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.	§	

PLAINTIFF HIBBETT SPORTING GOODS, INC.'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Plaintiff Hibbett Sporting Goods, Inc. ("Plaintiff" or "Hibbett") files this response to the 12(b)(1) Motion to Dismiss (the "Motion") filed by Defendant Weatherford Dunhill LLC c/o Dunhill Property Management Services, Inc. ("Defendant" or "Dunhill"), and in support thereof would show as follows:

I. INTRODUCTION

Plaintiff filed this declaratory-judgment action to resolve the controversy between it and Defendant concerning Defendant's wrongful attempt to terminate a lease for retail space in a Weatherford, Texas shopping center and evict Plaintiff from that space. In response, Defendant filed a Motion to Dismiss (Dkt. 8) claiming that the Court lacks subject matter jurisdiction and urging it to exercise its discretion under the Declaratory Judgment Act to dismiss this action. Defendant's arguments lack merits and its Motion should be denied in its entirety. This Court has diversity jurisdiction because the amount in controversy exceeds $75,000. Further, this Court's exercise of jurisdiction serves the Declaratory Judgment Act's goals and the factors established in

St. Paul Insurance Co. v. Trejo weigh unanimously in favor of exercising jurisdiction over Plaintiff's declaratory judgment action.

II. BACKGROUND

On November 5, 2009, Plaintiff and Defendant entered into an Agreement of Lease (the "Lease") whereby Plaintiff leased 6,068 gross leasable square feet of space in a shopping center in Weatherford, Texas, Parker County (the "Center"). The Lease contained a main term and two option terms of five years each. On February 21, 2020 Plaintiff signed the second five-year option term. The Lease, as entered into on November 5, 2009 and amended on December 5, 2011, contained force majeure and continuing co-tenancy provisions, both of which altered the parties' obligations under the Lease based on defined sets of circumstances, including "restrictive governmental laws or regulations" (Lease Agreement, § 37 – Force Majeure Provision) and tenant and space occupancy requirements (Second Amendment to Lease Agreement, Paragraph 27).

In March 2020, President Donald Trump declared a national emergency due to the coronavirus pandemic. Shortly thereafter, the State of Texas and Parker County, Texas declared a local disaster and public health emergency and ordered that individuals could not occupy various establishments, including malls and retail stores that do not sell essential household goods. As such, Plaintiff and the other businesses occupying the Center could not access the premises or conduct business.

On March 24, 2020, Plaintiff informed Defendant that its store was closed due to "an event of force majeure, a casualty, the discovery of hazardous substances within the Center and/or Premises, loss of the right of quiet enjoyment and/or access and visibility to the Premises being materially and adversely affected." As a result, Plaintiff informed Defendant that Plaintiff's rental and payment obligations under the lease had been abated.

On May 7, 2020, without referencing Plaintiff's prior communications, Defendant informed Plaintiff that its failure to remit rent for April 2020 would constitute a default under the lease. On May 8, 2020, Plaintiff informed Defendant that the Lease's continuing co-tenancy requirement, which required that certain co-tenants within the Center continue occupying the premises, was not being satisfied. As such, Plaintiff was entitled to pay an alternative rent amount. Plaintiff received no response to its correspondence and on June 1, 2020 fully paid its rent and other charges for April, May, and June 2020. Nevertheless, on June 5, 2020, with no prior correspondence, Defendant informed Plaintiff it was rejecting Plaintiff's payments, terminating the Lease, and would be initiating action to re-possess the space Plaintiff was leasing. None of Defendant's limited communications met the Lease's notice requirements since they were sent to the wrong address.

