UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDWARD LANGILL, et al.

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY OF CALIFORNIA, et al.

Defendants.

Case No.: 20cv176-LAB (DEB)

ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE A JURY DEMAND, AND FOR LEAVE TO AMEND; AND

ORDER TO SHOW CAUSE RE: DEFENDANT'S IDENTITY

Defendant Allstate Insurance Company[1] removed this case from California state court on January 27, 2020. Several months later, after various proceedings, Plaintiffs filed a motion seeking an extension of time to demand a jury trial, and leave to amend to add a non-diverse Defendant as well as several claims. Allstate opposed all requests. After briefing on that motion was complete, the parties filed cross-motions for summary judgment, which are not yet fully briefed.

[1] Allstate says it has been erroneously sued under the name of "Allstate Insurance Company of California," and that it is an Illinois corporation with its principal place of business in Illinois, and not as Plaintiffs have alleged a California corporation. Plaintiffs appear to accept this correction, even though their pleadings continue to refer to Allstate Insurance Company of California.

The dispute arises in connection with a homeowner's insurance policy on Plaintiffs' condominium. Plaintiffs allege that workers who were renovating the property carried bags of debris containing asbestos through the condominium. As they were doing this, Plaintiffs allege, asbestos leaked out and the condominium was contaminated. Allstate denied coverage on February 15, 2017. Plaintiffs' tenant and his family threatened a lawsuit. Then on May 15, 2017 the tenant filed suit against Plaintiffs, the homeowners' association, and companies involved in the renovation. After the suit was underway, Allstate began providing a defense.

The dispute concerned policy language, under which Allstate would not provide coverage for chemical contamination generally, though it would do so if the contamination was sudden and accidental.

Extension of Time to Demand Jury Trial

Under Fed. R. Civ. P. 81(c)(3), Plaintiffs had 14 days after being served with a notice of removal to demand a jury trial. Under Fed. R. Civ. P. 6(b)(1)(B) the Court for good cause (specifically, excusable neglect) may extend deadlines. And Fed. R. Civ. P. 39(b) authorizes the Court to grant a jury trial to a party who does not timely request it. Nevertheless, the Court's discretion to grant an untimely request for a jury trial is narrow. *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001). The Court has discretion to grant a jury trial only where the delay is excused by some cause beyond mere inadvertence or oversight. *Id.* While in some other contexts, inadvertence may amount to excusable neglect, binding precedent holds that in the context of untimely jury demands it does not. "An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." *Id.* (citing *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir.1976)). *See also Zivkovic v. S. Calif. Edison Co.*, 302 F.3d 1080, 1086–87 (9th Cir. 2002) (holding that *pro se* plaintiff's good faith mistake of law amounted to mere inadvertence, and did not warrant relief from an untimely jury demand); *Mardesich*, 538 F.2d at 849 (where inadvertence or

oversight are the only grounds for relief, a district court has "virtually no discretion to exercise" under Rule 39(b)). Although the right to a jury trial is constitutional, denying a motion for jury trial for failure to make a timely demand does not offend the Constitution. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980) (citing *Pac. Queen Fisheries v. Symes*, 307 F.2d 700, 718–19 (9th Cir. 1962)).

While Plaintiffs' motion describes the delay as resulting from "excusable neglect," they fail to advance any reason other than inadvertence to support their request. To the contrary, Plaintiffs affirmatively admit that their failure to make a timely jury demand was "solely" due to inadvertence. (Docket no. 19–1 at 7:6–10.)

Because Plaintiffs' request to make a late jury trial demand is unsupported by a showing of "excusable neglect," their motion is **DENIED**.

Motion for Leave to Amend

Plaintiffs' motion also includes a request to file their proposed second amended complaint ("SAC"), which is attached as an exhibit to the motion. The seek to add claims and theories, as well as a new party, Jordie Fuller, an Allstate insurance agent. Plaintiffs argue that they have obtained new information showing that Fuller participated in Allstate's intentional misrepresentation, and also that he was negligent in informing Plaintiffs of their coverage and in failing to report information to Allstate about Plaintiffs' claim.

Adding Defendant Fuller

Allstate removed this action from state court on the basis of diversity jurisdiction. The parties agree that Fuller is non-diverse, and that if he is added the Court would be required to remand the action. Leave to add claims is governed by Fed. R. Civ. P. 15(a), and joinder under these circumstances is governed by 28 U.S.C. § 1447(e). *See McGrath v. Home Depot USA, Inc.*, 298 F.R.D. 601, 606-607 (S.D. Cal. 2014). Adding a party that would destroy diversity requires a higher level of scrutiny than ordinary amendment under Rule 15(a). *IBC Aviation Servs.,*

Inc. v. Compania Mexicana de Aviacion, S.A. de C.V., 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000). Whether to permit joinder is within the Court's discretion. *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998). Courts in this Circuit consider factors such as:

> (1) whether the new defendants should be joined under Fed. R. Civ. P. 19(a) as "needed for just adjudication"; (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is intended solely to defeat federal jurisdiction; and (5) whether the claims against the new defendant appear valid.

Sullivan v. OM Fin. Life Ins. Co., 2010 WL 5137159, at *2. The Court in particular must examine the plaintiff's motive for joinder. *Id*. (citing *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1376 (9th Cir. 1980).

Plaintiffs argue that Allstate lacks standing to challenge joinder, but the precedent they cite is inapposite. Allstate, having removed this case from state court, has standing to oppose the joinder of a party whose presence would destroy diversity and require remand. *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (citing *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)) (holding that plaintiff was "entitled to present facts" showing that joinder of non-diverse defendant was fraudulent).

The SAC alleges that Fuller was (and still is) an Allstate insurance agent. It alleges that while doing the things alleged in the complaint, he was acting within the scope of his agency or employment. (SAC, ¶ 7.) The SAC does not allege facts suggesting that he was Plaintiffs' agent in any respect. (*See* Docket no. 19-1 at 3 n.1 (alleging that Fuller "acted as Allstate's agent and/or employee" in selling Plaintiffs their policy).)

The proposed additional factual allegations against Fuller are, for the most part, minimal. The SAC does not allege that Fuller told Plaintiffs anything about their insurance coverage until after Allstate had initially denied their claim. Even

then, all they allege he told them was that nothing more could be done. (SAC, ¶ 16.) The SAC includes the language of Allstate's denial letter, and the SAC makes clear its allegations about concealment or misrepresentation are based on what the letter said. (SAC, ¶ 46.) Although Plaintiffs interpret this to mean Allstate (and Fuller) represented to them that claims arising from sudden and accidental discharge of contaminants were not covered (SAC, ¶ 33), the denial letter in fact says Allstate concluded that the damage was not caused by any sudden event: "There is no evidence of a sudden event which caused damage to covered property." (SAC, ¶ 13.) Telling Plaintiffs that their claim (whose cause the parties disagreed about) was not covered is not the same as telling Plaintiffs that a damage caused by sudden and accidental discharge of contaminants was not covered.

Plaintiffs' misrepresentation and concealment claims are also based on the denial letter's failure to disclose that damage caused by the sudden and accidental discharge of a contaminant was covered, even if contamination in general was not. The letter, however, made clear that Allstate did not believe that any sudden and accidental event occurred, and was denying the claim on that basis. Plaintiffs are essentially arguing that Allstate had a duty to disclose terms of the policy that hypothetically could apply if the facts were different than Allstate believed. It may be that Plaintiffs can show that Allstate knew its conclusion about the nature of the contamination was false, and offered it as a pretext for denying the claim. But even if they could, there is no reason to suppose they could bring Fuller within such a claim. Nothing in the SAC suggests that Fuller had any part in making the decision to deny the claim, or that he had any information beyond what was in the letter itself about why the claim was denied. In essence, Plaintiffs are suggesting that Fuller should have offered advice about what the coverage would be if the facts were different than Allstate concluded they were, though they have not identified

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any basis for this. The wrongful denial of a claim does not by itself amount to concealment of the fact that the claim was valid.

Fuller's only other significant involvement was his alleged failure to report promptly to Allstate that Plaintiffs had been sued. Plaintiffs allege they told him on March 22, 2017 and again on April 17, 2017 that they would be sued. After the action was filed, they say they reported to "Allstate" that they had been served. (Joint Case Mgt. Stmt. (Docket no. 15) at 3:2–3.)[2] Plaintiffs accuse Fuller of delaying notifying Allstate's claim adjuster that suit was filed, until July 16, 2018.

