940 F.3d 381
United States Court of Appeals, Seventh Circuit.

Christine DANCEL, Plaintiff-Appellant,
v.
GROUPON, INC., Defendant-Appellee.

No. 19-1831
|
Argued September 16, 2019
|
Decided October 9, 2019

Synopsis

Background: User of social networking website, whose photograph from website was used, by operator of online marketplace for discount vouchers, to promote a voucher for a restaurant, brought putative class action against operator in state court, seeking damages under Illinois Right of Publicity Act. After removal and after denial of user's motion to remand, the United States District Court for the Northern District of Illinois, Ronald A. Guzman, Senior District Judge, 2019 WL 1013562, denied user's motion for class certification. User appealed.

[Holding:] The Court of Appeals, St. Eve, Circuit Judge, held that remand for jurisdictional discovery regarding minimal diversity of citizenship was warranted.

Remanded.

West Headnotes (9)

[1] Federal Courts
Class actions

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(3) Class actions

Generally, in a permissive appeal from a class certification decision, the Court of Appeals will consider only those issues related to the class certification decision. Fed. R. Civ. P. 23(f).

[2] Removal of Cases
Review

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(9) Review

Court of appeals, which had granted permission for plaintiff in putative class action to appeal from denial of class certification, would not expand the scope of appeal to include district court's denial of plaintiff's motion to remand the removed action, which motion had asserted that defendant had waived the right to remove because subject matter jurisdiction had always existed and defendant waited to seek removal; timing of removal was a question of procedure, rather than a question of subject matter jurisdiction which court of appeals would be obligated to reach. 28 U.S.C.A. § 1446(b); Fed. R. Civ. P. 23(f).

[3] Federal Courts
Determination of question of jurisdiction

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3252 Determination of question of jurisdiction

Even on interlocutory review of a district court order, the Court of Appeals must be assured that the district court has subject matter jurisdiction, because if it does not, then the Court of Appeals cannot decide the merits of the appeal, and can only direct that the suit be dismissed.

[4] Removal of Cases
Defects in proceedings, objections, amendments, and waiver

334 Removal of Cases
334VI Proceedings to Procure and Effect of Removal

334k94 Defects in proceedings, objections, amendments, and waiver

Whether the party that removed an action failed to demonstrate diversity of citizenship is distinct from whether diversity exists, and only the latter is a question of subject matter jurisdiction that cannot be waived. 28 U.S.C.A. § 1332.

[5] **Removal of Cases**

Defects in proceedings, objections, amendments, and waiver

334 Removal of Cases
334VI Proceedings to Procure and Effect of Removal
334k94 Defects in proceedings, objections, amendments, and waiver

Deficiency in defendant's allegations of minimal diversity of citizenship, for defendant's removal of putative class action, involved defendant's failure to demonstrate diversity, which was distinct from question whether diversity existed, as would present a non-waivable question of subject matter jurisdiction, and thus, the Court of Appeals, upon identifying the deficiency in the allegations of diversity after having granted to plaintiff permission to appeal from denial of class certification, would not be required to direct that the case be immediately remanded to state court, and would be able to proceed to the class certification issue, if the existence of subject matter jurisdiction was apparent from the record, or if a lack of subject matter jurisdiction was cured through amendment of notice of removal, which could be done on appeal. 28 U.S.C.A. §§ 1332(d)(2)(A), 1653; Fed. R. Civ. P. 23(f).

1 Cases that cite this headnote

[6] **Removal of Cases**

Evidence

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(7) Evidence

The removing party bears the burden of showing the existence of federal jurisdiction.

[7] **Removal of Cases**

Review

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(9) Review

Defendant's allegation of negative citizenship, i.e., defendant alleged that some undetermined number of members of putative class for removed action were not citizens of the two states for which corporate defendant was citizen, did not allow minimal diversity of citizenship to be inferred by the Court of Appeals from an unchallenged factual determination by the District Court that supported subject matter jurisdiction. 28 U.S.C.A. § 1332(d)(2)(A).

[8] **Removal of Cases**

Allegations in pleadings

334 Removal of Cases
334III Citizenship or Alienage of Parties
334k47 Allegations in pleadings

To establish minimal diversity of citizenship, as element for removal of a class action, a defendant cannot merely allege diversity of citizenship without identifying the parties' states of citizenship. 28 U.S.C.A. § 1332(d)(2)(A).

