UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFF GUTSCH,

Plaintiff,

v.

JASON REED, et al.,

Defendants.

Case No. 19-cv-06415-RS

ORDER GRANTING MOTION TO REMAND

Plaintiff Jeff Gutsch filed this action in Sonoma County Superior Court alleging that his property destroyed in the Tubbs fire was underinsured as the result of negligence and/or misrepresentations on the part of his insurance agent, defendant Jason Reed, a resident of Arizona. The complaint also names the insurer, defendant Liberty Insurance Corporation, a Vermont company, alleging certain wrongful conduct in the claims process. Finally, the complaint includes a petition for a writ of mandate pursuant to California Code of Civil Procedure § 1085 against California Insurance Commissioner Ricardo Lara for alleged failure to carry out his duties under the California Insurance Code.

Liberty removed the matter, contending there is removal jurisdiction based on diversity, because the Insurance Commissioner is a "sham defendant," whose presence in the suit may be disregarded. Gutsch moved to remand, arguing the mandamus petition against the Insurance Commissioner is tenable.

1. *Jurisdiction*

In light of a potential threshold jurisdictional issue, the parties were requested to provide additional briefing. Specifically, the parties were asked to address case law suggesting that federal courts may lack jurisdiction to adjudicate petitions for writs of mandate under state law, or at least that they ordinarily should decline to exercise jurisdiction in such matters. *See, Indep. Living Ctr. of S. California, Inc. v. Kent*, 909 F.3d 272, 287 (9th Cir. 2018) (Christen, J., concurring) ("District courts in our circuit have concluded that 'federal courts are without power to issue writs of mandamus to direct state agencies in the performance of their duties.'"); *Clemes v. Del Norte Cty. Unified Sch. Dist.*, 843 F. Supp. 583, 596 (N.D. Cal. 1994) ("Mandamus proceedings to compel a state administrative agency to act are actions that are uniquely in the interest and domain of state courts. It would be entirely inappropriate for a federal court, through exercise of its supplemental jurisdiction, to impose itself upon such proceedings. Considerations of federalism and comity, not generally present with typical 'pendent' state claims, loom large in the case of state mandamus proceedings.")

The concern was that, if there is a jurisdictional bar, or even mere prudential considerations against a federal court deciding the merits of a state law petition for writ of mandate, it could be problematic for the court to wade into the parties' dispute as to whether the claim advanced against the Insurance Commissioner is viable or not. Were the court to conclude that the pleading is a "sham," it would retain jurisdiction of the balance of the case, but effectively would be dismissing the mandate petition on the merits. While a decision to the contrary would not dispose of the merits of the mandate petition, it would still involve some evaluation of those merits.

The parties therefore were invited to address the jurisdictional issue, and also whether it might be appropriate to sever and remand the mandate petition, while retaining the balance of the action. *See* 28 U.S. Code § 1441(c) (providing for such a procedure in cases removed on the basis of a federal question, where the case also contains "a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute." In response, Liberty argues the court has jurisdiction to evaluate the claims against the Insurance

Commissioner for purposes of applying the "fraudulent joinder" standard. Liberty suggests the court can therefore find the Insurance Commissioner was fraudulently joined and dismiss him from the action. Liberty does not address, however, whether such a dismissal would nonetheless permit a claim against the Insurance Commissioner to go forward in state court, or whether the finding that he was a "sham" defendant might have preclusive effect. If the latter, then the problem of whether a federal court has jurisdiction over such claims remains.

Liberty argues that in the alternative, the Insurance Commissioner could be severed under Rule 21 of the Rules of Civil Procedure, *prior* to any evaluation of the fraudulent joinder issue. While Rule 21 authorizes severance of parties and claims "at any time, on just terms," that appears primarily to serve as a remedy for misjoinder, in lieu of dismissal. Particularly given that in federal question cases the severance procedure is provided by statute, 28 U.S. Code § 1441(c), it would stretch Rule 21 too far to rely on it as a basis for severing the Insurance Commissioner in these circumstances.

Gutsch's additional briefing vehemently opposes any severance and dismissal of the Insurance Commissioner. While Gutsch insists remand is the correct result here, he also offers authority for the proposition that a federal court generally may exercise jurisdiction over the merits of state law mandamus claims if they are otherwise properly before the court.

The propriety of a federal court adjudicating a state law mandamus claim remains questionable. At a minimum, however, "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628, 122 S. Ct. 2450, 2454 (2002). Additionally, as both sides here agree, the question presented by the present remand motion is only whether the claim against the Insurance Commissioner is tenable for purposes of the fraudulent joinder doctrine. The ultimate merits of the claim are not presented at this juncture. *See Brazina v. Paul Revere Life Ins. Co.*, 271 F.Supp.2d 1163, 1169 (N.D. Cal. 2003) ("In considering fraudulent joinder, the court does not review the merits of [the plaintiff's] claim but only determines whether a cause of action exists under California law."). Accordingly, it is appropriate to proceed to the question of whether the Insurer Commissioner is a "sham defendant," whose

presence in this action may be disregarded for purposes of diversity.[1]

2. *Standards*

"There are two ways to establish fraudulent joinder: '(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.'" *Grancare, LLC, v. Thrower by and Through Mills*, 889 F.3d 543, 548 (9th Cir. 2018) (quoting *Hunter v. Philip Morris, USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). Here, Liberty proceeds solely on the second ground, and consequently, must show that the non-diverse party who was "'joined in the action cannot be liable on any theory.'" *Id*. (quoting *Ritchey v. Upjohn Drug Co*., 139 F.3d 1313, 1318 (9th Cir. 1998)).

