UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LARRY O. CROTHER, INC., a California Company, d.b.a. ABC INSULATION & SUPPLY CO.,

Plaintiff,

v.

LEXINGTON INSURANCE COMPANY, a Delaware corporation, and DOES 1 through 25, inclusive,

Defendants.

No. 2:11-cv-00138-MCE-GGH

ORDER

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Through the present action, Plaintiff Larry O. Crother, Inc. d.b.a. ABC Insulation & Supply Co. ("Plaintiff") seeks to recoup certain insurance premiums it paid its comprehensive general liability carrier, Defendant Lexington Insurance Company ("Lexington"). Plaintiff's initial complaint was filed on December 13, 2010 in the Superior Court of the State of California in and for the County of Sacramento. Lexington was served with the Summons and Complaint on December 16, 2010.

Because Lexington was the only named Defendant, and because Lexington claims to be a corporation incorporated under the laws of the State of Delaware with a principal place of business in the State of Massachusetts, Lexington timely removed Plaintiff's action to this Court on January 14, 2011, citing diversity of citizenship pursuant to 28 U.S.C. §§ 1441(a) and 1446. Thereafter, on January 28, 2010, Plaintiff filed a First Amended Complaint ("FAC") purporting to add new, and non-diverse, Defendants; namely, Plaintiff's insurance broker and agent. That filing prompted Lexington's Motion to Strike the purported FAC as improperly filed without the requisite leave of court. Plaintiff filed that amended pleading without seeking either a stipulation from Lexington or a court order authorizing it to do so. By Order dated March 18, 2011, that Motion was granted.

Now before the Court is Plaintiff's Motion seeking authorization to refile his FAC. That proposed pleading seeks to add John O. Bronson Co., Inc., an insurance broker, as a defendant along with Kirk Willard, an agent employed by Bronson, on grounds that Bronson and Willard handled Plaintiff's general liability insurance between October 30, 2003 and January 15, 2008 and negligently failed to secure issuance of a policy that excluded retail sales from the determination of Plaintiff's premium, thereby resulting in overcharges of some $74,094.00. See Proposed FAC, ¶¶ 27-31.

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Plaintiff further asserts, as an additional cause of action, that Bronson and Willard's failure in this regard violated the fiduciary duty owed to Plaintiff, both by neglecting to procure an exclusion and because they failed to adequately demand and/or pursue a refund from Lexington when the purported unearned premiums were discovered. Id. at ¶¶ 32-35.

While the FAC now proposed also reduces the amount in controversy from $152,934.27 to $74,094.00, and also purports to add an additional claim for breach of contract against Lexington, and to clarify certain other allegations, the inclusion of Bronson and Willard as additional defendants would add non-diverse parties to the action, since Bronson is alleged to be a California corporation, and Willard is identified as resident of Sacramento County, California. Id. at ¶¶ 3-4.

If the Court finds that Bronson and Willard are indeed proper defendants, then, diversity would be destroyed and the sole basis for federal jurisdiction over this matter would be removed. That development would compel the Court to remand the action back to state court where it was originally commenced. See Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001). Consequently, the propriety of including Bronson and Willard is dispositive in whether this matter properly remains here. A determination that they may properly be joined makes irrelevant any consideration of whether the remainder of Plaintiff's claimed amendments are warranted.

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Moreover, while Defendant Lexington has also filed a Motion to Dismiss Plaintiff's originally filed Complaint that is concurrently set for hearing with Plaintiff's Motion for Leave to File its FAC, that Motion to Dismiss also becomes moot if the Court finds that joinder of Bronson and Willard is appropriate.

Although Federal Rule of Civil Procedure 15(a)[1] directs that the Court "should freely give [leave to amend] when justice so requires", Rule 15(a) does not apply where, as here, Plaintiff seeks to amend its complaint after removal to add non-diverse parties whose joinder would divest the court of jurisdiction. To apply the permissive standard of Rule 15(a) in that situation could "allow a plaintiff to improperly manipulate the forum of an action..." Clinco v. Roberts, 41 F. Supp. 2d 1081, 1087 (N.D. Cal. 1999). Consequently, where the addition of defendants would directly impact diversity, the provisions of 28 U.S.C. § 1447(e), rather than those contained in Rule 15(a), control. Clinco, 41 F. Supp. 2d at 1086-87; see also Chan v. Bucephalus Alternative Energy Group, LLC, 2009 WL 1108744 at * 3 (N.D. Cal. 2009).

Section 1447(e) provides in pertinent part that "[i]f, after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to state court." The decision as to whether to permit an amendment destroying diversity jurisdiction remains in the sound discretion of the Court.