1 Cases that cite this headnote

[9] **Removal of Cases**

Review

334 Removal of Cases
334VII Remand or Dismissal of Case
334k107 Proceedings for Remand and Review Thereof
334k107(9) Review

Remand to the district court for jurisdictional discovery was warranted, on plaintiff's appeal from denial of class certification in removed action, where the Court of Appeals identified a deficiency in allegations of minimal diversity of citizenship, as element for removal of a class action, existence of subject matter jurisdiction was not apparent from the record, and without jurisdictional discovery defendant was unable,

on appeal, to cure the lack of subject matter jurisdiction through amendment of notice of removal. 28 U.S.C.A. §§ 1332(d)(2)(A), 1653; Fed. R. Civ. P. 23(f).

1 Cases that cite this headnote

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:18-cv-02027 — **Ronald A. Guzmán**, *Judge*.

Attorneys and Law Firms

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Before Bauer, Brennan, and St. Eve, Circuit Judges.

Opinion

St. Eve, Circuit Judge.

***1** We accepted Christine Dancel's petition under Federal Rule of Civil Procedure 23(f) so that we could review the district court's denial of class certification. Dancel, however, has proceeded as though we gave her a free ticket to redo her opposition to the removal of her suit from state court. Although we refuse to entertain the bulk of her arguments, she has drawn our attention to a critical hole in the notice of removal—it does not allege the citizenship of even one diverse member of the putative class. We therefore order a limited remand so that the district court can patch this hole, securing its jurisdiction over the case.

I

Dancel sued Groupon, Inc. in the Circuit Court of Cook County in 2016. She alleged that Groupon, an online marketplace that sells discount vouchers to businesses, had used her photograph on one of its pages to promote a voucher for a restaurant in Vernon Hills, Illinois. Groupon had collected this photograph automatically from Dancel's public Instagram account based on data linking it to the restaurant's location. Her complaint sought damages under the Illinois Right of Publicity Act, 765 ILCS 1075/1, 30, on behalf of a class of "[a]ll Illinois residents (1) who maintain an Instagram account, and (2) whose photograph(s) from such Instagram account have appeared on a Groupon Deal offer page."

The parties litigated in state court for two years until Dancel moved to certify a class that differed from the one in her complaint. Her new class (which also had a subclass) was to consist of "[a]ll persons who maintained an Instagram Account and whose photograph (or photographs) from such account was (or were) acquired and used on a groupon.com webpage for an Illinois business." Unlike the original class, this one was not defined by its members' residency, though it was still limited to advertisements of Illinois businesses.

In response to the modified class definition, Groupon filed a notice of removal under the Class Action Fairness Act, 28 U.S.C. § 1453 (CAFA). The CAFA permits removal of a proposed class action to federal court as long as there is minimal diversity, meaning just one member of the plaintiff class needs to be a citizen of a state different from any one defendant. *Id.* § 1332(d)(2)(A). (There are other requirements regarding numerosity and the amount in controversy, but they are met here—Dancel alleges each of the tens of thousands of class members is entitled to $1000 in statutory damages, 765 ILCS 1075/40(a)(2).) Groupon, the sole defendant, is a Delaware corporation with its principal place of business in Illinois and thus is a citizen of those two states. To meet the minimal-diversity requirement, its notice of removal stated that the new class "undoubtedly would include at least some undetermined number of non-Illinois and non-Delaware citizens as class plaintiffs." Groupon did not identify any one of these class members or his or her citizenship.

Dancel initially let this omission slide. She moved to remand on the theory that Groupon's removal was improper not because jurisdiction was lacking but because it had always existed, and therefore Groupon had waived its right to remove. *See* 28 U.S.C. § 1446(b). Indeed, she expressly told the district court she did not challenge the existence of minimal diversity, which, she argued, had been apparent from her complaint's use of residency: some Illinois residents are citizens of another state, and it was likely at least one such person was within the original class definition. She changed her tune in her reply in support of remand, though, and argued there that Groupon was required to "specifically identify

some absent class member who is not a citizen of Illinois or Delaware" to show minimal diversity. In a sur-reply, Groupon insisted that it could easily cure the deficiency, if pressed, but thought it unnecessary to do so. The district court rejected Dancel's waiver argument and denied the motion to remand but did not address minimal diversity or direct Groupon to cure its allegations. Dancel did not apply for leave to appeal the denial. *See* 28 U.S.C. § 1453(c)(1).

