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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Neal Bordenave,

Plaintiff,

v.

Safeco Insurance Company of Illinois, Braden
J. Danyus,

Defendants.

No. 2:20-cv-01939-KJM-DMC

ORDER

Plaintiff Neal Bordenave originally brought this action in state court against defendants Safeco Insurance Company of Illinois and appraiser Braden Danyus. Safeco removed the action to this court based on the parties' diversity of citizenship. Mr. Bordenave has moved to remand. For the reasons below, the court **grants** the motion to remand.

I. BACKGROUND

Mr. Bordenave had a home insurance policy with Safeco when his home was destroyed in the 2018 Camp Fire. Compl. ¶¶ 8–12, Not. Removal Ex. A, ECF No. 1; *see generally* Policy, Not. Removal Ex. A, ECF No. 1. After the fire, Mr. Bordenave filed a claim with Safeco, seeking payment of benefits under the policy. Compl. ¶ 13. Mr. Bordenave alleges Safeco attempted to minimize the payout under the policy by undervaluing his losses and making lowball offers to cover the cost of replacing his home, *id.* ¶ 15, which he refused to accept, *id.* ¶ 17.

1 Mr. Bordenave elected to purchase a replacement home “in lieu of rebuilding” his home, as
2 permitted by his policy coverage. *Id.* ¶ 22. Mr. Bordenave found a new home. *Id.* Safeco hired
3 Mr. Danyus to appraise it. *Id.* ¶ 23. Mr. Bordenave alleges Mr. Danyus falsely inflated the value
4 of the replacement property to minimize Safeco’s payment. *Id.* ¶¶ 24–25.

5 As noted, Mr. Bordenave originally filed this action in California state court. Not.
6 Removal ¶ 1. Against Safeco, Mr. Bordenave asserts breach of contract and breach of the
7 covenant of good faith and fair dealing. Compl. ¶¶ 29–41. Against Mr. Danyus, he asserts
8 negligent misrepresentation, violation of Business and Professions Code section 17200, and tort
9 of another. *Id.* ¶¶ 42–62. Safeco removed the matter to this court, asserting diversity jurisdiction.
10 *See generally* Not. Removal. Safeco is a corporation organized in Illinois with its principal place
11 of business in Massachusetts, while Mr. Bordenave and Mr. Danyus are both citizens of
12 California. *Id.* ¶¶ 8–10. Safeco alleges in the notice of removal that Mr. Bordenave fraudulently
13 joined Mr. Danyus in an attempt to prevent removal. *Id.* ¶¶ 13–14. Mr. Bordenave’s motion to
14 remand is fully briefed and the court submitted it without oral argument. Mot. Remand, ECF
15 No. 6; Opp’n, ECF No. 7; Reply, ECF No. 9; Min. Order, ECF No. 8.

16 **II. LEGAL STANDARD**

17 When a federal district court would have had original jurisdiction over an action originally
18 filed in state court, the action may be removed to federal court. 28 U.S.C. § 1441(a). The
19 removal statute is strictly construed, and doubts regarding the court’s jurisdiction are resolved in
20 favor of remand. *See Luther v. Countrywide Home Loans Servicing, LP*, 533 F.3d 1031, 1034
21 (9th Cir. 2008). Removal is proper only when (1) the case presents a federal question or (2) there
22 is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.
23 *See* 28 U.S.C. §§ 1331, 1332(a).

24 Diversity jurisdiction requires complete diversity, meaning each plaintiff has different
25 citizenship when compared to each defendant. *Grancare, LLC v. Thrower by & through Mills*,
26 889 F.3d 543, 548 (9th Cir. 2018) (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996)). “In
27 determining whether there is complete diversity, district courts may disregard the citizenship of a
28 non-diverse defendant who has been fraudulently joined.” *Id.* (citing *Chesapeake & Ohio Ry. Co.*

