

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Case No. 14-CV-21776-WILLIAMS

BARBARA STONE,  
individually and as next  
friend of HELEN STONE,

Plaintiff,

vs.

JACQUELINE HERTZ; BLAIRE LAPIDES;  
ROY LUSTIG; MICHAEL GENDEN;  
RANDI McMORRIS; FRED E. GLICKMAN;  
and FRED E. GLICKMAN, P.A.,

Defendants.

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**ORDER GRANTING PLAINTIFF/COUNTER-DEFENDANT'S MOTION TO DISMISS**

THIS MATTER is before the Court on Plaintiff/Counter-Defendant Barbara Stone's Motion to Dismiss the Counterclaim [D.E. 85]. For the reasons stated below, the Motion is GRANTED.

On July 25, 2014, Defendants/Counter-Plaintiffs Jacqueline Hertz and Blaire Lapides filed a counterclaim against Barbara Stone asserting claims of defamation and tortious interference with a business relationship [D.E. 45]. The counterclaim was brought under 28 U.S.C. § 1332 based on the diversity of the parties. According to the counterclaim, the Counter-Plaintiffs are citizens of Florida, and Stone is a citizen of New York. *Id.* at ¶¶ 2-4. Because all of Stone's claims have been dismissed [see D.E. 76; D.E. 83], the counterclaim sets forth the only remaining claims in this action.

Stone has filed an (untimely) motion to dismiss the counterclaim on the grounds that there is no diversity among the parties [D.E. 85]. Specifically, Stone argues that

there is no diversity because she is a resident of Florida, as are the Counter-Plaintiffs. *Id.* at ¶¶ 2-3.

A challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may be presented as either a facial or factual attack. *McElmurray v. Consol. Gov't of August-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). Facial attacks challenge subject-matter jurisdiction based on the allegations in the complaint, and the district court takes as true the allegations contained in the complaint when considering the motion. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). In contrast, factual attacks challenge the existence of subject-matter jurisdiction in fact, and in such cases “no presumptive truthfulness attaches to plaintiff’s allegations.” *Id.* Stone’s challenge is a factual attack. “[T]he party invoking the court’s jurisdiction bears the burden of proving, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction.” *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002).

As evidence that Stone is a citizen of New York, the Counter-Plaintiffs have cited the original *pro se* Verified Complaint Stone filed in this matter [D.E. 2], in which Stone invoked the Court’s diversity jurisdiction in bringing her claims against the Counter-Plaintiffs and other Defendants, and her Amended Verified Complaint [D.E. 10], in which Stone again invoked the Court’s diversity jurisdiction [D.E. 87].<sup>1</sup> However, in neither the Verified Complaint nor the Amended Verified Complaint did Stone allege that she was a citizen of New York; rather, Stone alleged only that she was a “resident of the State of New York” [D.E. 2 ¶ 1; D.E. 10 ¶ 62]. In her motion to dismiss, Stone asserts that she

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<sup>1</sup> Stone also invoked the Court’s federal question jurisdiction under 28 U.S.C. § 1331, based on claims asserted under the Americans with Disabilities Act and the Elder Justice Act [D.E. 2; D.E. 10].

“resides in Florida,” and that the Counter-Plaintiffs also reside in Florida, but her motion is not accompanied by an affidavit or any other evidence [D.E. 85 ¶ 2].<sup>2</sup>

“It is by now axiomatic that the inferior federal courts are courts of limited jurisdiction. They are empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution, and which have been entrusted to them by a jurisdictional grant authorized by Congress.” *University of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (internal citations and quotations omitted). Because federal courts are courts of limited jurisdiction, “there is a presumption against” the existence of jurisdiction. *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (quoting *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)). It is for this reason that the party invoking the federal court’s jurisdiction bears the burden of proof. *Id.*

Pursuant to 28 U.S.C. § 1332(a)(1), a district court may have jurisdiction over claims between “citizens of different States.” Diversity jurisdiction requires “complete diversity,” meaning that “every plaintiff must be diverse from every defendant.” *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998). To establish “citizenship” for purposes of diversity jurisdiction, “[r]esidence alone is not enough.” *Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1269 (11th Cir. 2013). “Citizenship is equivalent to ‘domicile’ for purposes of diversity jurisdiction,” and “domicile requires both residence in a state and ‘an intention to remain there indefinitely.’” *Id.* (quoting *McCormick*, 293 F.3d at 1257-58); see also *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1341-42 (11th Cir. 2011) (“Domicile is not synonymous with residence;

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<sup>2</sup> In opposing Stone’s motion, Counter-Plaintiffs erroneously assert that Stone alleged that Counter-Plaintiffs were New York residents in her motion [D.E. 87 ¶¶ 9, 13].

one may temporarily reside in one location, yet retain domicile in a previous residence. Although physically present in the current residence, the person does not intend to remain in that state indefinitely"). Here, the Counter-Plaintiffs have not cited any evidence in the record indicating that Stone was a citizen of New York on July 25, 2014, the date the counterclaim was filed.<sup>3</sup> The only evidence cited by the Counter-Plaintiffs indicates that Stone was a *resident* of New York prior to the filing of the counterclaim. But "residence alone is not enough." *Travaglio*, 735 F.3d at 1269. In opposing the motion to dismiss, Counter-Plaintiffs acknowledge that Stone has only asserted residency in her complaints, but they assert that this is "of no consequence, since there is nothing in either the pleadings or the record to establish that plaintiff and defendants are citizens of the same state" [D.E. 87 at 3 n.2].<sup>4</sup> This overlooks both the distinction

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<sup>3</sup> For diversity purposes, a party's citizenship is determined "at the time the suit is filed." *MacGinnitie v. Hobbs Grp., LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005) (citing *Harris v. Garner*, 216 F.3d 970, 983 (11th Cir. 2000)).

