**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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LAWRENCE S. BONNER,

Plaintiff,

v.

CARLOS LEON, et al.,

Defendants.

Case No. 2:13-cv-1858-APG-VCF

**ORDER REMANDING CASE TO STATE COURT**

(Doc. #33)

## I. SUMMARY

Before the Court is Plaintiff Lawrence Bonner's Petition for Remand for lack of jurisdiction. (Doc. #33.) The Court has also considered the opposition filed by Defendants American Bankers Insurance Company of Florida ("American Bankers"), American Collectors Insurance, Inc. ("American Collectors"), and Assurant, Inc. ("Assurant")(collectively "Insurance Defendants") (doc. #35), and Plaintiff's reply (doc. #36). For the reasons discussed below, the motion is granted in part and denied in part.

## II. BACKGROUND

The following facts are taken from Plaintiff's Complaint. In 2010, Plaintiff, a long-time classic car enthusiast, delivered a 1964 Chevy Nova to Nevada Defendant C&H Soda Blasting ("C&H") for automotive restoration and repair. Nevada Defendants Carlos and Carla Leon (collectively "Leon Defendants") own C&H.[1] Although there was no written estimate for the work, Plaintiff was satisfied with the verbal estimates of cost and length of time for the repairs. Over the course of time, Plaintiff made several payments for the car repair, and gave personal loans to the Leon Defendants, to facilitate timely repair. Plaintiff expected the repairs to take one year.

[1] The Court refers to C&H and the Leon Defendants collectively as the "Mechanic Defendants."

In 2011, Plaintiff grew concerned that Mr. Leon was not working on the car and demanded that Mr. Leon return the vehicle regardless of the state of completion. On March 14, 2012, after Plaintiff's multiple attempts to retrieve the vehicle and Mr. Leon's numerous false promises that it would be returned, Plaintiff filed a police report detailing the surrounding events. The police department advised Plaintiff to file a lawsuit to retrieve the car.

On March 15, 2012, after filing the police report, Plaintiff contacted Insurance Defendants about Mr. Leon's actions. However, Insurance Defendants refused to allow Plaintiff to make a claim. Insurance Defendants told Plaintiff that the police department's lack of involvement was evidence that the car was not stolen. Thus, Plaintiff focused his efforts on Mr. Leon to attempt to retrieve the car.

In July 2012, Carlos Leon filed for bankruptcy.[2] At this point, fearful that the car would be implicated in the bankruptcy, Plaintiff enlisted the services of a law firm. However, Mr. Leon still did not return the car. Plaintiff assumed that Mr. Leon sold, abandoned, destroyed, lost, or converted the car. Thus, around February 2013, the law firm then sent a letter to Insurance Defendants requesting that Plaintiff be allowed to file a claim. Insurance Defendants again refused to allow Plaintiff to make a claim. Over the course of multiple communications extending well into April 2013, Insurance Defendants would not allow Plaintiff to make a claim, nor did they undertake any investigation. Instead, Insurance Defendants told Plaintiff to make another police report, get the police to investigate the vehicle as stolen, or call it stolen in the police report. Plaintiff's attorneys again attempted to retrieve the vehicle from Mr. Leon to no avail.

On August 8, 2013, Plaintiff sued the Leon and Insurance Defendants in Nevada state court. The claims against the Leon Defendants assert deceptive trade practices, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, civil RICO, intentional misrepresentation, and unjust enrichment. Plaintiff seeks money damages and a

[2] The Court takes judicial notice that Carlos Leon, formerly doing business as C&H Soda Blasting, Inc., and Carmen Leon filed a voluntary Chapter 13 bankruptcy petition on May 4, 2012, and the 5-year plan was confirmed on May 12, 2014. See generally In re Leon, No: 12-15399-mkn (Bankr. D. Nev.).

preliminary injunction for the return of the vehicle, or information of the location of the vehicle and its state of repair.

The claims against the Insurance Defendants assert breach of contract, breach of the implied covenant of good faith and fair dealing, unfair claims practices, and unjust enrichment. Plaintiff seeks money damages and declaratory relief.

Insurance Defendants removed the case to this Court based on both diversity jurisdiction and federal question (based on the Leon Defendants' pending bankruptcy case under 28 U.S.C. § 1334(a)). Plaintiff now moves to remand the case arguing the Mechanic Defendants' presence in the suit destroys complete diversity, and the pending bankruptcy does not vest this court with jurisdiction.

## III. MOTION TO REMAND

A defendant may remove an action to federal court if the plaintiff could have initially filed the complaint in federal court. 28 U.S.C. § 1441(a). When reviewing a motion to remand, a district court must analyze jurisdiction "on the basis of the pleadings filed at the time of removal." *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1213 (9th Cir. 1998). Federal district courts have diversity jurisdiction over cases in which there is (1) complete diversity of citizenship among opposing parties and (2) the amount in controversy exceeding $75,000. 28 U.S.C. § 1332(a).

When a debtor files a bankruptcy petition, an automatic stay immediately arises. 11 U.S.C. § 362(a). The scope of the stay is quite broad. In re Stringer, 847 F.2d 549, 551 (9th Cir. 1988). The automatic stay precludes and nullifies post-petition actions, judicial or nonjudicial, in nonbankruptcy against the debtor or affecting the property of the estate. Hillis Motors, Inc. v. Haw. *Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993). This includes all claims "that [were] or could have been commenced before the commencement of the [bankruptcy] case . . . , or to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case. . . ." 11 U.S.C. § 362(a)(1). Any claim made in violation of the automatic stay is void ab initio. In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). A court may sua sponte consider

whether an action is taken in violation of the automatic stay. *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1110 (9th Cir. 2006).