1 *v. Cockrell*, 232 U.S. 146, 152 (1914)). “There are two ways to establish fraudulent joinder:
2 (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a
3 cause of action against the non-diverse party in state court.” *Id.* (citation and marks omitted).
4 The court may find fraudulent joinder only if, “after all disputed questions of fact and all
5 ambiguities in the controlling state law are resolved in the plaintiff’s favor, the plaintiff could not
6 possibly recover against the party whose joinder is questioned.” *Nasrawi v. Buck Consultants,*
7 *LLC*, 713 F. Supp. 2d 1080, 1084 (E.D. Cal. 2010) (citing *Kruso v. Int’l Tel. & Tel. Corp.*,
8 872 F.2d 1416, 1426 (9th Cir. 1989)). “But ‘if there is a possibility that a state court would find
9 that the complaint states a cause of action against any of the resident defendants, the federal court
10 must find that the joinder was proper and remand the case to the state court.’” *Grancare,*
11 889 F.3d at 548 (quoting *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009)).
12 The “plaintiff need only have one potentially valid claim against a non-diverse defendant to
13 survive a fraudulent joinder challenge.” *Nasrawi*, 713 F. Supp. 2d at 1084–85 (citation and marks
14 omitted).

15 “Fraudulent joinder claims may be resolved by ‘piercing the pleadings’ and considering
16 summary judgment-type evidence such as affidavits and deposition testimony.” *Morris v.*
17 *Princess Cruises, Inc.*, 236 F.3d 1061, 1068 (9th Cir. 2001) (citation and marks omitted). The
18 removing defendant “bears a heavy burden” in attempting to show removal as here is proper
19 given the “general presumption against fraudulent joinder.” *Hunter*, 582 F.3d at 1044.

20 **III. ANALYSIS**

21 Mr. Bordenave argues the case must be remanded because Mr. Danyus is properly joined
22 and not completely diverse. Mot. Remand at 6–8. Safeco argues Mr. Danyus was fraudulently
23 joined, in part because, it says, all the claims against Mr. Danyus are barred by the economic loss
24 rule. Opp’n at 10–12.

25 “[T]he economic loss rule ‘prevent[s] the law of contract and the law of tort from
26 dissolving one into the other.’” *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988
27 (2004) (citation omitted). Generally, purely economic losses are not recoverable based on a
28 negligence claim. *S.M. Wilson & Co. v. Smith Int’l, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978);

1 *Seely v. White Motor Co.*, 63 Cal. 2d 9, 16–18 (1965). However, a plaintiff can recover tort
2 damages in a contract case if there was physical harm, if a defendant breached a legal duty
3 independent of the contract, or if a “special relationship” existed between the parties. *See*
4 *Robinson*, 34 Cal. 4th at 989; *J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979).

5 Mr. Bordenave is able to state a claim against Mr. Danyus despite the economic loss rule.
6 Real estate appraisers and insurance company employees can be liable for negligent
7 misrepresentation under California law in some circumstances even when they are not parties to a
8 contract. *See Cecena v. Allstate Ins. Co.*, 358 F. App’x 798, 799–800 (9th Cir. 2009)
9 (unpublished) (citing *McNeill v. State Farm Life Ins. Co.*, 116 Cal. App. 4th 597, 603 (2004)).
10 For example, in *Soderberg v. McKinney*, an appraiser faced potential tort liability for
11 misrepresentations in an appraisal even though the appraiser was not hired by the investors who
12 claimed they were harmed. *See* 44 Cal. App. 4th 1760, 1766–67 (1996) (“[A] supplier of
13 information is liable for negligence to a third party only if he or she intends to supply the
14 information for the benefit of one or more third parties in a specific transaction or type of
15 transaction identified to the supplier.” (citing *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 392
16 (1992))).

17 The Court of Appeal’s decision in *Bock v. Hansen* confirms a tort claim might be viable
18 against Mr. Danyus here. 225 Cal. App. 4th 215 (2014). In *Bock*, the court recognized that an
19 insurance adjuster can be liable for negligent misrepresentation. *See generally id.* Safeco claims
20 *Bock* is distinguishable because the adjuster’s misrepresentations in that case allegedly caused
21 physical harm, whereas Mr. Bordenave alleges no physical injury. Opp’n at 17. At least one
22 federal district court has read *Bock* as Safeco does. *See Feizbakhsh v. Travelers Com. Ins. Co.*,
23 No. 16-2165, 2016 WL 8732296, at *6 (C.D. Cal. Sept. 9, 2016) (finding *Bock* “applied the well-
24 settled rule that an agent can be held personally liable for negligent misrepresentation when
25 physical injury results”). Many other federal district courts, however, have held that negligent
26 misrepresentation claims might be viable even without allegations of physical injury “because
27 such claims are not ‘obviously foreclosed according to settled principles.’” *Livshetz v. Fed. Ins.*
28 *Co.*, No. 20-3374, 2020 WL 4748461, at *3 (C.D. Cal. Aug. 17, 2020) (quoting *Zuccolotto v.*