<sup>4</sup> Counter-Plaintiffs' assertion that "nothing" in the record indicates that Stone is a citizen of Florida is, in fact, belied by the record, which at the very least raises questions about Stone's residency if not her citizenship. On July 7, 2014 – less than three weeks before Hertz and Lapides filed their counterclaim – Stone filed a *pro se* motion which she signed with an address in Hollywood, Florida [D.E. 38]. In the motion, Stone asserted that she was under house arrest at the time. *Id.* Stone also submitted in this case court papers filed on June 22, 2014, by the Miami-Dade State Attorney's Office in a criminal case against Stone indicating: (1) that Stone had been arrested in Miami-Dade County on December 19, 2013, and released on bond on December 23, 2013; (2) that she had been placed in a pretrial diversion program on March 13, 2014; and (3) that she had allegedly violated the terms of her release by visiting her mother's nursing home on June 19 and June 21, 2014 [D.E. 47-3 at 1-2]. Stone also used the Hollywood, Florida, address in a *pro se* motion filed on August 19, 2014 [D.E. 47-1]. While this material sheds no light on Stone's intent to remain for purposes of domicile, it does tend to suggest that Stone was a Florida resident between December 2013 and August 2014.

When the pleadings are inadequate, a court may review the record to find evidence that diversity exists. See *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1320 (11th Cir. 2001). But a party's self-serving declaration of citizenship in a legal brief may not be considered "evidence" of citizenship that may, by itself, establish diversity jurisdiction. See *Travaglio*, 735 F.3d at 1269-70. Therefore, even if Stone had declared in her motion that she was a citizen of Florida rather than a resident, the Court could not have credited this as evidence. However, Stone's previous use of the Hollywood, Florida, address was not part of an effort to defeat diversity jurisdiction; indeed, at the time she filed those papers, Stone's own claims, which were themselves based in part on diversity jurisdiction, were still pending before the Court. Raising the issue of diversity at that time would have been against Stone's interest, which gives these assertions of residency evidentiary weight. See *Molinos Valle Del Cibao*, 633 F.3d at 1342.

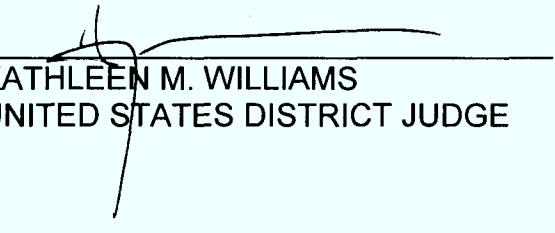
between residency and citizenship articulated in *Travaglio* and several other cases, and Counter-Plaintiffs' burden to prove diversity of citizenship. The relevant question is not whether there is any evidence in the record showing that the parties are citizens of the same state, but whether there is evidence to show that the parties are citizens of different states – and it is Counter-Plaintiffs' burden to provide that evidence. See *McCormick*, 293 F.3d at 1257 (“the party invoking the court’s jurisdiction bears the burden of proving, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction”). The Counter-Plaintiffs have not cited any evidence establishing that Stone is a *citizen* of New York or any other state for purposes of diversity jurisdiction, and they have therefore failed to meet their burden to prove that federal jurisdiction exists.

“A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking.” *Fitzgerald*, 760 F.2d at 1251; see also Fed. R. Civ. P. 12(h)(3) (“[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action”). Because Counter-Plaintiffs have failed to show that this Court has subject-matter jurisdiction over this action, Counter-Defendant’s Motion to Dismiss [D.E. 85] is GRANTED, and this case is DISMISSED. All pending motions are DENIED, and the Clerk is directed to CLOSE this case.

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The Court recognizes that, after August 2014, Stone resumed filing motions using her New York address – including, curiously, the motion to dismiss in which she declared herself a Florida resident [D.E. 85]. Suffice to say that, based on this record, Stone’s true state of residence is far from clear. And it is for this very reason that Counter-Plaintiffs must come forward with affirmative evidence not only of Stone’s residency but also of her citizenship, to overcome the presumption that the Court does not have jurisdiction. See *Fitzgerald*, 760 F.2d at 1251. Counter-Plaintiffs have not met this burden.

DONE AND ORDERED in Chambers in Miami, Florida, this 5 day of March,  
2015.

  
KATHLEEN M. WILLIAMS  
UNITED STATES DISTRICT JUDGE

copies furnished to:  
counsel of record

Barbara Stone  
101 N. Ocean Drive  
Hollywood, FL 33019

Barbara Stone  
244 Fifth Ave. #B296  
New York, NY 10001