IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

HIBBETT SPORTING GOODS, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:20-CV-00607-O**
	§	
WEATHERFORD DUNHILL LLC C/O DUNHILL PROPERTY MANAGEMENT SERVICES, INC.	§	
	§	
Defendant.	§	

DEFENDANT WEATHERFORD DUNHILL LLC C/O DUNHILL PROPERTY MANAGEMENT SERVICES, INC.'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Incorrectly identified Defendant, Weatherford Dunhill LLC c/o Dunhill Property Management Services, Inc. ("Dunhill"),[1] respectfully moves the court to dismiss the Plaintiff's Original Complaint for Declaratory Judgment ("Complaint") against it pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and its discretionary powers under the Declaratory Judgement Act, 28 U.S.C. § 2201(a) ("the Act"), and in support thereof, respectfully shows the court as follows:

I. INTRODUCTION

The Court should dismiss this action for declaratory relief pursuant to Federal Rule of Civil Procedure 12(b)(1) and its discretionary powers under the Act because plaintiff Hibbett Sporting Goods, Inc.'s ("Hibbett") pre-emptive, anticipatory claim for declaratory relief amounts to an impermissible race to the courthouse in anticipation of litigation, and its claim that this court has diversity jurisdiction fails because the amount in controversy is less than $75,000.00. Hibbett was

[1] The correctly named party should be Weatherford Dunhill, LLC. There is no entity named "Weatherford Dunhill, LLC c/o Dunhill Property Management Services, Inc."

well aware of an impending action to terminate its lease agreement with Dunhill and retake possession of the leased premises due to its own default under the plain language of the lease. In a blatant attempt to deprive Dunhill of the opportunity to bring suit in the forum of its choice, Hibbett launched this declaratory attack to improperly position itself as the plaintiff in federal court.

Pre-emptive suits and forum shopping as employed in this case by Hibbett are highly disfavored and it is well within this Court's discretion to dismiss the anticipatory declarative action. This Court should exercise its discretion and dismiss this suit so that the natural plaintiff, Dunhill, can bring its claims against Hibbett to terminate the lease and re-take possession of the leased premises, arising out of Hibbett's failure to comply with the terms of the lease, in state court. Because of the glaringly obvious attempt at forum shopping though its anticipatory declaratory judgment action, and the fact that the $75,000.00 minimum requirement for diversity citizenship jurisdiction is not met, this court should dismiss this case, pursuant to Rule 12(b)(1) and the Declaratory Judgment Act.

II. FACTUAL BACKGROUND

In November 2009, Dunhill and Hibbett entered into a lease agreement (the "Lease"). Under the terms of the Lease, Hibbett leased approximately 6,068 gross leasable square feet to operate a sporting goods store. The Lease includes a Main Term of five (5) years and two (2) option terms of five (5) years each. Under the terms of the Lease, Hibbett is required to pay installments of Minimum Rent on the first day of each calendar month.

Hibbett failed to pay rent for the months of April and May 2020. On April 30, 2020 Dunhill issued written "Notice of Unpaid Rent" to Hibbett for its failure to pay April rent. Under the lease, Hibbett had ten (10) days after receipt of the notice to cure its failure to timely pay rent. Hibbett failed to make any payment within the ten (10) day cure period. After receiving the April 30, 2020

"Notice of Unpaid Rent," Hibbett's general counsel sent correspondence to Dunhill stating that it would not pay rent as due and instead invoke a co-tenancy provision of the Lease.

Section 25 of the Lease provides that failure to pay rent past the cure period constitutes an event of default, allowing Dunhill to terminate the Lease without notice. Hibbett then, long past the cure period, attempted to pay past due rent. Dunhill responded on June 2, 2020, informing Hibbett of Dunhill's rejection of past due rent payment and provided notice of Dunhill's intent to terminate the Lease. Pursuant to its rights under the Lease, Dunhill notified Hibbett that it would seek to retake possession of the Premises and recover its damages. This notice was not required by the terms of the Lease but was given as a courtesy to Hibbett. After being notified of the impending action to terminate the Lease, retake possession of the premises, and recover damages, Hibbett filed this lawsuit in an attempt to position itself as the plaintiff in federal court.

III. LEGAL STANDARDS

a. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

The limited jurisdiction of federal courts over civil lawsuits generally only extends to two types of cases: (1) cases involving claims under federal law; and (2) cases involving claims under state law when the plaintiff is the citizen of a different state from every defendant and the amount in controversy exceeds $75,000.00. *See* 28 U.S.C. §§ 1331, 1332. In this case, Hibbett's only claim for federal jurisdiction is based on diversity of citizenship. Subject matter based on diversity of citizenship requires complete diversity, and that the "matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs." 28 U.S.C. § 1332. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Farkas v. GMAC Mortg., L.L.C.*, 737 F.3d 338, 341 (5th Cir. 2013).

b. Declaratory Judgment Act (28 U.S.C. § 2201)

The Declaratory Judgment Act does not grant litigants an absolute right to declaratory relief, rather it enables the district court and places within its sound discretion the ability to decide whether or not to entertain a declaratory action. *See Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 387 (5th Cir. 2003). "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Wilton v. Seven Falls Company*, 515 U.S. 277, 287-88 (1995). Before deciding whether to hear a declaratory judgment suit, a district court must first determine: "(1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action." *Sherwin-Williams Co.*, 343 F.3d at 387. The action is justiciable if there is an actual controversy among the parties. *Id*. An actual controversy exists where there is a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000). The court has authority to grant declaratory relief if it has jurisdiction and there is no pending state court action between the parties that would violate the Anti-Injunction Act. *Sherwin-Williams Co.*, 343 F.3d at 387. If those two requirements are met, the court then has to decide whether to exercise its discretion to dismiss the case. *See id*.

