

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PARADISE VILLAS HOA, INC. §
 §
VS. § ACTION NO. 4:21-CV-117-Y
 §
AMGUARD INSURANCE COMPANY and §
TODD ANTHONY GILMORE §

ORDER GRANTING MOTION TO REMAND

Pending before the Court is Plaintiff's Opposed Motion to Remand (doc. 7). After consideration of the motion, related briefs, and applicable law, the Court concludes that the motion should be granted.

I. Background

Plaintiff brought this suit in the 29th Judicial District Court, Palo Pinto County, Texas, seeking damages and benefits allegedly due from its insurance company, AmGuard Insurance Company ("AmGuard"), and its third-party adjuster, Todd Anthony Gilmore. Plaintiff contends that it is the owner of commercial property at 3033 Hells Gate Loop in Strawn, Texas, that was covered by an insurance policy issued by AmGuard. Plaintiff contends that during the policy's term, it suffered damages to the property as a result of a hail/windstorm. Plaintiff alleges that it timely reported the loss to AmGuard, who sent Gilmore to investigate the damages and adjust the claim. Plaintiff contends that Gilmore failed to properly inspect the property or adjust the claim and "prepared an estimate which vastly under-scoped the actual covered damages to the [p]roperty." (Pl.'s First Am. Original Pet. (doc. 1-1) 7.) As

a result, Plaintiff asserted claims against AmGuard for breach of contract and against both defendants for civil conspiracy and violation of the Texas Insurance Code.

AmGuard removed the claims to this Court, contending that the exercise of diversity subject-matter jurisdiction is appropriate. AmGuard admits in its Notice of Removal that Gilmore is, like Plaintiff, a Texas citizen, but contends that his citizenship should be disregarded because he was improperly joined. Plaintiff now seeks remand.

II. Legal Standard

When federal jurisdiction is based on diversity, a defendant may not remove the case from state court "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2). The presence of a non-diverse defendant will not defeat diversity, however, if the removing party establishes that the non-diverse defendant was improperly joined. *Salazar v. Allstate Tex. Lloyd's, Inc.*, 455 F.3d 571, 574 (5th Cir. 2006). Improper joinder may be established by showing either: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Smallwood v. Ill. Cent. R.*, 385 F.3d 568, 573 (5th Cir. 2004) (quoting *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003)).

When, as here, the removing party relies on the second ground for establishing improper joinder, the Court must determine whether

there is any reasonable basis for predicting that the plaintiff might be able to recover under state law against the non-diverse defendant. *Id.* The Court does not "determine whether the plaintiff will actually or even probably prevail on the merits of the claim [against the non-diverse defendant], but look[s] only for a possibility that the plaintiff might do so." *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 308-09 (5th Cir. 2005). As part of this inquiry, the Court uses the same standard employed in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6); that is, the Court looks at the plaintiff's factual allegations to determine whether the plaintiff has pleaded enough facts to state a plausible claim for relief against the non-diverse defendant under state law. *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Group, Ltd.*, 818 F.3d 193, 200-208 (5th Cir. 2016) (concluding that federal, not state, pleading standard applies to determine whether state-law claim is adequately stated against the allegedly improperly joined non-diverse defendant).

The burden is, however, on the removing party to establish the existence of federal jurisdiction. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). "The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper." *Smallwood*, 385 F.3d at 574. "[A]ny doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court." *Cross v. Bankers Multiple Line Ins. Co.*, 810 F. Supp. 748, 750 (N.D. Tex. 1992) (Means, J.); see also *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir.

1999) (in determining whether there is a reasonable basis for predicting that state law would permit recovery, "we are obliged to resolve any contested issues of material fact, and any ambiguity or uncertainty in the controlling state law, in [plaintiff's] favor"). The existence of a single valid claim against the non-diverse defendant, even where the rest are unavailing, requires remand of the entire case to state court. *Gray ex rel. Rudd v. Beverley Enters.-Miss., Inc.*, 390 F.3d 400, 412 (5th Cir. 2004).

III. Analysis

After careful review of the facts alleged by Plaintiff, the Court concludes that a plausible claim for relief has been stated against Gilmore under at least section 541.060(a)(2)(A) of the Texas Insurance Code. That section imposes liability when one "in the business of insurance" fails "to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." TEX. INS. CODE ANN. § 541.060(a)(2)(A) (2009).

The Texas Supreme Court has held that "[t]he business of insurance includes the investigation and adjustment of claims and losses." *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 132 (Tex. 1998). Indeed, "an adjuster who services insurance policies for an insurer engages in the business of insurance, is subject to the Texas Insurance Code, and may be found liable under it." *Roach v. Allstate Vehicle and Prop. Ins. Co.*, No. 3:15-CV-3228-G, 2016 WL 795967, at *4 (N.D. Tex. Feb. 29, 2016) (Fish, J.) (citing *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 282

(5th Cir. 2007)).