Based on the allegations in the Complaint, all the acts giving rise to Plaintiff's claims against the Leon Defendants happened prior to the Leon Defendants' bankruptcy petition and could have been commenced before the Leon Defendants filed the bankruptcy case. Plaintiff's claims for deceptive trade practices, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, civil RICO, intentional misrepresentation, and unjust enrichment were ripe no later than the moment that Plaintiff filed his police report. It is of no consequence that Plaintiff only enlisted the services of an attorney and continued to try and retrieve the car after the bankruptcy filing. Moreover, contrary to Plaintiff's argument, the claims most certainly implicate the bankruptcy estate because Plaintiff seeks compensatory and punitive money damages, not just return of the vehicle or proceeds directly traceable to the vehicle. Thus, because the claims implicate the bankruptcy estate, and because the claims arose, ripened, and could have been commenced before the bankruptcy filing, the claims against the Leon Defendants violate the automatic stay and are void. The claims against the Leon Defendants are dismissed. Because the claims are void ab initio, they cannot trigger the Court's jurisdiction under 28 U.S.C. § 1334(a), and diversity jurisdiction is the only remaining possible basis for removal.

As a resident of Nevada, C&H's presence in this case destroys diversity. However, if I sever this case in the manner proposed by the Insurance Defendants, the remaining case will be comprised solely of defendants who are not residents of Nevada, and the Court will therefore have diversity jurisdiction. Defendants cite to Greene v. Wyeth, 344 F.Supp.2d 674 (D. Nev. 2004) to argue that the claims against C&H have been procedurally misjoined. Defendants contend that the factual basis for the claims against the Mechanic Defendants is separate and distinct from the claims against the Insurance Defendants, and therefore severance C&H is warranted.

In Greene, the court severed misjoined claims against the non-diverse defendants because "the joinder [was] procedurally inappropriate." Id. at 685. Id. In that case—a products liability suit against a drug manufacturer—the plaintiffs also sued the prescribing physician and a drug

sales representative, both of whom were non-diverse. The court relied on well-established authority that ingestion of a drug by all plaintiffs could not alone constitute the same transaction or occurrence to warrant permissive joinder. Id. at 683. Because the joinder "clearly accomplishe[d] no other objective than the manipulation of the forum, and where the rights of the parties and interest of justice [were] best served by severance," "the interests of judicial expediency and justice weigh[ed] in favor of severance." Id. at 685. Thus, the court exercised its Rule 21 authority to add or drop parties to a suit "at any stage of the action and on such terms as are just," and severed and remanded the claims against the non-diverse defendants. Id. at 683–85.

Although Greene was decided nearly 10 years ago, the Ninth Circuit still has not taken up the issue of "fraudulent misjoinder."[3] As was the case 10 years ago, there remains a split of authority regarding whether federal courts recognize procedural misjoinder as a basis for removal jurisdiction. In re Yasmin and Yaz (Drospirenone) Marketing, Sales Prac. & Prods. Liability. Lit., 779 F. Supp. 2d 846, 854 (S.D. Ill. 2011). Courts disagreeing with fraudulent misjoinder as a basis for removal cite the narrow construction that must be applied to removal, its procedural complexity, and the lack of clarity governing its standards. See id. Many of these courts opine that the better approach is for parties to seek severance in state court prior to removal. Id.

I do not need to reach the question of whether severance is warranted because this case is distinguishable from Greene. In Greene the claims clearly did not arise from the same factual transaction or occurrence. Here, there is a colorable argument that all the claims relate to the same following facts: the Mechanic Defendants wrongfully withheld the car from the Plaintiff, Plaintiff filed the police report, and the Insurance Defendants repeatedly refused to acknowledge or investigate the police report. These arguably constitute the same series of occurrences,

[3] Unlike fraudulent joinder, which requires dismissal of an untenable claim against a non-diverse defendant, the term "fraudulent misjoinder" has been coined to explain a standard by which courts may gauge whether severance of improperly joined parties is warranted. See, e.g. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), abrogated on other grounds by Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000). Severance where there is a "fraudulent misjoinder" is new and not universally applied. See Burns v. Western Southern Life Ins. Co., 298 F. Supp. 2d 401, 402 (S.D.W.Va.2004) (citing 14B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Pro. § 3723 (3rd ed. 2003); Robert A. Weems, Mississippi Law of Torts § 21:3 (2003)).

justifying joinder. Although not all the occurrences overlap, some may. For example, the interpretation of the insurance contract may turn on whether the car was actually stolen, and that likely implicates the underlying actions of C&H. Moreover, whereas in Greene the joinder clearly accomplished no other objective than manipulation of the forum, here joinder may allow for judicial efficiency and complete vindication of rights. Therefore, it is not abundantly clear that the claims against C&H are misjoined, the joinder's objective was manipulation of the form, or that severing the claims would be just.

Accordingly, I find that the claims against C&H were not clearly misjoined. As C&H's presence in this lawsuit destroys diversity, the court lacks jurisdiction over the case. I remand it back to the state court.

## IV. REQUEST FOR ATTORNEYS' FEES

In conjunction with his Motion to Remand, Plaintiff requests the Court award him the fees and costs incurred as a result of Defendants' removal. 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005) (citations omitted).

Defendants' removal was not objectively unreasonable. Considering that at least one judge in this district has recognized procedural misjoinder and the Ninth Circuit has not definitively ruled on the matter, Defendants' arguments were warranted by existing law or, at a bare minimum, by a nonfrivolous argument for extending or modifying existing law or for establishing new law. Therefore, I decline to award fees.

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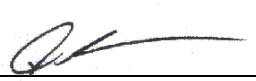
## V. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff Lawrence Bonner's Petition for Remand is GRANTED in part, and DENIED in part. The Clerk of the Court is directed to REMAND and close this case.

DATED THIS 16th day of July, 2014.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE