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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Brittany Renae Roberson, et al.,

10 Plaintiffs,

11 v.

12 Newell Rubbermaid Incorporated, et al.,

13 Defendants.
14

No. CV-14-00573-PHX-JAT

ORDER

15 Pending before the Court is Plaintiffs' 28 U.S.C. § 1447(c) Motion to Remand.
16 (Doc. 17). The Court now rules on the motion.

17 **I. BACKGROUND**

18 Plaintiffs allege the following facts. In August 2011, Osbon Auto Repair, located
19 in Glendale, Arizona, repaired the rear axle on Plaintiff Roberson's 1997 Mercury
20 Mountaineer. (Doc. 17, Ex. D). On November 24, 2011, Plaintiff Roberson's 1997
21 Mercury Mountaineer experienced a rear axle failure causing the vehicle to swerve off
22 the road and rollover. (Doc. 16 at 4). Plaintiffs' infant son was strapped in a Graco car
23 seat. (*Id.*). The car seat detached from its base and was ejected from the vehicle. (*Id.*)
24 Plaintiffs' son was killed. (Doc. 17 at 2).

25 On November 22, 2013, Plaintiffs filed a complaint in Maricopa County Superior
26 Court against the manufacturers of the car seat, Defendant Newell Rubbermaid, Inc., and
27 its subsidiary, Graco Children's Products, Inc. (collectively "Graco Defendants"). (Doc.
28 1, Ex. A at 3). Plaintiffs also named Osbon Auto Repair; the owner of Osbon Auto

1 Repair, Felipe De Jesus Saucedo and his wife, Jane Doe De Jesus Saucedo; and the
2 Osbon employee who worked on the vehicle, John Doe Armenta and his wife, Jane Doe
3 Armenta (collectively the “Osbon Defendants”) as defendants. (*Id.*) When Plaintiffs filed
4 their complaint, Osbon Auto Repair was no longer in business, and Plaintiffs could not
5 locate any of the other Osbon Defendants for personal service. (Doc. 21 at 4). However,
6 with the state court’s approval, Plaintiffs served the Osbon Defendants by publication of
7 the Complaint on April 5, 2014. (Doc. 17, Ex. B). On March 19, 2014, Graco Defendants
8 removed the matter to the United States District Court of Arizona, pursuant to 28 U.S.C.
9 §§ 1441 and 1446. (Doc. 1 at 1). Subsequently, Plaintiffs filed an amended complaint.
10 (Doc. 16). Plaintiffs now move to remand the matter to state court. (Doc. 17).

11 **II. MOTION TO REMAND**

12 **A. Legal Standard**

13 A federal district court has “original jurisdiction of all civil actions where the
14 matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and
15 costs, and is between . . . citizens of different States[.]” 28 U.S.C. § 1332(a)(1). The
16 removal statute, 28 U.S.C. § 1441, provides, in pertinent part: “[A]ny civil action brought
17 in a State court of which the district courts of the United States have original jurisdiction,
18 may be removed by the defendant” to the United States district court “for the district and
19 division embracing the place where such action is pending.” 28 U.S.C. § 1441(a); *see*
20 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only . . . actions that originally
21 could have been filed in federal court may be removed to federal court by the
22 defendant.”).

23 Courts strictly construe the removal statute and disfavor removal jurisdiction. *See,*
24 *e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941); *Gaus v. Miles,*
25 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). There is a “strong presumption” against removal,
26 and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal
27 in the first instance.” *Gaus*, 980 F.2d at 566 (internal citations omitted). “The ‘strong
28 presumption’ against removal jurisdiction means that the defendant always has the

1 burden of establishing that removal is proper.” *Id.* If at any time it appears that the district
2 court lacks subject matter jurisdiction, the case must be remanded. 28 U.S.C. § 1447(c).