Federal district courts are divided, however, "as to whether an adjuster may be held liable under Section 541.060(a)(2)(A)." *Lugge v. Allstate Fire & Cas. Ins. Co.*, 4:16-CV-959-ALM; 2017 WL 928457, at *4 (E.D. Tex. Feb. 10, 2017). As noted by AmGuard, this Court has previously held that this section "cannot be used to impose liability on a third-party adjuster . . . who does not have settlement authority and whose sole role in the claims process is assessing damage on behalf of the insurer." *Together 6 LLC v. The Burlington Ins. Co.*, No. 4:15-CV-064-Y; 2015 WL 11120522, *3 (N.D. Tex. Apr. 22, 2015) (Means, J.); accord *Lopez v. United Prop. & Cas. Ins. Co.*, 197 F. Supp. 3d 944, 950 (S.D. Tex. 2016); *One Way Invs., Inc. v. Century Sur. Co.*, No. 3:14-CV-2839-D; 2014 WL 6991277, at *4 (N.D. Tex. Dec. 11, 2014) (Fitzwater, J.). Other courts disagree, however, concluding that "an adjuster may be liable under section 541.060(a)(2)(A) because an adjuster is the individual charged with investigating and evaluating claims and thus has the inherent ability to affect or bring about the settlement of a claim." *Lugge*, 2017 WL 928457, at *4 (citing cases); see also *Roach*, 2016 WL 795967, at *5 (concluding that "[t]he Texas legislature's decision to use the word 'effectuate' instead of the word 'finalize' indicates that § 541.060(a)(2)'s prohibition extends to all persons who play a role in bringing about a prompt, fair, and equitable settlement of a claim" and noting that "the insurance adjuster, as the person primarily responsible for investigating and evaluating insurance claims, has

the ability to affect or bring about the 'prompt, fair, and equitable settlement' of claims") (quotation omitted).

In light of the nature of the motion at issue, however, this Court need not attempt to resolve the dispute. "In the context of a motion to remand, this split in authority regarding the scope of an insurance adjuster's liability under the Texas Insurance Code counsels in favor of remand because '[a]ny ambiguities are construed against removal and in favor of remand to state court.'" *Lugge*, 2017 WL 928457, at *4; *Roach*, 2016 WL 795967, at *6 (concluding that "in the context of a motion to remand, the split in authority regarding the scope of an insurance adjuster's liability under the TEX. INS. CODE must be resolved in favor of remand"). Thus, if Plaintiff has stated a facially plausible claim against Gilmore, remand is appropriate.

Plaintiff's first amended original petition alleges as follows:

Gilmore was tasked with the responsibility of conducting a thorough and reasonable investigation of Plaintiff's loss, including determining the cause of and then quantifying the damage to the exterior and interior of Plaintiff's Property. Gilmore was also tasked with conducting a thorough and reasonable investigation to ensure a proper scope of damages. Rather than conducting such an inspection, Gilmore failed and refused to even look at the covered damages to Plaintiff's Property. Subsequent to the inspection, Gilmore prepared an estimate which vastly under-scoped the actual covered damages to Property. Clearly, Gilmore did not conduct a thorough investigation of the claim.

Despite having been assigned the claim, and despite being given authority and instructions to inspect, adjust and evaluate the claim, Gilmore failed and refused to properly adjust the claim. Gilmore failed to properly inspect the Property and the damages, failed to request information, failed to adequately investigate the claim,

failed to respond to requests for information from the Plaintiff and/or their agents, failed to timely evaluate the claim, failed to timely estimate the claim, and failed to timely and properly report to AmGuard and make recommendations to AmGuard to address all the covered damages. Gilmore's failure to present all of the covered damages to AmGuard contributed to Plaintiff's claim [not] being paid properly and in full.

Plaintiff provided information regarding the loss and the claim to Gilmore. Plaintiff allowed full and complete access to the Property. Plaintiff provided sufficient information when requested by Gilmore so he could fairly and reasonably adjust and evaluate the loss. Plaintiff made inquiries regarding the status of the loss and payment, but Gilmore failed and refused to respond to the inquiries and failed to properly adjust the claim and the loss.

(Pl.'s First Am. Original Pet. (doc. 1-1) 7-8) Contrary to AmGuard's contentions, Plaintiff has not merely pled conclusory allegations, nor has it failed to include sufficient allegations against Gilmore to state a plausible claim for relief. "[A] near-verbatim recitation of portions of Chapter 541 . . . does not preclude the possibility of recovering against [a defendant] so long as [the plaintiff] has also alleged sufficient facts describing actionable conduct by [the defendant]." *Hernandez v. Stillwater Ins. Co.*, 3:14-CV-1560-G, 2014 WL 3700577, at *3 (N.D. Tex. July 25, 2014) (Fish, J.) Plaintiff alleges that Gilmore failed to adequately inspect and quantify the damages to both the interior and exterior of its property, even refusing to look at some of the covered damages to its property, and then prepared an estimate that undervalued the scope of those damages. Plaintiff alleges that as a result of Gilmore's actions, AmGuard failed to pay Plaintiff his full policy benefits. Although greater detail about the type and extent of the damages Gilmore allegedly

overlooked certainly would have made Plaintiff's claims more plausible, the failure to include such detail does not render Plaintiff's claims implausible. If Plaintiff's allegations are true, and in light of the split of authority regarding the viability of a § 541.060(a)(2) claim against an insurance adjuster, the Court concludes that there is at least a reasonable possibility that Plaintiff could recover from Gilmore under state law. See also *Paniagua v. Allstate Tex. Lloyd's*, No. DR-15-CV-011-AM-VRG; 2015 WL 13134503 (W.D. Tex.) (Garcia, Mag. J.) (concluding that similarly alleged claims against insurance adjuster under section 541.060(a)(7) of the Texas Insurance Code were sufficiently stated and warranted remand). Consequently, remand is appropriate.

IV. Conclusion

For the foregoing reasons, the Court concludes that Plaintiff's Motion to Remand is GRANTED. All claims are hereby REMANDED to the 29th Judicial District Court, Palo Pinto, Texas.

SIGNED June 16, 2021.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE