts to either \$52,305.10 or \$28,305.10, he has failed to satisfy the jurisdictional amount in controversy on that basis. The plaintiff argues, however, that his damages "can easily exceed the jurisdictional amount" and that his allegation of damages "must be accepted." Pl.'s Mem. in Opp'n at 2. That is clearly not the law.

The plaintiff attempts to fill in the gap between his actual damages and the jurisdictional amount in controversy by pointing out that he has an "emotional distress claim in several of his legal theories" and that his unfair trade practices claim could entitle him to punitive damages and attorneys' fees. Assertion of emotional distress claims have become routine in Connecticut litigation. Since they are amorphous and difficult to quantify, they arguably override the monetary requirements of federal jurisdiction. No authority is cited for this possibility and we do not endorse it.

While the plaintiff maintains that his claim for punitive damages is sufficient to exceed the jurisdictional amount, where punitive damages are permitted, the demands for such damages as part of a jurisdictional amount are subject to "closer scrutiny, and the trial judge accorded greater discretion, than a claim for actual damages." Zahn v. Int'l Paper Co., 469 F.2d 1033 n.1 (2d Cir. 1972). An award of punitive damages under the Connecticut Unfair Labor Practices Act (CUTPA) is a matter of discretion for the court. Staele v. Michael's Garage, Inc., 35 Conn. App. 455, 463, 646 A.2d 888, 889 (1994). "While the CUTPA statutes do not provide a method for determining punitive damages, courts generally award punitive damages in amounts equal to actual damages or multiples of the actual damages." Perkins v. Colonial Cemeteries, Inc., 53 Conn. App. 646, 649, 734 A.2d 1010, 1012 (1999). It is pure speculation as to whether the plaintiff would receive any award of punitive damages and, assuming that punitive damages were awarded, what that amount might be. Based on Connecticut's practice regarding punitive damages under CUTPA, it is unlikely that any award of punitive damages would be adequate to cure the substantial gap between the plaintiff's actual damages and the jurisdictional amount. see Jiminez v. Going Forward, Inc., 25 F. Supp. 2d 54 n.1 (D. Conn. 1998) (concluding that punitive damages awarded under CUTPA are ordinarily minor amounts).

Regarding attorneys' fees, they are included in the

jurisdictional amount only if such fees are recoverable as a matter of right, Devit, 2002 WL 1000079, at *2. (citing Givens v. W.T. Grant Co., 457 F.2d 612, 614 (2d Cir.), vacated on other grounds, 409 U.S. 56 (1972)), which is clearly not the case here. While the plaintiff does have a claim under CUTPA, attorneys' fees under that Act, Conn. Gen. Rev. Stat. Ann. § 42-110g, and relevant case law are discretionary. Id. at *5, (citing Riggio v. Orkin Exterminating Co., 58 Conn. App. 309, 317, 753 A.2d 423, 429 (2000)). Such an amount, whatever it might be, is not to be included in calculating the jurisdictional amount in controversy.

The plaintiff's bald assertions regarding his possible damages are not sufficient to constitute competent proof that the amount in controversy exceeds \$75,000. Consequently, the plaintiff has failed to satisfy his burden of proving that it appears to a reasonable probability that his claim is in excess of the statutory jurisdictional amount. This court, therefore, lacks subject matter jurisdiction. The defendant's motion to dismiss the plaintiff's claim for lack of subject matter jurisdiction is **Granted**. [**Doc. #22**]. Because the defendant's third-party complaint is premised solely on a theory of equitable subrogation to recover any amounts it is required to pay to the plaintiff, the third-party complaint is dismissed without prejudice. [**Doc. 8**]. Likewise, the plaintiff's cross-complaint against the third-party defendant, Carol Gorman, a resident

of Connecticut, is dismissed for lack of subject matter jurisdiction. [Doc. #16]. Finally, because the defendant's counter-claim against the plaintiff asserts no independent jurisdictional basis, it is dismissed without prejudice. [Doc. # 7]. The clerk is directed to enter judgment accordingly and to close the case.

SO ORDERED.

**Dated: January 8, 2003
Waterbury, CT**

**Gerard L. Goettel
U.S.D.J.**