III. ARGUMENTS AND AUTHORITIES

Defendant claims the Court should dismiss this action as a "pre-emptive, anticipatory claim for declaratory relief" filed to prevent Defendant from bringing its own suit "in the forum of its choice." Defendant additionally claims that Plaintiff's action does not meet the necessary amount-in-controversy requirements for establishing the Court's jurisdiction. Defendant mischaracterizes the purpose of the Declaratory Judgment Act and attempts to impugn Plaintiff's intent, ascribing malice to Plaintiff's actions when there is none. This Court has subject-matter jurisdiction as the amount in controversy exceeds $75,000. Additionally, the *Trejo* factors established by the Fifth Circuit unanimously favor the Court's exercising jurisdiction over Plaintiff's action.

A. Plaintiff Satisfies the Amount-in-Controversy Requirement

Defendant correctly states that a federal court only has jurisdiction in two types of cases: (1) cases involving claims under federal law; and (2) cases involving state law when the plaintiff

is a citizen of a different state from every defendant and the amount in controversy exceeds $75,000. *See* 28 U.S.C. §§ 1331, 1332. Defendant also correctly states that the party seeking to invoke federal diversity jurisdiction bears the burden of establishing these two requirements. *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir. 2003) (citing *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998)). Defendant fails to recognize, however, that the Supreme Court has outlined the method for measuring the amount in controversy: "[U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id*. (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 3030 U.S. 283, 288 (1938).

Plaintiff has, in good faith, alleged that the amount in controversy exceeds $75,000.00 as required by 28 U.S.C. §§ 1331 and 1332. Defendant incorrectly claims that this case involves only two months' worth of rent, amounting to only $17,192.66. Instead, this case involves the resolution of a controversy over whether Defendant improperly terminated a 5-year lease just over three months into that lease. The amount in controversy, therefore, is not two months' worth of rent, but the value Plaintiff would lose and costs it would incur if it did not seek and obtain declaratory relief – i.e., if it accepted Defendants' wrongful repudiation of the Lease and eviction. Indeed, Plaintiff paid all alleged overdue rent and associated charges prior to Defendant's threat of eviction, thereby leaving no amount in controversy under Defendant's theory.

Under federal law, the amount in controversy for a declaratory-judgment action is "the value of the right to be protected or the extent of the injury to be prevented." *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002) (citing *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983*)*); *see also Queens Mobile Home Community v. JP El Paso I, LLC*, EP-15-CV-00298-FM, 2016 WL 11582359 at *4 (W.D. Tex. Feb. 2, 2016). And where the plaintiff seeks

injunctive or declaratory relief to protect a business from breach of an agreement, the amount in controversy is the business' loss caused by the alleged breach. *See Pharmacy 101 Ltd. v. AMB Property, LP*, Civil Action No: 05-1386, 2006 WL 8456475 at *3 (E.D. La. May 13, 2006) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977); 14B Charles Alan Wright, et. al., Federal Practice & Procedures § 3708).

Not only would the wrongful termination and eviction deprive Plaintiff of the value of the leased premises for nearly five more years, but it would also inappropriately and prematurely force Plaintiff to incur additional costs, including costs incurred in connection with moving its property from the leased location, locating a new location, interrupting its business from its eviction date until it could re-open in a new location (if it were able to find a satisfactory new location), and the loss of familiar customers who did not resume shopping at the new location or potential new customers who were not drawn to it because of its inferiority. At a minimum, if Plaintiff were evicted, it would require a minimum of five months to identify and move into a new location (a minimum 30 days to find a satisfactory new location (if possible), 30 days to negotiate a new lease, 30 days for permits, and 60 days to build out the new location). Based on Plaintiff's historical financial performance, suspending its operation for five months would cause it to suffer approximately $375,000 in lost profit. Additionally, moving to a secondary site would result in a drop in sales of 15-20%.

Plaintiff's Complaint alleges the size of its leased space (just over 6,000 square feet), its monthly rent ($8,596.33), and the length of its lease (five years). With a store that size and rent for the duration of the lease exceeding $500,000, it is clear that the value of Plaintiff's Lease and the potential lost costs associated with the termination of that Lease only 3 months into the five-year term would exceed $75,000. A court may make "common-sense inferences" about the amount in

controversy based upon the injuries a plaintiff alleges in a complaint. *Robertson v. Exxon Mobile Corp.*, 814 F.3d 236, 2401-41 (5th Cir. 2015) (finding that claims for damages for emphysema and for wrongful death from lung cancer, or claims for prostate cancer and a host of other ailments, made it "more likely than not" that a plaintiff was seeking more than $75,000.00). Based on these allegations, Plaintiff has met the amount in controversy requirement.

