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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|------------------------------|---|---|
| STEREOSCOPE, LLC, a |) | Case No. CV 14-05593 DDP (SSx) |
| California limited liability |) | |
| company; CRONKITE & KISSELL, |) | |
| LLC, a California limited |) | ORDER DENYING PLAINTIFFS' MOTION |
| liability company; CLINT |) | TO REMAND AND GRANTING |
| CRONKITE; DAVID KISSELL, |) | DEFENDANTS' MOTION TO DISMISS |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | [Dkt. Nos. 10, 11] |
| U.S. BANK NATIONAL |) | |
| ASSOCIATION, a national |) | |
| banking association; KIM |) | |
| GALBRAITH, an individual; |) | |
| PAULA OSWALD, an individual; |) | |
| OLALEYE FADAHUNSI, an |) | |
| individual, |) | |
| |) | |
| Defendants. |) | |
| |) | |

Presently before the Court are Plaintiffs' Motion to Remand ("Mot. to Remand," Dkt. No. 11) and Defendants' Motion to Dismiss ("Mot. to Dismiss," Dkt. No. 10). Having considered the parties' submissions, the Court DENIES Plaintiffs' Motion to Remand and GRANTS Defendants' Motion to Dismiss.

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1 **I. BACKGROUND**

2 Plaintiffs Clint Cronkite and David Kissell are the owners and
3 principals of Cronkite & Kissell, LLC ("Cronkite & Kissell"), a
4 California financial advisory and private investments company.
5 (Complaint ("Compl."), Dkt. No. 1, ¶ 1.) Cronkite & Kissell is a
6 majority owner of Stereoscope, LLC ("Stereoscope"), a California
7 production services company that specializes in 3D technology and
8 film services. (Id.)

9 On July 11, 2011, Plaintiff Stereoscope entered into a Joint
10 Venture Agreement (the "Agreement") to produce motion pictures with
11 Cutting Edge Pictures ("CEP"), a wholly owned subsidiary of The
12 Reserve Entertainment Group ("TREG"). (Id. ¶ 2) The Agreement
13 required Stereoscope to obtain four percent of the film financing.
14 (Id. ¶ 4.) TREG and Stereoscope also formed Cutting
15 Edge/Stereoscope Motion Pictures, LLC ("CESMP") pursuant to the
16 Agreement. (Id.)

17 Stereoscope raised \$708,000 from investors to satisfy its four
18 percent of the film financing. (Id. ¶ 5.) TREG formed Liberty
19 City Movie, LLC ("LCM") to begin work on the Joint Venture's first
20 project, and designated TREG as managing member and CESMP as a
21 member. (Id. ¶ 6.) In or around March 2012, LCM opened an escrow
22 account at U.S. Bank National Association ("U.S. Bank"), with LCM
23 as borrower, EB Capital as lender, and U.S. Bank as the escrow
24 agent. (Id.) The escrow agreement indicated that Allen Bates, a
25 principal at TREG, was the authorized representative for LCM and
26 that Joshua Estes was the authorized representative for EB Capital.
27 (Exhibit A to Compl.) The \$708,000 Stereoscope had raised was
28 placed into this LCM escrow account. (Compl. ¶ 6)

1 Defendants are U.S. Bank National Association, which was the
2 escrow agent for LCM's funds, as well as three employees of U.S.
3 Bank who were involved in various ways with the administration of
4 the LCM escrow account. Defendant Kim Galbraith was the LCM
5 account manager, Defendant Olaleye Fadahunsi was the investment
6 manager, and Defendant Paula Oswald was a Vice President at U.S.
7 Bank. (Id. ¶¶ 6, 25-27.) Of all Defendants, only Paula Oswald is
8 a citizen of California. (Id. ¶¶ 24-27.)

9 In or around May 2012, the relationship between TREG and
10 Stereoscope began to deteriorate. (Id. ¶ 7.) On May 30, 2012,
11 Stereoscope sent a "Notice of Claims" letter to U.S. Bank informing
12 Galbraith of a dispute over the funds in the account and requesting
13 that U.S. Bank freeze the funds pending resolution of the dispute.
14 (Id.) On November 19, 2012, Stereoscope served TREG, CEP, and LCM
15 with a demand for arbitration. (Id.) On November 21, 2012, U.S.
16 Bank released \$705,892 from the LCM escrow account to TREG. (Id.)

17 On February 14, 2013, Judge Diane Wayne, who arbitrated the
18 dispute, issued a preliminary injunction finding wrongdoing on the
19 parts of TREG, CEP, and LCM. (Id. ¶ 8.) After Judge Wayne issued
20 further subpoenas, Plaintiffs eventually learned that U.S. Bank had
21 released the majority of the funds from the LCM escrow account and
22 that TREG had formed another company, Checkmate Film Funding, LLC
23 ("Checkmate"), which had put \$500,000 of the withdrawn funds into a
24 new escrow account with U.S. Bank. (Id. ¶ 9.) On October 31,
25 2013, Judge Wayne issued a final arbitration award in favor of
26 Stereoscope. (Id. ¶ 10.)

27 Plaintiffs claim that to date they have not recovered any of
28 the funds stolen from the U.S. Bank escrow accounts. (Id. ¶ 11.)

1 Defendants contend that U.S. Bank properly interpleaded the
2 \$500,000 in the Checkmate escrow account in a state court action,
3 enabling Plaintiffs to recover that entire \$500,000 amount less
4 attorney's fees. (Mot. to Dismiss, Dkt. No. 10-1, at 2.)

5 Plaintiffs allege that U.S. Bank wrongfully refused to freeze
6 the funds in the original LCM escrow account and refused to obey
7 any instructions from Stereoscope after receipt of the "Notice of
8 Claims." Plaintiffs further allege that Defendants subsequently
9 aided LCM and TREG's fraud in moving the LCM escrow funds and
10 concealing the fact that the funds had been moved.

11 On May 28, 2014, Plaintiffs filed a Complaint against
12 Defendants in Los Angeles Superior Court. (Dkt. No. 1.) The
13 Complaint alleged seven causes of action: (1) intentional
14 interference with contractual relations; (2) fraud and deceit; (3)
15 fraudulent concealment; (4) intentional interference with
16 prospective business relations; (5) gross negligence; (6)
17 intentional infliction of emotional distress; and (7) punitive
18 damages.

19 Defendants removed the case to federal court, arguing that
20 Plaintiffs included Defendant Paula Oswald as a sham defendant to
21 destroy diversity. (Dkt. No. 1.) Defendants subsequently filed a
22 Motion to Dismiss for Failure to State a Claim. (Dkt. No. 10.)
23 Plaintiffs filed a Motion to Remand. (Dkt. No. 11.)

24 **II. LEGAL STANDARD**

25 **A. Motion to Remand**

26 Diversity jurisdiction under 28 U.S.C. § 1332 requires
27 complete diversity of the parties; however, removal is proper
28 despite the presence of a non-diverse defendant when that defendant

1 was fraudulently joined. Fraudulent joinder is a "term of art"
2 courts use to describe a non-diverse defendant who has been joined
3 to an action for the sole purpose of defeating diversity. McCabe
4 v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). A court
5 will disregard such a "sham" defendant for the purposes of
6 determining diversity if it is "obvious according to the settled
7 rules of the state" that the plaintiff has failed to state any
8 cause of action against the defendant in question. Morris v.
9 Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir.2001).

10 The "strong presumption against removal jurisdiction" means
11 that the party asserting the fraudulent joinder bears the burden of
12 proof. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir.
13 1988). The court should remand the case unless the moving party
14 can show fraudulent joinder by clear and convincing evidence.
15 Hamilton Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206
16 (9th Cir. 2007). If there is a "non-fanciful possibility" that the
17 plaintiff can state a claim against the non-diverse defendant, then
18 the court must remand the case. Macey v. Allstate Prop. & Cas.
19 Ins. Co., 220 F. Supp. 2d 1116, 1118 (N.D. Cal. 2002).