The Ninth Circuit has emphasized that the inquiry is not the same as a Rule 12(b)(6) review for failure to state a plausible claim. *Id*. at 549. Rather, the bar is lower and requires only that "there is a '*possibility* that a state court would find that the complaint states a cause of action against any of the [non-diverse] defendants.'" *Id*. (quoting *Hunter*, 582 F.3d at 1046) (emphasis added in *Grancare*). Thus, even a claim against a non-diverse party that might be subject to dismissal will not necessarily constitute fraudulent joinder. *Id*. In effect, the "possibility" standard is akin to the "wholly insubstantial and frivolous standard for dismissing claims under Rule 12(b)(1)." *Id*. at 549-50 (quotation omitted). If there is any possibility above the trivial or frivolous that the plaintiff can state a claim against the non-diverse defendant, "the federal court must find that the joinder was proper and remand the case to state court." *Hunter*, 582 F.3d at 1046 (quotation omitted).

Furthermore, there is a "'general presumption against [finding] fraudulent joinder,'" which adds to the usual presumption against removal in all cases under Section 1332 and imposes a

[1] Although the Insurance Commissioner, sued in his official capacity, is not considered a "citizen" of California, his status as a party still destroys diversity. *See Palma v. Prudential Ins. Co.*, 791 F. Supp. 2d 790, 801 (N.D. Cal. 2011) ("[D]iversity jurisdiction does not exist here because of the presence of the Commissioner, a non-citizen, as a Defendant.")

particularly heavy burden on the defendant. *Grancare*, 889 F.3d at 548 (quoting *Hunter*, 582 F.3d at 1046). As discussed below, Liberty has not satisfied that burden here.

3. *The mandamus claim*

Gutsch seeks a writ of mandate under state law to compel the Insurance Commissioner to perform what Gutsch contends are mandatory duties under two separate provisions of the California Insurance Code. Liberty insists the mandamus claim is not viable because the provisions relate to the Insurance Commissioner's exercise of discretion. *See Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 442 (1989) ("Mandamus will lie to compel a public official to perform an official act required by law . . . . Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner.").

Gutsch first contends the Insurance Commissioner has failed to comply with his duties under California Insurance Code § 790.05, which describes a procedure whereby the Insurance Commissioner can charge persons with having engaged in unfair practices under the code and hold hearings to consider appropriate relief. As Liberty correctly points out, the Insurance Commissioner undoubtedly is vested with great discretion in determining if and when to bring charges and hold a hearing under § 790.05. Among other things, the section specifies the Insurance Commissioner is to proceed only upon determining there is "reason to believe that a person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in Section 790.03" *and* that an enforcement action by the Insurance Commissioner "would be to the interest of the public." As such, Gutsch certainly could not obtain a writ of mandate simply compelling the Insurance Commissioner to bring an enforcement action.

While mandamus does not lie to compel an official to exercise discretion in a particular manner, however, it may be used "to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law." *Common Cause*, 49 Cal. 3d at 442. Here, the gravamen of Gutsch's claim is that the Insurance

Commissioner has not conducted a reasonable and genuine investigation of the complaints in the first instance. Whether Gutsch will be able to prove such a claim under state law is another question, but it is not so trivial or frivolous as to constitute a fraudulent joinder.[2]

Although Gutsch need have only one potentially viable claim against the Insurance Commissioner to be entitled to remand, his claim under California Insurance Code § 10089.74 also clears the bar applicable here. Gutsch alleges the Insurance Commissioner failed to exercise his ministerial, mandatory, duty under that section to give Gutsch notice of his right to mediation, which, at Gutsch's election, would have led to a mandatory referral to mediation. Liberty points to various other parts of the statutory scheme that plainly bestow on the Insurance Commissioner discretion as to which insurer-insured disputes warrant intervention by the Insurance Commissioner and possible referral to mediation. Here, however, Gutsch has alleged that the Insurance Commissioner already performed all of the discretionary steps along that path, and only failed to act after the mandatory provisions of § 10089.74 had been triggered. Again, whether Gutsch can prevail on such a claim is a question for another day—and another court—but it is not plainly frivolous or trivial.[3]

Accordingly, Gutsch's motion for remand is granted. The determination that the claims against the Insurance Commissioner are not so frivolous or trivial as to constitute a fraudulent joinder for diversity jurisdiction purposes is without prejudice to any assessment by the state court as to the adequacy of the pleading or the viability of those claims on their merits.

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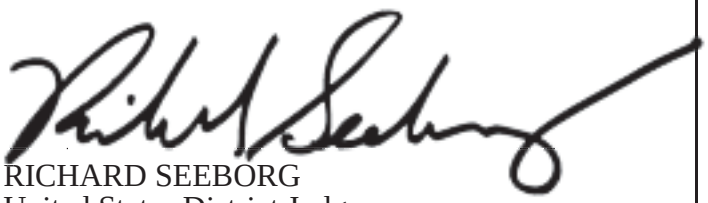
[2] Liberty complains that Gutsch's current characterization of his claim as seeking to compel the Insurance Commissioner to exercise his discretion as opposed to compelling a particular outcome is not supported by the allegations of the complaint. It may be that the complaint presently articulates a narrower—and less viable—theory, but the question is not whether the claim is adequately pleaded. *See Grancare*, 889 F.3d at 550 ("If a defendant cannot withstand a Rule 12(b)(6) motion, the fraudulent inquiry does not end there. For example, the district court must consider . . . whether a deficiency in the complaint can possibly be cured by granting the plaintiff leave to amend.")

[3] While filing litigation waives a right to mediation, it is not clear that vitiates Gutsch's mandamus claim where he was never given notice of the mediation right in the first instance.

IT IS SO ORDERED.

Dated: June 5, 2020



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California