3 **B. Analysis**

4 Plaintiffs assert that remand is proper because the Court lacks subject matter
5 jurisdiction. (Doc. 17 at 2). Specifically, Plaintiffs argue that there are no claims arising
6 under federal law and because “Arizona residents are on both sides of this case . . .
7 removal based on diversity was improper.” (*Id.*) In response, Graco Defendants make two
8 arguments. First, they argue that removal is proper because it appears from the face of the
9 Complaint that diversity jurisdiction exists. (Doc. 20 at 2). Alternatively, Graco
10 Defendants contend that removal is proper because the Osbon Defendants were
11 fraudulently joined to destroy diversity. (*Id.* at 4).

12 **1. Residency**

13 Graco Defendants contend that because Plaintiffs have not been able to locate the
14 Osbon Defendants, Plaintiffs have not established that the Osbon Defendants were
15 Arizona residents when Plaintiffs filed their original complaint. (Doc. 20 at 2–3).

16 For the Court to have diversity jurisdiction, each plaintiff must be a citizen of a
17 different state than each of the defendants. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68
18 (1996). A defendant who is a citizen of a plaintiff’s state destroys complete diversity,
19 regardless of whether that defendant was properly served prior to removal. *Pullman Co.*
20 *v. Jenkins*, 305 U.S. 534, 538 (1939); *Preaseau v. Prudential Ins. Co.*, 591 F.2d 74, 78
21 (9th Cir. 1979); *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969)
22 (“[T]he existence of diversity is determined from the fact of citizenship of the parties
23 named and not from the fact of service.”). It is immaterial whether the resident defendant
24 is named or whether that defendant’s true identity is known. *See Preaseau*, 591 F.2d at
25 78; *Pecherski v. Gen. Motors Corp.*, 636 F.2d 1156, 1159 (8th Cir. 1981). On a motion to
26 remand, the removing party has the burden of proving complete diversity. *Carson v.*
27 *Dunham*, 121 U.S. 421, 425–46 (1887); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190,
28 1195 (9th Cir. 1988).

1 Here, Graco Defendants assert that the Osbon Defendants are not Arizona citizens
2 because Plaintiffs cannot locate them. (Doc. 20 at 2–3). However, Graco Defendants have
3 not provided any legal authority for their conclusion. Moreover, case law indicates that a
4 plaintiff’s inability to serve, or even identify, a defendant does not preclude a finding a
5 resident defendant is properly joined. *Pullman Co.*, 305 U.S. at 538 (1939); *Preaseau*,
6 591 F.2d at 78. Additionally, Plaintiffs, despite not having the burden of proof, have
7 proven that they properly served the Osbon Defendants by publication, provided at least
8 the known last name of each Osbon Defendant, and established that the Osbon
9 Defendants’ last known residence was in Arizona. Accordingly, Graco Defendants have
10 not met their burden of proving that the Osbon Defendants are not Arizona residents.

11 2. Fraudulent Joinder

12 Alternatively, Graco Defendants argue that the Court nonetheless has diversity
13 jurisdiction because Plaintiffs fraudulently joined the Osbon Defendants to defeat
14 diversity jurisdiction. Specifically, Graco Defendants assert that Plaintiffs’ original
15 complaint “fails to state a plausible claim against the [Osbon] Defendants” and that the
16 original, not the amended complaint, “is controlling for this Court’s analysis of
17 jurisdictional issues.” (Doc. 20 at 4). In support of their argument, Graco Defendants
18 state that Plaintiffs lack a cause of action against the Osbon Defendants because the
19 police report taken after the incident states that Plaintiff Roberson’s father, not the Osbon
20 Defendant’s worked on the vehicle’s rear axle prior to the incident.

21 Fraudulent joinder is a “term of art.” *Morris v. Princess Cruises, Inc.*, 236 F.3d
22 1061, 1067 (9th Cir. 2001). Joinder of a resident defendant is considered fraudulent, and
23 courts ignore the defendant’s presence in the lawsuit for purposes of determining
24 diversity, “if the plaintiff fails to state a cause of action against a resident defendant, and
25 the failure is obvious according to the settled rules of the state.” *Id.* (quoting *McCabe v.*
26 *Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)). Courts resolve any doubt as to
27 whether a plaintiff has stated a valid cause of action against the resident defendant in
28 favor of the case being retained by the state court. *Albi v. St. & Smith Publ’ns*, 140 F.2d