***2** Instead, the parties litigated the class certification motion, which eventually the court denied on predominance grounds. Fed. R. Civ. P. 23(b)(3). Dancel petitioned for review of that denial, and we granted the petition. Fed. R. Civ. P. 23(f).

II

Despite asking for and receiving only permission to appeal the class-certification decision, Dancel begins this appeal by relitigating her motion to remand. She repeats her assertion of waiver based on Groupon's delay in seeking removal. She also argues that Groupon's allegations of jurisdiction were deficient, and therefore urges us to direct that the case be remanded to state court.

[1] **[2]** **[3]** We refuse the invitation to expand the scope of this appeal. Generally, in an appeal under Rule 23(f) we will consider only "those issues related to [the] class certification decision." *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918, 922 (7th Cir. 2017) (quoting *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 576 n.2 (7th Cir. 2008)). Here, there is no overlap between the denial of remand and the later denial of certification. Rather than try to draw such a relationship, Dancel insists that we must address her arguments because they go to the district court's subject-matter jurisdiction. True, we must, even on interlocutory review, be assured that the district court has jurisdiction, for if it does not then "we cannot decide the merits of an appeal; we can only direct that the suit be dismissed." *Isaacs v. Sprint Corp.*, 261 F.3d 679, 683 (7th Cir. 2001). That gets her only so far, though. Dancel concedes that the timing of Groupon's removal is a question of procedure and not jurisdiction. *See In re Cont'l Cas. Co.*, 29 F.3d 292, 294 (7th Cir. 1994). We are, thus, not obligated to reach the argument, and so we decline to do so.

[4] **[5]** In contrast to her concededly procedural waiver argument, Dancel frames her belated challenge to the allegations in Groupon's notice of removal as a question of the district court's jurisdiction. Whether a party has failed "to *demonstrate* diversity," however, is distinct from whether diversity "in fact *existed*," and only the latter is a question of subject-matter jurisdiction that cannot be waived. *See Harmon v. OKI Sys.*, 115 F.3d 477, 479 (7th Cir. 1997) (quoting *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993)); *see also Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 677 (7th Cir. 2006) (finding challenge to allegations waived by late motion to remand). We must be assured only of the existence of subject-matter jurisdiction for purposes of this appeal, so we need not direct that this case be immediately remanded to state court, even though we agree Groupon's allegations are deficient. As long as the existence of subject-matter jurisdiction is either apparent from the record, *see Harmon*, 115 F.3d at 479–80, or cured through amendment of the notice of removal, *see Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 670 (7th Cir. 2012), we can proceed to the class-certification issue.

[6] The record does not currently reveal the existence of jurisdiction, so Groupon must amend its allegations, as it may do even on appeal. *See* 28 U.S.C. § 1653. Groupon, as the removing party, bears the burden of showing the existence of federal jurisdiction. *See Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 617 (7th Cir. 2012). It has rested on its speculation that "undoubtedly" a class member is a citizen of a state other than Illinois or Delaware, even now, over a year after the deficiency was first identified in Dancel's reply. We asked Groupon to correct the jurisdictional statement in its appellate brief, but it added only that its system did not screen photos for their owners' citizenship—still providing nothing but a guess of diversity, educated and sensible though it may be.

***3** Groupon sees no problem with its allegations because, in its view, Dancel waived her opportunity to contest them. Subject-matter jurisdiction cannot be waived or forfeited, it acknowledges, but the facts underlying jurisdiction can. So, we have held that when a district court makes an unchallenged factual determination that supports jurisdiction, an opposing party "forfeits his objection to the finding, though not to the inference of jurisdiction drawn from the finding." *Workman v. United Parcel Serv.*, Inc., 234 F.3d 998, 1000 (7th Cir. 2000). (This rule is subject, of course, to the court's investigation if it doubts its own jurisdiction. *See id.*)

[7] Groupon's allegations here do not have the necessary factual content for Dancel's waiver to permit an inference of jurisdiction. If Groupon had alleged, even if only "on information and belief," that a specific member of the putative

class had "a particular state of citizenship," then we may have accepted Dancel's waiver as establishing jurisdiction "for now." *Med. Assur. Co. v. Hellman*, 610 F.3d 371, 376 (7th Cir. 2010). Groupon instead posited that some "undetermined number" of class members are "non-Illinois and non-Delaware citizens."