B. The *Trejo* Factors Weigh Unanimously in Favor of Exercising Jurisdiction

As Defendant notes, before deciding whether it can hear a declaratory judgment suit, a district court must 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. v. Holmes County*, 343 F.3d 383, 387 (5th Cir. 2003). Defendant does not argue that there is no justiciable action before the Court. Nor does Defendant argue that the Court does not have the authority to grant the requested declaratory relief. Instead, Defendant focuses on whether the Court should discretionarily dismiss Plaintiff's declaratory-judgment action.

The Fifth Circuit has outlined seven nonexclusive factors a district court should consider when determining whether to discretionarily dismiss a declaratory judgment action. They are: (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 that 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 purpose 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).

1. Plaintiff Did Not Inappropriately Forum Shop or Bring Suit in Anticipation of Litigation under *Trejo* Factors 2 and 3

Defendant focuses exclusively on factors 2 and 3, claiming Plaintiff filed its suit prematurely, in anticipation of "inevitable state court litigation," and in an effort to "deprive plaintiff of his choice of forum." (Defendant Motion to Dismiss, Dkt. 8, pg 2, 6). This both mischaracterizes the purpose of the Declaratory Judgment Act and implies malicious intent on Plaintiff's part.

The Fifth Circuit has explained that

> [t]he filing of every lawsuit requires forum selection. Federal declaratory judgment suits are routinely filed in anticipation of other litigation. The courts use pejorative terms such as "forum shopping" or "procedural fencing" to identify a narrower category of federal declaratory judgment lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating related litigation. Merely filing a declaratory judgment action in federal court with jurisdiction to hear it, in anticipation of state court litigation, is not itself improper anticipatory litigation or otherwise abusive "forum shopping."…Declaratory judgments are often "anticipatory" appropriately filed when there is an actual controversy that has resulted in or created a likelihood of litigation. More than one venue may be proper, requiring the plaintiff to select a forum. These *Trejo* labels cannot be literally applied….A proper purpose of section 2201 (a) is to allow potential defendants to resolve a dispute without waiting to be sued or until the statute of limitations expires. *Texas Emplrs. Ins. Assoc. v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988). The mere fact that a declaratory judgment action is brought in anticipation of other suits does not require dismissal of the declaratory judgment action by the federal court.

Sherwin-Williams Co., 343 F.3d at 391-92, 397 (5th Cir. 2003); *see also Poly-America, L.P. v. Stego Industries, L.L.C.*, 694 F.Supp.2d 600, 610 (N.D. Tex. Mar. 8, 2010); *Atlantic Cas. Ins. Co. v. Ramirez*, 651 F.Supp.2d 669, 675 (N.D. Tex. Sept. 2, 2009).

To claim that Plaintiff brought this declaratory action to "deprive plaintiff of his choice of forum" is to claim that Plaintiff is not entitled to use the Declaratory Judgment Act for one of the very purposes it was created. The Fifth Circuit has stated that the Act's purpose is to "settle 'actual controversies' before they ripen into violations of law or breach of some contractual duty." *Hardware Mutual Casualty Co. v. Schantz*, 178 F.2d 779, 780 (5th Cir. 1949); *see also Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989). Plaintiff brought this action because Defendant stated it would evict Plaintiff from its store location. Plaintiff believed and still believes that Defendant's claim that it was terminating the Lease amounted to an adjudiciable repudiation and that any eviction would breach the Lease. Faced with that repudiation, Plaintiff filed this declaratory judgment action rather than waiting to be physically removed from the premises. It was not inappropriate for Plaintiff to do so. Critically, had Defendant filed first, Plaintiff would have sought removal of the case to federal court based on diversity jurisdiction, putting the parties in the same forum.