20 **B. Motion to Dismiss**

21 A 12(b)(6) motion to dismiss requires the court to determine
22 the sufficiency of the plaintiff's complaint and whether or not it
23 contains a "short and plain statement of the claim showing that the
24 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under
25 Rule 12(b)(6), a court must (1) construe the complaint in the light
26 most favorable to the plaintiff, and (2) accept all well-pleaded
27 factual allegations as true, as well as all reasonable inferences
28 to be drawn from them. See Sprewell v. Golden State Warriors, 266

1 F.3d 979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d
2 1187 (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th
3 Cir. 1998).

4 In order to survive a 12(b)(6) motion to dismiss, the
5 complaint must "contain sufficient factual matter, accepted as
6 true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556U.S. 662, 663 (2009) (quoting Bell Atl. Corp.
7 v. Twombly, 550 U.S. 544, 570 (2007)). However, "[t]hreadbare
8 recitals of the elements of a cause of action, supported by mere
9 conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.
10 Dismissal is proper if the complaint "lacks a cognizable legal
11 theory or sufficient facts to support a cognizable legal theory."
12 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th
13 Cir. 2008); see also Twombly, 550 U.S. at 561-63 (dismissal for
14 failure to state a claim does not require the appearance, beyond a
15 doubt, that the plaintiff can prove "no set of facts" in support of
16 its claim that would entitle it to relief). A complaint does not
17 suffice "if it tenders 'naked assertion[s]' devoid of 'further
18 factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550
19 U.S. at 556). "A claim has facial plausibility when the plaintiff
20 pleads factual content that allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct alleged."
22 Id. The Court need not accept as true "legal conclusions merely
23 because they are cast in the form of factual allegations." Warren
24 v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

26 **III. DISCUSSION**

27 **A. Motion to Remand**

28 Plaintiffs move to remand this case back to state court,

1 arguing that Defendant Paula Oswald was not fraudulently joined.
2 Defendants do not dispute that Oswald, like Plaintiffs, is a
3 citizen of California; rather, Defendants argue that Oswald is a
4 sham defendant. Both parties agree that Oswald is the only non-
5 diverse defendant named in the Complaint.

6 Based on the allegations in the Complaint, the Court finds
7 that Plaintiffs have not stated any possible cause of action
8 against Oswald. Plaintiffs assert fraud, intentional interference
9 with prospective economic relations, gross negligence, and
10 intentional infliction of emotional distress claims against Oswald.
11 As Defendants point out, the only factual allegation made
12 specifically against Oswald is that she advised LCM it could file
13 an incumbency certificate listing an additional principal of LCM as
14 an authorized representative for the LCM escrow account.

15 The elements of a fraud claim under California law are: "(1)
16 misrepresentation of a material fact (consisting of false
17 representation, concealment or nondisclosure); (2) knowledge of
18 falsity (scienter); (3) intent to deceive and induce reliance; (4)
19 justifiable reliance on the misrepresentation; and (5) resulting
20 damage." City of Atascadero v. Merrill Lynch, 68 Cal. App. 4th
21 445, 481 (1998). Plaintiffs do not allege that Oswald herself
22 misrepresented a material fact to Plaintiffs. Plaintiffs allege
23 that the incumbency certificate fraudulently listed TREG and its
24 principals as "the only authorized representatives for LCM."
25 (Compl. ¶ 65.) However, it is unclear that the incumbency
26 certificate was fraudulent, as it merely added an additional
27 authorized representative to the account and was signed by LCM's
28 existing authorized representative; furthermore, Plaintiffs have

1 not shown how this certificate induced their reliance in any way.