A district court has broad discretion to dismiss a declaratory judgement action brought under the Declaratory Judgment Act when it is brought for improper reasons. *See* 28 U.S.C. § 2201; *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601-03 (5th Cir. 1983). The Fifth Circuit has identified seven nonexclusive factors for a district court to consider when deciding whether to exercise its discretion to dismiss a declaratory judgment action: (1) whether there is a

pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending. *St. Paul Insurance Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994).

IV. ARGUMENTS

a. Lack of Subject Matter Jurisdiction

This court should dismiss Plaintiff's action pursuant to Rule 12(b)(1) because the amount in controversy is less than $75,000.00 and there is no federal question jurisdiction. The Plaintiff's complaint correctly acknowledges that the issue in this case centers around two months of unpaid rent. Under the Lease, the monthly rent due in years 11-15 of the Option Term is $8,596.33. Thus the value of the two months' rent, the object of this litigation, is $17,192.66, far less than the required $75,000.00 threshold for diversity jurisdiction in federal court. *See* 28 U.S.C. § 1332.

"The party seeking to invoke federal diversity jurisdiction bears the burden of establishing both that the parties are diverse and that the amount in controversy exceeds $75,000.00." *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). In this case Plaintiff did no more than declare, without any further support, that more than $75,000.00 is in controversy in this case. The amount in controversy here is less than $75,000.00 and diversity of citizenship is the only

basis for federal jurisdiction; therefore, the Court should dismiss this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. *See* Fed. R. Civ. Proc. 12(b)(1).

b. Plaintiff Filed Suit in Anticipation of Litigation

Even if this Court determines it has subject matter jurisdiction in this case, it should exercise its discretion and dismiss this premature action because it was filed in anticipation of inevitable state court litigation by Dunhill. Declaratory suits filed in anticipation of litigation have the potential to deprive the plaintiff of his choice of forum. *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1293 (S.D. Tex. 1990). There is a "general policy that a party whose rights are being infringed should have the privilege of electing where to enforce those rights." *Texas Instruments, Inc. v. Micron Semiconductor, Inc.*, 815 F. Supp. 994, 997 (E.D. Tex. 1993). When the infringer, in this case the Plaintiff, races to file a declaratory action he attempts to take that privilege away. *See id*. This subverts and distorts the purpose of the Declaratory Judgment Act, which is to promote efficiency and not to provide a method for a potential defendant to race to *res judicata* or the forum of its choice. *See Dresser Industries, Inc. v. Insurance Co. of North America*, 358 F. Supp. 327, 330 (N.D. Tex. 1973). Courts consider whether the plaintiff in a declaratory action had reason to expect the defendant to file a lawsuit when determining whether the action was brought in anticipation of litigation. See, e.g., *Mill Creek Press, Inc. v. The Kinkade Co.*, No. CIVA.3:04-CV-1213-G, 2004 WL 2607987, at *7-8 (N.D. Tex. Nov. 16, 2004).

Here, Plaintiff Hibbett was well aware of an impending action to terminate the Lease and retake possession of the premises and recover damages caused by its default. First, Dunhill wrote the Plaintiff after it failed to pay rent due under the Lease, informing it that failure to pay is considered an event of default. After Plaintiff took no action to pay rent within the prescribed curative period, Dunhill notified the Plaintiff that it had defaulted by refusing to pay rent and that

the Lease would be terminated, the premises retaken, and damages sought. Given the language in the notices and the language in the Lease, the Plaintiff knew that in order to retake the leased premises Dunhill would have to file suit in state court, in a forcible entry and detainer action. The right to terminate the lease and retake the premises from its tenant who refuses to pay rent was infringed, thus it is Dunhill's privilege to choose the forum in which to enforce that right. See *Texas Instruments*, 815 F. Supp. at 997. This action was brought in anticipation of litigation to deprive Dunhill of its rights and privileges, thus the court should dismiss the action.

V. CONCLUSION

Because the amount in controversy in this case is less than $75,000.00 and the only basis for federal subject matter jurisdiction alleged by the plaintiff is diversity of citizenship, the Court should dismiss this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Even if this Court determines that it has jurisdiction, it should exercise its discretionary power under the Declaratory Judgement Act and dismiss the action because it was filed in anticipation of litigation by the defendant.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 20, 2020, a true and correct copy of the foregoing has been furnished to all parties of record via the Court's electronic filing service in accordance with the Federal Rules of Civil Procedure.

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