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[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

IBC Aviation Servs., Inc v. Compania Mexicana de Aviaction, S.A. de C.V., 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000), citing Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1998) In determining whether to allow joinder under Section 1447(e), the following five factors should be considered:

> (1) whether the party sought to be joined is needed for just adjudication and would be joined under Federal Rule of Civil Procedure 19(a); (2) whether the statute of limitations would prevent the filing of a new action against the new defendant in state court; (3) whether there has been an unexplained delay in seeking to join the new defendant; (4) whether plaintiff seeks to join the new party solely to defeat federal jurisdiction; (5) the strength of the claims against the new defendant.

IBC Aviation; 125 F. Supp. 2d at 1011; see also Boon v. Allstate Ins. Co., 229 F. Supp. 2d 1016, 1020 (C.D. Cal. 2002) (citing Clinco, 41 F. Supp. 2d at 1082).

With respect to the first factor, a necessary party under Rule 19(a) is one "having an interest in the controversy, and who ought to be made a party, in order that the court may act on that rule which requires it to decide and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." IBC Aviation, 125 F. Supp. 2d at 1011 (citing CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 905, 912 (9th Cir. 1991). Although whether a party is necessary under Rule 19(a) should be considered by the court in determining the propriety of joinder, the standard under Section 1447(e) is less restrictive than that applicable to Rule 19(a). Id. (citing Trotman v. United Parcel Serv., 1996 WL 428333 at *1 (N.D. Cal. 1996).

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In accordance with the discretion the Court is accorded in allowing joinder under Section 1447(e), joinder is indicated "when failure to join will lead to separate and redundant actions", but not when the defendants whose joinder is sought "are only tangentially related to the cause of action or would not prevent complete relief." Boon, 229 F. Supp. 2d at 1022.

In IBC, the plaintiff provided cargo handling services to airlines, and entered into an agreement with Mexicana Airlines to handle its cargo at the Los Angeles International Airport. IBC ultimately sued Mexicana for breach of its Cargo Handling Agreement, along with another company, AeroMexpress, that was responsible for overseeing the cargo services delivered by IBC to Mexicana. IBC did not initially sue AeroMexpress employee Steven Connolly, but after removal of the action to federal court sought to add Connolly as a defendant on grounds that he was the principal person responsible for the acts underlying IBC's claim against Mexicana and AeroMexpress. In analyzing whether Connolly was a necessary party under a Rule 19(a) analysis, the IBC court answered that question in the affirmative, reasoning that "disallowing the amendment would hinder IBC from asserting its rights against an employee directly involved in the alleged breach of the [subject] Cargo Handling Agreement and related causes of action." IBC, 125 F. Supp. 2d at 1012.

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The factual circumstances confronted by the IBC court are factually comparable to this case, where Plaintiff alleges that its insurance broker and agent, Bronson and Willard, were responsible for not procuring the proper scope of insurance for Plaintiff, and for saddling Plaintiff with unnecessary premium costs as a result. Significantly, even Lexington appears to have conceded the centrality of the broker/agent to Plaintiff's dispute. In a letter to the California Department of Insurance dated January 16, 2009, Lexington's own Associate General Counsel, Barnett Ovrut, indicated that a "specific policy exclusion" could have been written to exclude Plaintiff's retail sales of insulation from the calculation of Plaintiff's comprehensive general liability policy. Ovrut appears to opine that the broker and/or agent were responsible for failing to exclude "material sales from premium determination." As the letter states:

> "Review and analysis of the Policy indicates that premium is to be determined on the basis of ABC Insulation's "sales". No distinction is made in this respect for sales from insulation contracting and sales of insulation materials. A specific policy exclusion would be required for receipts from material sales to not be included in premium determination. As ABC Insulation was represented by an insurance broker with respect to obtaining the insurance provided under the policy, responsibility for excluding material sales from premium determination had that been ABC Insulation's intent rested with such broker."

See Ovrut letter, Exhibit 2 to the Declaration of Daniel W. Smith, page 1, paragraph 1.

