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 REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Incorrectly identified Defendant, Weatherford Dunhill LLC c/o Dunhill Property Management Services, Inc. ("Dunhill"),[1] files this Reply in Further Support of its Rule 12(b)(1) Motion to Dismiss Plaintiff's Original Complaint for Declaratory Judgment ("Complaint") 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

This is a landlord-tenant dispute wherein the Declarative Plaintiff, Hibbett Sporting Goods, Inc., ("Hibbett") filed an anticipatory suit in order to avoid an impending action brought by Dunhill so that it could obtain its preferred choice of forum and its preferred choice as a plaintiff in this matter. Hibbett's Response (DK. 15) ignores the very nature of this suit and examines factors that should weigh heavily *in favor* of dismissal. Further, Hibbett has failed to allege a sufficient basis

[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."

for this Court to exercise diversity jurisdiction over the parties. For these reasons, the Court should grant Dunhill's Motion to Dismiss.

II. ARGUMENTS

a. Plaintiff Failed to Properly Allege a Jurisdictional Basis

In the present matter, Plaintiff bears the burden of establishing subject matter jurisdiction. *See Gaitor v. Peninsular & Occidental Steamship Co.*, 287 F.2d 252, 253-54 (5th Cir. 1961). Bare allegations of jurisdictional facts that are challenged are insufficient to invest a federal court with jurisdiction. *See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 556 (5th Cir. 1993) *cert denied,* 510 U.S. 1041 (1994), *abrogated on other grounds by Marathon Oil Co. v. Ruhgas*, 145 F.3d 211 (5th Cir. 1998).

In order to support federal jurisdiction based on diversity, the party invoking that jurisdiction must prove, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount. *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998). Courts are to rely upon "summary judgment-type" evidence to ascertain the amount in controversy. *Id.* This includes providing such evidence in affidavits. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995).

Here, Plaintiff has made conclusory allegations regarding the amount in controversy and failed to support its claims with the kind of "summary judgment-type" evidence required. Plaintiff's arguments in support of its claim of exceeding the amount in controversy threshold contain bare assertions unsupported by any affidavit or other admissible proof. As a result, Plaintiff failed to meet its evidentiary requirements and the Court should dismiss this action for failing establish subject matter jurisdiction.

b. The *Trejo* Factors Require Dismissal of Plaintiff's Declaratory Action

Plaintiff relies upon the seven nonexclusive *Trejo* factors in support of its argument that the Court should deny Dunhill's motion. As stated in Plaintiff's Response, those factors are as follows: (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). Plaintiff addressed each factor in its Response; therefore, Dunhill will reply in kind. There is no state judicial decree is involved, so that factor is not applicable.

1. The Lack of a Pending State Court Suit Is Not Determinative

The Fifth Circuit, in analyzing the first of the *Trejo* factors, has held that the lack of a pending state court suit is not a determinative factor, but must be weighed against the other factors and considerations. *See Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 392-394 (5th Cir. 2003). Here, while there is no pending state court suit, Plaintiff admits that it expected Dunhill to file a state court suit to evict it from the leased premises. This factor is, at worst, inconclusive.

2. Plaintiff Filed Suit in Anticipation of an Impending Dunhill Suit

Courts generally do not allow a party to choose a preferred forum by filing a declaratory action in federal court when it has notice that another party intends to file suit involving the same issues in a different forum. *Mill Creek Press, Inc. v. The Thomas Kinkade Co.,* No. CIVA. 3:04-

CV-1213-G, 2004 WL 2607987 at *7 (citing *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F.Supp. 1290, 1292 (S.D. Tex. 1990). Based on the arguments presented by both parties, it is clear that Hibbett expected Dunhill to bring suit to evict it from the shopping center. Less than a week after receiving Dunhill's notice of lease termination, Hibbett filed this instant action. This indicates the nature and purpose of this anticipatory declaratory action and should weigh in favor of dismissal.

3. Plaintiff's Declaratory Action Fails the Fairness Inquiry

The next *Trejo* factors examine the underlying fairness of the plaintiff's filing of a declaratory action. First, a court must determine whether the declaratory plaintiff is using the declaratory judgment process to gain access to a federal forum on improper or unfair grounds, and then, whether inequities result from plaintiff's filing. *Sherwin-Williams Co.*, 343 F.3d at 388, 391. One such improper use of the declaratory judgment action is when the contract at issue contains a valid and binding arbitration provision. When parties agree to be bound by an arbitration agreement, they cannot evade arbitration through artful pleading. *Craddick Partners, Ltd. v. EnerSciences Holdings, LLC,* No. 11-15-00014-CV, 2016 WL 3920024 at *5 (citing *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007)). Such actions should be dismissed when the declaratory plaintiff improperly forum shops and seeks refuge in federal court even though an arbitration agreement exists in the contract that is the subject of the declaratory action. *See Schmidt Land Services, Inc. v. UniFirst Corp.*, 432 S.W.3d 470 (Tex.App.—San Antonio 2014, pet. denied); *Craddick Partners, Ltd.*, 2016 WL 3920024 at *5. Allowing otherwise would be inequitable and unfair, given that the parties included the arbitration provision in the contract and agreed to be bound by it during the bargain and exchange process of contract negotiations.

Here, Hibbett attached the lease agreement to its Complaint and incorporated it by reference. (DK. 1-1). Section 35 of that lease agreement contains a provision titled "Dispute Resolution." (DK. 1-1, p. 26). That provision requires that any controversy or claim arising out of or relating to the lease *shall* be settled by arbitration administered by the American Arbitration Association. (DK. 1-1, p. 26) (emphasis added). Hibbett's Response contends that Dunhill's plans to evict it from the leased premises constitutes an adjudicable action. (DK. 15, p. 8). This adjudicable action would therefore be a controversy or claim relating to the lease, thus requiring arbitration. Hibbett has improperly sought a ruling by this Court relating to a controversy arising out of the lease agreement. The only proper forum for such a ruling is in arbitration. Accordingly, the fairness factors strongly favor dismissal.

4. The *Trejo* Efficiency Standards Favor Dismissal

The next two *Trejo* factors focus on the efficiency of the action. First, a court determines whether federal court is a convenient forum for the parties. *Trejo,* 39 F.3d at 591. This includes the location of the federal court as it relates to the parties and to the location where the acts or events giving rise to the claims occurred. *See Sherwin-Williams,* 343 F.3d at 400. Next, a court considers whether maintaining the declaratory judgment action would serve judicial economy and avoid piecemeal litigation. *Id.* at 391.

Here, the Northern District, while convenient from a location standpoint, is most inconvenient when considering that the parties agreed that any and all claims or controversies arising out of the lease would be brought in arbitration. Further, maintaining this declaratory action would only serve to hinder judicial economy. If a claim or controversy exists (which Hibbett asserts it does), then the parties belong in arbitration. Dismissing Hibbett's declaratory action now

will actually serve judicial economy because it would eliminate the inevitable motion practice to come involving a motion to compel arbitration. Therefore, these factors favor dismissal.

III. CONCLUSION

As stated in Dunhill's Motion and this Reply in Support, Hibbett failed to properly allege a jurisdictional basis for this Court to exercise diversity jurisdiction. Even if the Court holds that Hibbett has in fact properly alleged diversity jurisdiction, the Court should nevertheless dismiss this action using its discretionary powers. The *Trejo* factors favor dismissal because any claim or controversy related to the lease agreement between the parties belongs in arbitration. Therefore, Dunhill respectfully requests the Court dismissal Hibbett's Complaint and award Dunhill all remedies available to it, both at law and in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on September 4, 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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