2 To prove fraudulent concealment under California law,
3 Plaintiff must show that: (1) the defendant concealed or suppressed
4 a material fact; (2) the defendant had a duty to disclose that fact
5 to the plaintiff; (3) the defendant intentionally concealed or
6 suppressed that fact with the intention of defrauding the
7 plaintiff; (4) the plaintiff was unaware of that fact and would not
8 have acted in the manner he did if he knew of the concealed or
9 suppressed fact at the time; and (5) the plaintiff sustained
10 resulting damage. See Hahn v. Mirda, 147 Cal. App. 4th 740, 748
11 (2007). Again, Plaintiffs have failed to plead facts supporting
12 the requisite elements of a fraudulent concealment claim in the
13 Complaint. Alleging that Oswald aided LCM in filing an incumbency
14 certificate does not by consequence indicate that she concealed or
15 suppressed a material fact. Furthermore, as Stereoscope was not a
16 party to the escrow agreement or the authorized representative for
17 LCM, Plaintiffs have not shown that Oswald or any other defendant
18 had a duty to Stereoscope.

19 The claim of gross negligence similarly fails; Stereoscope has
20 not pleaded facts that show Oswald owed them any kind of duty.

21 The intentional interference claim against Oswald fails
22 because Oswald was acting in her capacity as an employee of U.S.
23 Bank when she gave LCM information about filing the incumbency
24 certificate. In fact, Plaintiffs allege specifically that Oswald
25 and the other employees were acting "within their official capacity
26 and with the authorization and ratification of U.S. Bank." (Compl.
27 ¶ 94.) When employees act in the scope of their employment,
28 California law states that they are protected by privilege.

1 McCabe, 811 F.2d at 1339. Thus, the Court finds that the
2 intentional interference against Oswald fails as a matter of
3 California law.

4 Finally, the intentional infliction of emotional distress
5 claim has no support in the facts as pleaded in the Complaint.
6 Plaintiffs have not shown that Oswald engaged in any action that
7 was outrageous; rather, the Complaint only alleges that Oswald
8 advised LCM to file an incumbency certificate, a standard form for
9 escrow accounts.

10 The Court finds that it is "obvious according to the settled
11 rules of the state" that Plaintiffs have stated no claims against
12 Oswald. Thus, the Court concludes that removal was proper in this
13 case, and moves on to addressing the question of whether Plaintiffs
14 have stated a claim against any of the Defendants.

15 **B. Intentional Interference Claims**

16 To prove a claim for intentional interference with contractual
17 relations, Plaintiffs must show: "(1) a valid contract between
18 plaintiff and a third party; (2) defendant's knowledge of this
19 contract; (3) defendant's intentional acts designed to induce a
20 breach or disruption of the contractual relationship; (4) actual
21 breach or disruption and (5) resulting damage." Quelimane Co.,
22 Inc.v. Stewart Title Guaranty Co., 19 Cal.4th 26, 55 (1998). To
23 prove a claim for intentional interference with prospective
24 economic advantage, "(1) an economic relationship between the
25 plaintiff and some third party, with the probability of future
26 economic benefit to the plaintiff; (2) the defendant's knowledge of
27 the relationship; (3) intentional acts on the part of the defendant
28 designed to disrupt the relationship; (4) actual disruption of the

1 relationship; and (5) economic harm to the plaintiff proximately
2 caused by the acts of the defendant." Korea Supply Co. v. Lockheed
3 Martin Corp., 29 Cal.4th 1134, 1153 (2003).