There is a hole in the allegations against Fuller for failure to notify Allstate they had been sued. Allstate's opposition points out that Plaintiffs allege merely that they told Fuller they might be sued, and did not notify him after they were sued. Plaintiffs' reply brief does not comment on this. The parties agree Plaintiffs told Fuller before the suit was filed that they expected to be sued. But after suit was filed, Plaintiffs allege only that they told "Allstate" they had been sued. Allstate has pointed out Plaintiffs' failure to allege that they notified Fuller they had actually been sued, and Plaintiffs have not contested that point. The Court accepts this as a concession that they did not tell Fuller this (even though they may have told someone else connected with Allstate). This is consistent with their pending motion for partial summary judgment, in which they say they had conversations with Fuller about the dispute with their tenant. They argue at length that Fuller must have been aware they were being sued, implying that although they did not tell him about the lawsuit, they were sure he knew. (Docket no. 44-1 at 15:2-6, 15:17–23.)[3]

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[2] The motion cites the Joint Statement, not the SAC or any exhibit. Nothing in the record suggests that Plaintiffs notified Fuller that they had been served with process.

[3] The cited evidence shows that Tricia Langill had conversations with Fuller about other insurance issues, and that during those discussions Fuller asked her "how is the situation with [the condominium] going," prompting her to "update him"

In view of the facts and the nature of Plaintiffs' claims, Fuller's joinder is not required for just adjudication of this action or of any of Plaintiffs' claims. Fuller is only tangentially related, and his absence as a party would not prevent complete relief. *See IBC Aviation Servs.*, 125 F. Supp. 2d 1011–12. The fact that he is not joined as a party does not make him unavailable as a witness. And accepting Plaintiffs' allegation that he was acting as Allstate's agent or employee the entire time, Allstate is liable for all of his acts and omissions under a *respondeat superior* or agency theory. There is no risk Allstate would escape liability by blaming Fuller.

The claims against Fuller are weak at best, and probably futile. But even if Plaintiffs can make out a valid claim against him, Allstate would be liable for his acts and omissions, and its assets are clearly adequate to satisfy any judgment. Although the Court cannot say so with certainty, it appears joinder of Fuller is being sought merely to destroy diversity.

Because Plaintiffs base their request for joinder on recent disclosures, the request appears to be reasonably timely. They have not argued that any claim against Fuller would be time-barred, although it is questionable whether they intend to sue him separately.

Having considered the factors for joinder of a non-diverse party, the Court exercises its discretion to **DENY** leave to add Fuller.

Amendment to Add Other Claims

The analysis above has identified serious problems with Plaintiffs' proposed amendments. It may be that Plaintiffs, with the benefit of this Order and Allstate's arguments, can identify and shore up weaknesses in their proposed new claims. Nevertheless, it does not appear Plaintiffs' proposed new claims would survive a motion to dismiss. If Plaintiffs were allowed to file the SAC as it now stands, a new

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about it. (Docket no. 44-4, ¶ 20.) What she said, however, is not specified.

round of amendment would be needed. Under these circumstances, denial of leave to amend is appropriate. *See Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011). Furthermore, cross-motions for summary judgment are pending. The ruling on those will likely affect any amendment Plaintiffs propose to make. The interests of economy favor denying leave to amend at this time. *See* Fed. R. Civ. P. 1.

Leave to amend is **DENIED WITHOUT PREJUDICE**. If appropriate, Plaintiffs may seek leave to amend after the motions for summary judgment are decided, and may address the issue of the possibility of amendment in their briefing. Their request to file the SAC is **DENIED**.

Order to Show Cause re: Identity of Defendant(s)

Although Plaintiffs appear to agree with Allstate that Allstate Insurance Company is an Illinois citizen, they continue to refer to Defendants as both Allstate Insurance Company and Allstate Insurance Company of California, the latter of which appears to be a California citizen and thus non-diverse from Plaintiffs. (*See* SAC, Caption and ¶ 4.) This may be an oversight. But because the Court's jurisdiction is at stake, the issue must be addressed and resolved. *See Mt. Healthy city Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) (court must inquire *sua sponte* whenever a doubt arises as to its jurisdiction).

Plaintiffs and Defendant(s) must meet and confer, and if possible determine who the proper Defendant or Defendants are. If they agree, they should file a joint motion to correct Defendant's name in the docket. If they do not agree, they should each file a memorandum of points and authorities, not longer than three pages,

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explaining their position. They must file either their joint motion or their memoranda within **14 calendar days of the date this order is issued**.

IT IS SO ORDERED.

Dated: February 23, 2021

Honorable Larry Alan Burns
United States District Judge