1 310, 312 (9th Cir. 1944). A joinder is fraudulent only when the plaintiff does not have “a
2 cause of action against the resident defendant, and has no reasonable ground for
3 supposing he has,” but joins him only to “evade the jurisdiction of the federal court.” *Id.*
4 As one court in this District acknowledged, a defendant asserting fraudulent joinder must
5 demonstrate that the plaintiff does not have a “glimmer of hope” to establish a claim
6 against the resident defendant. *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 436 F. Supp.
7 2d 1070, 1072 (D. Ariz. 2006) (quoting *Mayes v. Rapoport*, 198 F.3d 466 (4th Cir.
8 1999)).

9 While the court may only consider the original pleading to evaluate whether
10 removal is proper¹, see *Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 159
11 F.3d 1209, 1213 (9th Cir. 1998), for fraudulent joinder purposes, the court may look past
12 the original pleadings. See *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir.
13 1998) (The court “will ‘look only to a plaintiff’s pleadings to determine
14 removability’ . . . [However], where fraudulent joinder is an issue, we will go somewhat
15 further.”) (internal citations omitted). Accordingly, when a plaintiff files an amended
16 complaint, a defendant asserting fraudulent joinder as a basis for removal must do more
17 than show that the original complaint fails to state a claim against the resident defendant.
18 See *Didyounng v. Allstate Ins. Co.*, 2012 WL 1983779, at *2 (D. Ariz. June 4, 2012);
19 *Burris v. AT&T Wireless, Inc.*, 2006 WL 2038040, at *2 (N.D. Cal. July 19, 2006).

20 Plaintiffs assert that they have properly pleaded negligence against the Osbon
21 Defendants and thus, remand is appropriate. Under Arizona law, to establish negligence,
22 a plaintiff must show (1) that the defendant had a duty to the plaintiff to conform to a
23 certain standard of conduct, (2) the defendant failed to conform to that standard, (3) there
24 is a reasonably close causal connection between the defendant’s failure and the resulting
25 injury, and (4) the plaintiff actually suffered damage or loss. *Gipson v. Kasey*, 150 P.3d
26 228, 231 ¶ 10 (Ariz. 2007); *Ontiveros v. Borak*, 667 P.2d 200, 204 (Ariz. 1983). In their

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28 ¹ Graco Defendant cites several cases in support of their contention that the Court
must limit its analysis to the original complaint. (Doc. 20 at 4). However, none of the
cases that Graco Defendants rely on discuss fraudulent joinder.

1 amended complaint, Plaintiffs assert that the Osbon Defendants owed them a duty to
2 perform car repairs so as not to create an unreasonable risk of harm, the Osbon
3 Defendants breached that duty, and the Osbon Defendants’ breach caused Plaintiffs
4 substantial injury and loss. (Doc. 16 at ¶¶ 13–17). Plaintiffs also presented the auto repair
5 order showing that the Osbon Defendants preformed repairs on Plaintiff Roberson’s
6 vehicle shortly before the accident. (Doc. 17, Ex. D). The Graco Defendants, on the
7 other hand, assert that Plaintiff Roberson’s father was the last person to service the
8 vehicle’s rear axle, which makes it “clear that the [Osbon] Defendants are sham
9 defendants who should be disregarded for the purposes of determining the existence of
10 diversity jurisdiction.” (Doc. 20 at 5).

11 The Court finds that Plaintiffs’ pleading and evidence demonstrate that it is far
12 from “obvious” that Plaintiffs cannot prevail against the Osbon Defendants. Plaintiffs
13 have plead at least the basic elements of negligence, and simply offering conflicting
14 evidence falls well short of showing that Plaintiffs have no “glimmer of hope” to prevail.
15 Therefore, Graco Defendants have not established that the fraudulent joinder exception to
16 complete diversity applies. Accordingly, removal is not proper in this case.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court does not have federal question or diversity
19 jurisdiction over this case. Because the Court lacks subject matter jurisdiction, it must
20 remand pursuant to 28 U.S.C. § 1447(c). The Court will therefore grant Plaintiffs’
21 Motion to Remand.

22 Accordingly,

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