1 *Zurich Am. Ins. Co.*, No. 16-1277, 2016 WL 10981515, at *3 (C.D. Cal. Sept. 26, 2016)); *see*
2 *also, e.g., 818Computer, Inc. v. Sentinel Ins. Co., Ltd.*, No. 19-9, 2019 WL 698102, at *4 (C.D.
3 Cal. Feb. 19, 2019). These courts persuasively reason that any “uncertainty surrounding the
4 proper scope of *Bock*” means a state court must determine whether the negligence claim has
5 merit. *Zuccolotto*, 2016 WL 10981515 at *3. While it remains uncertain whether a state court
6 would allow the tort claims against Mr. Danyus to proceed, even a remote possibility of success
7 on a single claim means Mr. Danyus was not fraudulently joined. *See Livshetz*, 2020 WL
8 4748461, at *3 (“[A]ny ambiguity in state law must be resolved in favor of the [plaintiff].”);
9 *Nasrawi*, 713 F. Supp. 2d at 1084–85.

10 Safeco also urges the court to hold that Mr. Danyus was fraudulently joined because
11 Mr. Bordenave does not adequately plead negligent misrepresentation. Opp’n at 13–17. This
12 argument misperceives the relevant legal test. “If a plaintiff’s complaint can withstand a Rule
13 12(b)(6) motion . . . it necessarily follows that the defendant has not been fraudulently joined.”
14 *Grancare*, 889 F.3d at 550. The inverse, however, is not necessarily true. That is, if the
15 complaint could not survive a motion to dismiss, the fraudulent joinder “inquiry does not end.”
16 *Id.* “[T]he district court must consider . . . whether a deficiency in the complaint can possibly be
17 cured by granting the plaintiff leave to amend.” *Id.*

18 In any event, Mr. Bordenave’s allegations satisfy the applicable pleading requirements for
19 purposes of this motion. A negligent misrepresentation claim has five elements: “(1) the
20 misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it
21 to be true, (3) with intent to induce another’s reliance on the fact misrepresented, (4) justifiable
22 reliance on the misrepresentation, and (5) resulting damage.” *Apollo Capital Fund, LLC v. Roth*
23 *Cap. Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007) (citation omitted). Mr. Bordenave’s
24 allegations map onto these elements. He alleges Mr. Danyus made a misrepresentation of fact by
25 inflating the value of the replacement property in his appraisal. *See Compl.* ¶¶ 23– 24.
26 Mr. Danyus’ misrepresentation was allegedly made without the reasonable belief that it was true,
27 and to lower Safeco’s payment to Mr. Bordenave. *Id.* ¶ 44. The misrepresentation was allegedly
28 made with the intent to induce Mr. Bordenave’s reliance—to get him to accept Safeco’s offer.

1 See Reply at 7. Mr. Bordenave relied on the misrepresentation and chose to purchase a different
2 property, and he “would not have done that but for Danyus’ lowball estimate.” *Id.* at 7–8. Lastly,
3 Mr. Bordenave seeks damages because “he had to pay more for a different property to obtain full
4 replacement cost benefits.” *Id.* at 8 (citing Compl. ¶¶ 14–25). To the extent the complaint falls
5 short of articulating these claims with more detailed factual allegations, Mr. Bordenave could
6 likely add those allegations to an amended complaint; the joinder of Mr. Danyus was not
7 fraudulent. See *Livshetz*, 2020 WL 4748461, at *4 (holding joinder not fraudulent because
8 defendants had not shown “[plaintiffs’] purported failure to meet the appropriate pleading
9 standard could not be cured by amendment”).

10 Because Mr. Bordenave could potentially state at least one negligent misrepresentation
11 claim against Mr. Danyus, his joinder was not fraudulent. See *Grancare*, 889 F.3d at 548. The
12 court need not reach Mr. Bordenave’s other claims.

13 **IV. CONCLUSION**

14 **The motion to remand is granted.** This case is remanded to the Superior Court of the
15 State of California in and for the County of Butte.

16 The Clerk is directed to **close** the case.

17 This order resolves ECF No. 6.

18 IT IS SO ORDERED.

19 DATED: July 16, 2021.

20 
CHIEF UNITED STATES DISTRICT JUDGE