

EXAMINERS' ANALYSIS OF QUESTION NO. 14

I. Diversity and Subject Matter Jurisdiction

Donaldson improperly removed Pine's action to federal court, and the U.S. District Court properly remanded the case to the Michigan circuit court.

The federal district courts are courts of limited jurisdiction. When an action is removed from state court, a federal court must consider whether it has subject matter jurisdiction. See *Curry v US Bulk Transport Inc*, 462 F3d 536, 539-540 (CA 6 2006). If a federal district court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action. *Id.* FRCP 12(h)(3). The burden of establishing jurisdiction rests with the defendant as the party removing the case and asserting federal jurisdiction. See, e.g., *Kokkonen v Guardian Life Ins Co of Am*, 511 US 375, 377 (1994). "[A]ll doubts as to the propriety of removal are resolved in favor of remand." *Jacada (Europe), Ltd v Int'l Mktg Strategies, Inc*, 401 F3d 701, 704 (CA 6 2005) (quoting *Coyne v Am Tobacco Co*, 183 F3d 488, 493 (CA 6 1999)), *abrogated on other grounds by Hall St Assocs, LLC v Mattel, Inc*, 552 US 576 (2008).

Title 28, § 1441(a) of the United States Code of Judicial Conduct, permits defendants in civil actions to remove cases originally filed in state courts to federal district courts where the district court would have had original jurisdiction. Cases may be removed under federal question jurisdiction or on the basis of diversity of citizenship. 28 USC § 1441(a). When the plaintiff has not alleged a federal cause of action in his complaint, removal is proper only if the federal district court would have had original jurisdiction based on diversity of citizenship. See 28 USC § 1332.

It is axiomatic that federal diversity jurisdiction exists only when "no plaintiff and no defendant are citizens of the same state." *Jerome-Duncan, Inc. v. Auto-By-Tel, LLC*, 176 F3d 904, 907 (CA 6 1999) (citing *United States Fidelity & Guar Co v Thomas Solvent Co*, 955 F2d 1085, 1089 [CA 6 1992]). Therefore,

complete diversity of citizenship must exist "both at the time that the case is commenced and at the time that the notice of removal is filed." *Id.* (citing *Easley v. Pettibone*, 990 F2d 905, 908 (CA 6 1993)).

Here, it is clear that, at the time Pine's complaint was filed in state court, Donaldson was a Michigan resident. Donaldson was also a Michigan resident when he removed the complaint to federal court. Therefore, the federal court lacked subject matter jurisdiction of the case because complete diversity was lacking. As such, remand to the state court was required. 28 USC § 1447(c).

A point or two can also be awarded if an applicant concludes that there was no diversity jurisdiction because Donaldson was a resident of Michigan at all relevant times. 28 USC 1441(b).

II. Res Judicata

The doctrine of res judicata precludes multiple lawsuits alleging the same cause of action. *Adair v Michigan*, 470 Mich 105, 121 (2004). Application of res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Richards v Tibaldi*, 272 Mich App 522, 530-531 (2006). See also MCR 2.116(C)(7).

A voluntary dismissal of an action is without prejudice unless the order of dismissal otherwise indicates. MCR 2.504(A)(2)(b). However, an involuntary dismissal is construed as a dismissal with prejudice. *Makowski v Towles*, 195 Mich App 106, 108 (1992); MCR 2.504(B)(3). A dismissal with prejudice operates as an adjudication on the merits for purposes of res judicata. *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 279 (1991). This includes a dismissal resulting from a decision on a motion with a court finding that a party has failed to comply with its orders. MCR 2.504; *Makowski*, 195 Mich App at 108.

Here, Pine's failure to comply with the discovery and pretrial orders resulted in the involuntary dismissal of his complaint against Donaldson. MCL 600.611; see also MCR 2.313(B)(2)(c); MCR 2.313(D)(1). Thus, under the facts: (1) the dismissal of the January 2011 action constituted an adjudication on the merits; (2) the dismissal of the January 2011 action was a final decision; (3) the claims made in the July 2012 complaint were identical to the claims made in the January 2011 complaint, and therefore, they were resolved in the prior action when the circuit court dismissed the action with prejudice; and (4) both actions involved the same parties, i.e., Pine and Donaldson. The fact that Pine appealed the dismissal order does not make it a non-final order, as the rule "in Michigan is that a judgment pending on appeal is deemed res judicata." *City of Troy v Hershberger*, 27 Mich App 123, 127 (1970).

Accordingly, res judicata precludes the filing of the July 2012 action, and the circuit court should grant Donaldson's motion to dismiss.