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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Betty Jane Foster,)
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 Plaintiff,)
)
 vs.)
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 Zurich American Insurance Company,)
 et al.,)
)
 Defendants.)

No. CV-09-8161-PCT-PGR

ORDER

Among the motions pending before the Court is the plaintiff's Motion to Amend (First) Amended Complaint and/or to Join a Necessary Party (doc. #12). Having considered the parties' memoranda in light of the relevant record, the Court finds that the motion should be granted pursuant to Fed.R.Civ.P. 15(a)(2).¹

Background

This action arises out of personal injuries sustained by the plaintiff on August 16, 2007 when she fell out of a golf cart in which she was a passenger

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Since the plaintiff has not raised any cogent argument related to joining a necessary party pursuant to Fed.R.Civ.P. 19, the Court construes the motion as only being one pursuant to Fed.R.Civ.P. 15.

Although the plaintiff has requested oral argument, the Court concludes that oral argument would not aid the decisional process.

1 while on the premises of the Yavapai-Apache Nation's Cliff Castle Casino, and
2 from the subsequent conduct of the casino's insurer, Zurich American Insurance
3 Company ("Zurich") and its adjuster, Jani Lehane, related to their handling of the
4 plaintiff's insurance claim.

5 The plaintiff's Amended Civil Complaint, the current operative complaint,
6 which was filed on August 21, 2009 in the Yavapai County Superior Court,
7 alleged five state law claims against named defendants Zurich and Lehane, all
8 stemming from these defendants' alleged misrepresentations to the plaintiff
9 concerning the statute of limitations applicable to her insurance claim, and one
10 state law negligence claim against fictitiously-named defendant John Doe Driver,
11 the driver of the golf cart. Zurich and Lehane removed the action to this Court
12 based on diversity of citizenship jurisdiction.

13 The plaintiff filed a lawsuit in the Yavapai-Apache Nation Tribal Court
14 against the Cliff Castle Casino and the Yavapai-Apache Nation and various
15 fictitious defendants arising from the same accident. The tribal court entered an
16 order of dismissal on December 14, 2009, wherein it reasoned that the plaintiff's
17 complaint was time-barred inasmuch as she neither timely complied with the
18 applicable tribal notice of claim requirement or the tribal statute of limitations.

19 Other motions pending before the Court, which are not being resolved at
20 this time, include Zurich and Lehane's motion to dismiss the amended complaint,
21 and Kenneth Thurman's motion to dismiss.

22 Discussion

23 In her pending motion to amend, the plaintiff seeks to file a second
24 amended complaint in part to specifically name Kenneth David Thurman as the
25 previously identified but fictitiously-named "John Doe Driver" as the person who
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1 negligently drove the golf cart in which she was injured; she also seeks to amplify
2 and clarify some of the allegations against Zurich and Lehane. The plaintiff has
3 also filed a contemporaneous motion to remand this case to the Yavapai County
4 Superior Court, wherein she argues that a remand is required pursuant to 28
5 U.S.C. § 1441(e) should the Court grant the motion to join Thurman as a
6 defendant since his joinder would destroy diversity jurisdiction. Since the
7 proposed addition of Thurman affects the Court's continuing jurisdiction over this
8 action, the Court will concentrate on the propriety of adding him as a defendant.

9 Rule 15(a)'s policy that leave to amend must be "freely given when justice
10 so requires" must not only be heeded by this Court, Foman v. Davis, 371 U.S.
11 178, 182, 83 S.Ct. 227, 230 (1962), it must be applied with "extreme liberality."
12 Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712 (9th Cir.2001),
13 *cert. denied*, 516 U.S. 1051 (1996). The defendants' arguments against allowing
14 the amendment to add Thurman are in effect limited to the Foman factor of futility.
15 While it is clear that "[f]utility of amendment can, by itself, justify the denial of a
16 motion for leave to amend[.]" Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.1995),
17 a proposed amendment is futile for purposes of Rule 15(a) "only if no set of facts
18 can be proved under the amendment ... that would constitute a valid and
19 sufficient claim[.]" Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1393 (9th
20 Cir.1997). In making this determination, the Court must resolve all inferences in
21 favor of granting the motion to amend. Griggs v. Pace American Group, Inc., 170
22 F.3d 877, 880 (9th Cir.1999).

23 Thurman argues that the plaintiff possesses no valid negligence claim
24 against him (1) because the Court lacks jurisdiction over him inasmuch as he is
25 protected by the Yavapai-Apache Nation's sovereign immunity, (2) because the
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1 plaintiff's claims against him are barred by res judicata given the ruling of the
2 Yavapai-Apache Tribal Court dismissing the plaintiff's claims against the Yavapai-
3 Apache Nation and the Cliff Castle Casino, and (3) because the plaintiff failed to
4 timely comply with the Yavapai-Apache Nation's notice of claim requirement.²
5 Based on the limited record before it, the Court cannot conclude at this time that
6 the plaintiff's negligence claim against Thurman is futile for purposes of Rule
7 15(a).