4 The Court finds that Plaintiffs have not stated a claim for
5 intentional interference, since Defendants' actions were not a "but
6 for" cause of the breach. See Hahn v. Diaz-Barba, 194 Cal. App.
7 4th 1177, 1196 (2011) (stating that a plaintiff must allege that
8 the contract would otherwise have been performed.) Plaintiffs
9 state in their Complaint that the relationship with TREG had begun
10 to deteriorate before they attempted to take back the escrow money
11 from the U.S. Bank account. It appears from the Complaint that
12 after this deterioration, Plaintiffs' goal was to have TREG return
13 the investors' money to Plaintiffs, ending the Joint Venture
14 Agreement. Based on the allegations in the Complaint, the Court
15 finds that Plaintiffs have failed to state a claim for intentional
16 interference, either with contractual relations or with prospective
17 business advantage, because Defendants were not a cause of the
18 disruption of the relationship between Plaintiffs and TREG.

19 C. Fraud Claims

20 As stated above, claims of fraud or fraudulent concealment
21 require the showing of a misrepresentation or concealment of a
22 material fact. The Court finds that Plaintiffs have not alleged
23 any material fact that was misrepresented to Plaintiffs. Though
24 Plaintiffs allege that Defendants fraudulently concealed the
25 whereabouts of the funds that were formerly in the LCM escrow
26 account, Plaintiffs have not shown that Defendants owed them any
27 duty to inform them of the status of the funds under California
28 law. See Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co.,

1 27 Cal. 4th 705, 711 (2002) (stating that an escrow holder has "no
2 general duty to police the affairs of its depositors" and its
3 duties are "limited to faithful compliance" with the depositors'
4 instructions).

5 Furthermore, Plaintiffs have not pleaded facts that show
6 reliance on any alleged material facts that were misrepresented or
7 concealed. The Complaint does not allege any actions that
8 Plaintiffs took in reliance on any statements or lack thereof by
9 U.S. Bank or its employees.

10 **D. Gross Negligence Claim**

11 A negligence claim first requires the pleading of the
12 existence of a duty. Though Stereoscope may have had an interest
13 in the LCM escrow account, it was not an actual party to the
14 account and was not an authorized representative of LCM.
15 California law holds that not only are escrow agents limited to
16 "faithful compliance" with depositors' instructions, but also mere
17 knowledge of a third party's interest in an escrow does not give
18 rise to a duty of care to that third party. Summit, 27 Cal. 4th at
19 711; Jafari v. F.D.I.C., No. 12-CV-2982-LAB RBB, 2 F. Supp. 3d
20 1125, 1133 (S.D. Cal. Mar. 5, 2014). The Court finds that
21 Plaintiffs have not pleaded a claim for gross negligence.

22 **E. Intentional Infliction of Emotional Distress Claims**

23 Under California law, the elements of intentional infliction
24 of emotional distress are: "(1) extreme and outrageous conduct by
25 the defendant with the intention of causing, or reckless disregard
26 of the probability of causing, emotional distress; (2) the
27 plaintiff's suffering severe or extreme emotional distress; and (3)
28 actual and proximate causation of the emotional distress by the

1 defendant's outrageous conduct." Christensen v. Superior Court, 54
2 Cal. 3d 868, 903 (1991) (internal quotations omitted). The
3 outrageous conduct "must be so extreme as to exceed all bounds of
4 that usually tolerated in a civilized community." Id.

5 The Court finds that Plaintiffs have not pleaded facts that
6 support their claim of intentional infliction of emotional
7 distress. Defendants simply carried out the instructions of LCM,
8 the named party on the escrow account, to withdraw funds. The
9 conduct by Defendants, even assuming that they knew of Plaintiffs'
10 interest in the LCM escrow account, was not "so extreme as to
11 exceed all bounds of that usually tolerated in a civilized
12 community."

13 **F. Punitive Damages Claim**

14 Although the caption of the Complaint states a claim for
15 punitive damages, the text of the Complaint does not do so. Thus,
16 the Court finds that Plaintiffs have not pleaded a claim for
17 punitive damages.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs' Motion to Remand is
20 DENIED. Defendants' Motion to Dismiss is GRANTED. The Complaint
21 is dismissed with prejudice.

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24 IT IS SO ORDERED.

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26 Dated: February 11, 2015

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DEAN D. PREGERSON
United States District Judge