[8] This allegation of negative citizenship fails to satisfy the minimal diversity requirement. In ordinary, non-class diversity cases, we have admonished parties that they cannot "merely allege diversity of citizenship without identifying the [parties'] states of citizenship," for that is no better than a "bare assertion that the defendants are citizens of 'another state different from the Plaintiff.' " *Dalton v. Teva N. Am.*, 891 F.3d 687, 690 (7th Cir. 2018). That the hurdle of minimal diversity for the CAFA is lower than the complete diversity required in most cases does not provide a basis to alter this rule, and we have applied it vigorously even in the class-action context. In *Toulon v. Continental Casualty Co.*, 877 F.3d 725 (7th Cir. 2017), we criticized the plaintiff—who had originally brought the suit in federal court—for failing to "identify a specific class member who is a citizen of a state other than Illinois." *Id.* at 733. The class was broad—astonishingly so, for it involved claims under the laws of fifty states (and the District of Columbia) relating to an insurance policy sold in at least thirty-two states, *id.* at 730, 732—but this breadth did not relieve our skepticism. We were content to conclude that the district court had jurisdiction only because the defendant supplemented the record under 28 U.S.C. § 1653 with affidavits demonstrating that minimal diversity existed. *Id.* at 733; *see also Hart*, 457 F.3d at 677 (relying on similar affidavits).

[9] At argument, we asked Groupon whether it could supplement the record to identify a specific, diverse class member. It responded that it would need discovery and requested remand to the district court for that purpose. We recently considered this procedure in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019), an appeal under 28 U.S.C. § 1453(c)(1). In *Miller*, the plaintiff asserted that the proposed class of employees at Chicago's O'Hare Airport was limited to Illinois citizens. *Id.* at 905. We expressed doubt about this assumption and pondered why the removing defendant had not alleged minimal diversity by identifying, in its notice of removal, one of its employees domiciled in a nearby state. *Id.* We found federal-question jurisdiction over the case, but hypothesized that if this were not an option, we might have remanded to the district court to explore whether a class member was a citizen of another state. *Id.* Without an alternative basis for jurisdiction here, we elect to follow the approach we hinted at in *Miller* and will return this case to the district court so that it may inquire into its jurisdiction. †

† Though the parties do not direct us to this issue, the Eleventh Circuit has prohibited jurisdictional discovery in cases removed under the CAFA. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1215 (11th Cir. 2007). That court has since limited this holding to cases (like this one) removed on amended pleadings, *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010), and two of its judges have suggested that *Lowery* should be overruled. *See id.* at 775–76 (W. Pryor, J., concurring). We agree with those concurring judges that *Lowery*'s reasoning, which is based on a strict reading of Rules 8 and 11 and little other authority, is unpersuasive and its holding is in tension with the Supreme Court's recognition that "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues," *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Nevertheless, because our ruling may be creating a split with the present position of the Eleventh Circuit, we have circulated this opinion to all active judges. *See* Cir. R. 40(e). No judge voted to hear the case en banc; Judge Flaum did not participate in the consideration of the matter.

III

***4** We order a limited remand for the district court to permit discovery to whatever extent the court deems necessary for Groupon to allege that at least one member of the putative class was a citizen of a state other than Illinois or Delaware at the time of removal. This remand is limited solely to the question of subject-matter jurisdiction and does not independently obligate the district court to consider or reconsider any non-jurisdictional issues, including the home-state or local-controversy exceptions to the CAFA, 28 U.S.C. § 1332(d)(3)–(4). *See Myrick v. WellPoint, Inc.*, 764 F.3d 662, 665 (7th Cir. 2014) (recognizing exceptions are not jurisdictional). We will retain our jurisdiction over this appeal pending resolution of this issue. *See Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 768 F.2d 189, 190 (7th Cir. 1985). If the district court, after a reasonable time, is not convinced that Groupon can carry its burden, then it may enter an indicative ruling that it is inclined to remand for lack of subject-matter jurisdiction under 28 U.S.C. § 1447(c), and we will take appropriate steps.

SO ORDERED.

All Citations

940 F.3d 381, 2019 WL 5057669

History (2)

Direct History (2)

1. Dancel v. Groupon, Inc.
2019 WL 1013562 , N.D.Ill. , Mar. 04, 2019

Remanded by

2. Dancel v. Groupon, Inc.
940 F.3d 381 , 7th Cir.(Ill.) , Oct. 09, 2019

Negative Treatment

There are no Negative Treatment results for this citation.