8 First, all of Thurman's sovereign immunity and notice of claim-related
9 arguments, as is Zurich and Lehane's subject matter-related futility argument, are
10 based on the contention that he was at the time of the accident an employee of
11 Cliff Castle Casino, and thus an employee of the Yavapai-Apache Nation, acting
12 in his official capacity within the scope of his employment. While that may very
13 well turn out to be the case, there is no evidence in the record before the Court at
14 this time that conclusively establishes such employment as a matter of fact or
15 law. While the Court understands that the plaintiff has alleged "on information
16 and belief" in his various pleadings that Thurman was an employee of Cliff Castle
17 Casino acting within the scope of his employment at the time of the accident,
18 Thurman's employment status is still merely an allegation, and thus speculative,
19 at this time for purposes of the futility doctrine.

20 Second, the Court cannot determine at this time whether Thurman is
21 entitled to the benefits of res judicata with regard to the tribal court order because

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24 Thurman raised these arguments in his motion to dismiss (doc. #34).
25 While the motion to dismiss is premature because the Court has not yet allowed
26 Thurman to be added as a named defendant, the Court has considered the
arguments raised therein to the extent that they are relevant to Rule 15(a)'s futility
issue.

1 he was not an actual party to the tribal court action and his privity to the named
2 defendants depends on his employment relationship with the Yavapai-Apache
3 Nation which has not yet been established, and because there is nothing in the
4 Court's record that conclusively establishes that any final judgment in the tribal
5 court action has in fact been entered.

6 While Zurich and Lehane have also opposed the proposed amendment as
7 it relates to the various state law claims raised against them on the ground of
8 futility, the Court, viewing the inferences raised in the current record in favor of
9 the plaintiff, is not willing to conclude through the mechanism of the motion to
10 amend that none of claims have any substantive merit.³

11 While the Court will permit the plaintiff to file a second amended complaint,
12 the Court cannot conclude at this time that 28 U.S.C. § 1441(e) mandates the
13 remand of this action. While the plaintiff argues that the joinder of Thurman will
14 destroy diversity of citizenship jurisdiction, the Court cannot make that
15 determination based on the plaintiff's proposed Verified Second Amended Civil
16 Complaint as the jurisdictional allegations therein are insufficient as a matter of
17 law to establish the existence of diversity jurisdiction.⁴ The Court will therefore

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19 The Court is not now making any ruling concerning the merits of Zurich
20 and Lehane's pending motion to dismiss, which is technically directed at the
21 existing amended complaint.

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22 The proposed second amended complaint alleges that each individual
23 party is a "resident" of somewhere notwithstanding that it is black letter law that
24 allegations of residency do not suffice for purposes of 28 U.S.C. § 1332. See
25 Steigleder v. McQuesten, 198 U.S. 141, 143, 25 S.Ct. 616, 617 (1905) ("It has
26 long been settled that residence and citizenship [are] wholly different things within
the meaning of the Constitution and the laws defining and regulating the
jurisdiction of the ... courts of the United States; and that a mere averment of
residence in a particular state is not an averment of citizenship in that state for

1 require the plaintiff to file a second amended complaint that properly states a
2 jurisdictional basis, and upon the receipt of that complaint the Court will resolve
3 the plaintiff's pending motion to remand. Therefore,

4 IT IS ORDERED that the plaintiff's Motion to Amend (First) Amended
5 Complaint and/or Join a Necessary Party (doc. #12), construed solely as a
6 motion pursuant to Fed.R.Civ.P. 15(a), is granted.

7 IT IS FURTHER ORDERED that the Clerk of the Court shall not file the
8 plaintiff's Verified Second Amended Civil Complaint lodged on October 19, 2009
9 (doc. #13-1).

10 IT IS FURTHER ORDERED that the plaintiff shall file a second amended
11 complaint that properly states a jurisdictional basis no later than **May 14, 2010**.

12 DATED this 4th day of May, 2010.

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15 Paul G. Rosenblatt
16 United States District Judge
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19 the purpose of jurisdiction."); accord, Kanter v. Warner-Lambert Co., 265 F.3d
20 853, 857-58 (9th Cir. 2001) (Plaintiffs' complaint ... state[s] that Plaintiffs were
21 'residents' of California. But the diversity jurisdiction statute, 28 U.S.C. § 1332,
speaks of citizenship, not of residency. ... [The] failure to specify Plaintiffs' state of
citizenship was fatal to [the] assertion of diversity jurisdiction.")

22 The proposed second amended complaint also alleges that the corporate
23 party is a "foreign corporation," which is insufficient since a proper allegation of
24 corporate citizenship for purposes of § 1332 requires an affirmative allegation of
25 both the state of corporation and the state in which it has its principal place of
26 business. See Montrose Chemical Corp. of California v. American Motorists Ins.
Co., 117 F.3d 1128, 1134 (9th Cir.1997).

The plaintiffs are also advised that the total capitalization of the parties' names in the caption of a complaint violates LRCiv 7.1(a)(3).