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In opposition to Plaintiff's Motion, Lexington does not deny that Bronson and Willard may be necessary parties given the allegations levied by Plaintiff against them. Instead, Lexington claims that the original agent who placed the policy with Lexington, Glenna Androus (who also happens to be Larry Crother's mother-in-law), should also have been named as a Defendant. (See Lexington's Opp'n, 3:5-14). Lexington argues Plaintiff's failure to add Androus amounts to gamesmanship on the part of Plaintiff that renders "fallacious" Plaintiff's present attempt to selectively add Bronson and Willard as diversity-destroying Defendants. Plaintiff points out in its reply, however, that Ms. Androus died in November of 2002, with her business being subsequently sold in 2003. Decl. of Cheryl A. Crother, ¶ 2. Because the allegations of the proposed FAC make it clear that Plaintiff seeks to sue Bronson and Willard only in their capacity as Plaintiff's insurance agent and broker for the period between October 30, 2003 and January 15, 2008 (see FAC, ¶ 27), Plaintiff's failure to add the deceased Ms. Androus appears justifiable, and not an abject attempt to "pick and choose" defendants to destroy diversity that the Court should reject.

Bronson and Willard's potential relationship to Plaintiff's claims appears to well exceed the requisite "tangential" link. Indeed, as Plaintiff points out, the Ovrut letter makes it likely that Lexington will blame Bronson and Willard at trial, and will point to their empty chairs if they are not joined as defendants.

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Consequently, the Court agrees that the addition of Bronson and Willard is necessary, under a Rule 19(a) analysis, to adjudicate the entire controversy stemming from the placement of Plaintiff's comprehensive general liability insurance.

The Northern District's decision in Chan v. Bucephalus, supra, is also instructive. The Plaintiff in Chan, after initially suing a company that solicited investment funding, later sought to add the non-diverse former managing partner of that company, alleged that the partner actively participated in the investment scheme wherein she was allegedly victimized. Under those circumstances, which are akin to Plaintiff's allegation here that Bronson and Willard were the parties directly responsible for negligently procuring the policies issued by Lexington, the Northern District found that the partner's role was more than tangential and consequently determined that the Rule 19(a) inquiry favored allowing amendment under a Section 1447(e) analysis. Chan, 2009 WL 1108744 at * 4. This Court similarly concludes that considerations under Rule 19(a) weigh in Plaintiff's favor in permitting the joinder of Bronson and Willard as additional parties.

Turning now to the second factor, whether or not the applicable statute of limitations would preclude Plaintiff from asserting his claims in a separate state court action, there is no evidence before the Court that Plaintiff's potential claims against Bronson or Willard would be subject to the applicable statute of limitations bar any differently now than at the time this lawsuit was initially filed in December of 2010.

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Consequently, that factor does not weigh one way or the other in favor of permitting joinder under Section 1447(e).

The third factor, whether the amendment was sought in a timely matter, does appear to favor Plaintiff. Plaintiff's initial attempt to add Bronson and Willard as defendants occurred on January 28, 2011, just six weeks after this matter was first filed in state court and only two weeks after removal, by Lexington, to this Court. In Clinco, supra, the Northern District found that an amendment sought some six weeks after the filing of the original complaint was timely. Clinco, 41 F. Supp. 2d at 1083.

Consideration of the final fourth and fifth factors is intertwined, since an assessment as to the strength of the claims against the proposed new defendant (fifth factor) would appear to bear directly on whether joinder is sought solely to defeat diversity and divest this Court of jurisdiction. Although Plaintiff's previously filed Motion to Remand, submitted immediately following its ultimately aborted attempt to file a FAC without the requisite leave of court, does suggest a motive to destroy diversity (as does Plaintiff's reduction of the jurisdictional amount in controversy to below the $75,000.00 threshold), as discussed above it appears that even Lexington concedes that Plaintiff may indeed have valid claims against Bronson and Willard. That competing interplay nullifies, in the Court's view, any inference to be drawn in either favoring or disfavoring amendment.

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On balance, in assessing the factors to be considered in determining whether to permit amendment under Section 1447(e), the Court concludes that Plaintiff should be allowed to submit his proposed FAC despite the fact that the pleading destroys diversity. Plaintiff's Motion for Leave to File First Amended Complaint (ECF No. 32) is accordingly GRANTED.[2] Plaintiff is directed to file its First Amended Complaint forthwith. Because that amended pleading adds defendants whose presence in this litigation destroys the diversity on which this Court's jurisdiction rests, this Court no longer has subject matter jurisdiction under 28 U.S.C. § 1332 and must remand this case to the originating Court, the Superior Court for the State of California in and for the County of Sacramento. It is accordingly unnecessary to adjudicate the propriety of the other changes contained within the First Amended Complaint, and the Court declines to do so. Additionally, because the Court determines it lacks jurisdiction, Lexington's Motion to Dismiss (ECF No. 24) is DENIED as moot.

IT IS SO ORDERED.

Dated: June 6, 2011

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

[2] Because oral argument was not of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).