

ENTERED

May 27, 2020

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

D.U.R. PROPERTIES LLC,

Plaintiff,

v.

AMRISC LLC *et al.*,

Defendants.

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Civil Action No. H-20-1196

ORDER

Pending before the Court is Plaintiff’s Motion to Remand (Document No. 7). Having considered the motion, submissions, and applicable law, the Court determines the motion should be granted.

I. BACKGROUND

This is an insurance case. Plaintiff D.U.R. Properties LLC (“DUR”) allegedly owns commercial real property located at 6100 South 42nd Street, McAllen, TX 78501 (the “Property”). DUR alleges the Property is insured under a commercial insurance policy (the “Policy”) issued by Defendant Certain Underwriters at Lloyd’s, London (the “Underwriters”), with the assistance of Defendant AmRisc LLC (“AmRisc”). In September 2018, DUR alleges the Property sustained storm damage. Thereafter, DUR allegedly sought coverage under the Policy for damage to the Property. DUR alleges the Underwriters, with

AmRisc's involvement and oversight, failed to sufficiently investigate damage to the Property and further failed to provide adequate coverage under the Policy.

Based on the foregoing, on February 11, 2020, DUR filed this lawsuit against the Underwriters and AmRisc in the 80th Judicial District Court of Harris County, Texas, asserting claims under Texas law. On April 3, 2020, the Underwriters removed the case to this Court on the asserted basis of diversity jurisdiction. On May 4, 2020, DUR moved to remand the case to state court.

II. STANDARD OF REVIEW

Article III courts are of "limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A defendant may remove a case to federal court if the federal court has subject matter jurisdiction to hear the original complaint. 28 U.S.C. § 1441(a). When diversity of citizenship is the asserted basis of jurisdiction, removal requires, *inter alia*, complete diversity of citizenship. 28 U.S.C. § 1332(a); *see also Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079 (5th Cir. 2008). Nevertheless, a case can be removed despite incomplete diversity if a defendant is fraudulently joined solely to destroy diversity. *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 171 (5th Cir. 2009). The removing defendant has the burden to show removal is proper. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995). When resolving a motion to remand, all allegations are considered in the light most favorable to, and any contested fact issues are

resolved in favor of, the plaintiff. *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 308 (5th Cir. 2005). Doubts as to the propriety of removal are resolved in favor of remand. *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

III. LAW & ANALYSIS

DUR contends the Court lacks subject matter jurisdiction. The Underwriters contend the Court has diversity jurisdiction because AmRisc was fraudulently joined.¹ The Court disregards a defendant who was fraudulently joined when determining whether diversity jurisdiction exists. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 572–73 (5th Cir. 2004). Fraudulent joinder—a “heavy burden”—requires the removing party to show either: (1) actual fraud in the jurisdictional pleadings of the facts; or (2) the plaintiff is unable to establish a claim against the non-diverse party in state court. *Id.* The Underwriters do not assert actual fraud in the jurisdictional pleadings of the facts and instead agree DUR and AmRisc are Texas citizens.² The Court turns to whether the Underwriters show DUR is unable to establish a claim against AmRisc in state court.

The Underwriters contend DUR cannot establish a claim against AmRisc in state court because the Underwriters elected to accept liability for AmRisc’s

¹ The Court notes the Underwriters object to certain evidence offered by DUR. The Court, however, resolves the motion to remand without considering the objected-to evidence. The Underwriters’ evidentiary objections are therefore moot.

² *The Underwriters’ Notice of Removal*, Document No. 1 at 4.

conduct under the Texas Insurance Code. Under the Texas Insurance Code, an insurer “may elect to accept whatever liability an agent might have to the claimant for the agent’s acts or omissions related to the claim” Tex. Ins. Code § 542A.006(a). The insurer’s election of liability must occur before the lawsuit is filed in state court to allow removal to federal court. *Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. CV H-18-1144, 2018 WL 3017431, at *2–3 (S.D. Tex. June 18, 2018) (Miller, J.); *see also Glaser v. Allstate Vehicle & Prop. Ins. Co. et al.*, No. 4:18-CV-2684, Document No. 16 (November 5, 2018) (Hittner, J.).

Before this lawsuit was filed, the Underwriters communicated to DUR (the “Notice of Election”):

Underwriters have elected to accept whatever liability Arnold Nerio of VeriClaim, Inc. (now Sedgewick) may have with respect to any acts or omissions related to his adjustment of the Claim, as well as other adjusters or third-party administrators involved in the adjustment of the Claim.³

The parties dispute whether AmRisc is one of the unnamed “other adjusters or third-party administrators” under the Notice of Election. DUR states it never alleged AmRisc was an adjuster or third-party administrator in the petition filed in state court. DUR further states the Underwriters—despite specifically identifying AmRisc by name in the same document containing the Notice of Election—failed

³ *The Underwriters’ Notice of Removal*, Document No. 1, Exhibit K at 7 (*The Notice of Election*).

to identify AmRisc by name in the Notice of Election itself. The Underwriters do not dispute the Notice of Election fails to identify AmRisc by name.

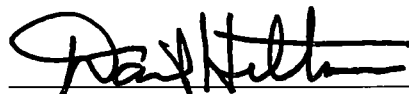
Construing all allegations in favor of DUR while resolving doubts against removal, the Court finds the Underwriters fail to demonstrate DUR is unable to establish a claim against AmRisc in state court. Thus, the Underwriters fail to demonstrate AmRisc was fraudulently joined. Because Underwriters do not assert another basis for jurisdiction, the Underwriters fail to demonstrate the Court has jurisdiction. Accordingly, the motion to remand is granted.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Plaintiff's Motion to Remand (Document No. 7) is **GRANTED**. This case is therefore **REMANDED** to the 80th Judicial District Court of Harris County, Texas.

SIGNED at Houston, Texas, on this 26 day of May, 2020.



DAVID HITTNER
United States District Judge