Overall, the *Trejo* factors "point toward dismissal only in a 'narrower category of federal declaratory judgment lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating related litigation." *Poly-America*, 694 F.Supp.2d at 610 (quoting *Sherwin-Williams*, 343 F.3d at 391). It is clear that Plaintiff's actions in filing this declaratory-judgment action were neither improper nor abusive and that factors 2 and 3 weigh in favor of the Court exercising its jurisdiction.

2. The Remaining *Trejo* Factors Weigh in Favor of Exercising Jurisdiction

The remaining *Trejo* factors, although not addressed by Defendant, similarly weigh heavily in favor of this Court exercising.

- Factor 1 (Parallel State Proceeding) – The lack of a parallel proceeding in a different forum does not require the court to accept jurisdiction, but "it is a factor that weighs strongly *against* dismissal." *Poly-America, L.P. v. Stego Industries, L.L.C.*, 694 F.Supp.2d 600, 610 (N.D. Tex. Mar. 8, 2010) (quoting *Sherwin-Williams*, 343 F.3d at 394) (emphasis added).

- Factor 4 (Possible Inequities in Time or Forum) – There are no inequities in allowing Plaintiff to gain precedence in time or in forum. Plaintiff properly sought declaratory relief in a court that has subject matter jurisdiction and in the appropriate venue. Defendant will be able to litigate its issues with Plaintiff in the same way that it would have if it had filed the lawsuit first. *See Atlantic Cas. Ins. Co. v. Ramirez*, 651 F.Supp.2d 669, 675 (N.D. Tex. Sept. 2, 2009).

- Factor 5 (Convenient Forum) – The Northern District of Texas, Fort Worth Division is a convenient forum. The store location at issue is in Parker County, within the Northern District of Texas, Fort Worth Division, and Defendant is, or at least has an office, located in the Northern District of Texas. *Id*.

- Factor 6 (Judicial Economy) – Maintaining jurisdiction over Plaintiff's declaratory judgment action would serve judicial economy. The parties have already begun the process of litigating the action in this Court.

- Factor 7 (State Judicial Decree) – There is no judicial decree involved in this action. As such, this factor does not require extensive consideration. *Id*.

IV. ALTERNATIVE REQUEST FOR LEAVE TO AMEND

Plaintiff maintains that it has sufficiently alleged the facts necessary to establish that this Court has diversity (or subject-matter) jurisdiction over this suit and should, in its discretion, continue exercising that jurisdiction. Nevertheless, if the Court were to find that Plaintiff's pleadings are insufficient to establish an amount in controversy exceeding $75,000, Plaintiff would respectfully request the opportunity to amend its Complaint since any such deficiency could be easily and expeditiously cured. *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave when justice so requires…"); *see also Castillo v. City of Grand Prairie, Texas*, Civil Action No. 3:19-CV-2191-L, 2019 WL 5578556 at *3 (N.D. Tex. Oct. 29, 2019) (Court granted plaintiff leave to amend his complaint following defendant's motion to dismiss as he had "not previously amended his Complaint and the deficiencies relate[d] to the failure to plead sufficient facts…").

V. CONCLUSION

Because the amount in controversy is greater than $75,000, Plaintiff has established diversity jurisdiction and Defendant's request to dismiss this action pursuant to 12(b)(1) should be denied. Additionally, because the *Trejo* factors unanimously favor this Court exercising its jurisdiction over Plaintiff's declaratory-judgment action, Defendant's Motion to Dismiss should be denied in its entirety. Alternatively, Plaintiff would request leave to amend its Complaint so that it may provide additional details establishing the Court's diversity jurisdiction.

Dated: August 20, 2020

Respectfully Submitted,

/s/ William S. Snyder

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on August 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.

/s/ William S. Snyder
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