

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JANE T. CARAGEIN, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No. 16-732
)	
v.)	Judge Cathy Bissoon
)	
OUTBACK STEAKHOUSE, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM ORDER

I. MEMORANDUM

For the reasons that follow, Plaintiff’s Motion to Remand to State Court (Doc. 6) will be granted.

BACKGROUND

On January 20, 2016, Jane T. Caragein and James N. Caragein (“Plaintiffs”) filed a complaint in the Court of Common Pleas of Allegheny County against Outback Steakhouse; Blooming Brands, Inc.; OSI Restaurant Partners, Inc.; Outback Steakhouse of Florida, LLC; and Tobi Frable (“Defendants”), alleging claims for negligence, strict liability, breach of implied warranty, and loss of consortium. (Defs’ Notice of Removal (Doc. 1), Ex. H). On June 2, 2016, Defendants removed Plaintiffs’ action to this Court. Alleging diversity jurisdiction, Defendant argues that removal is proper pursuant to 28 U.S.C. §§ 1441 *et seq.* (Doc. 1).

On June 21, 2016, Plaintiffs filed a Motion to Remand to State Court, arguing, most pertinently, that complete diversity of citizenship does not exist, as Plaintiffs and Defendant Tobi Frable are all residents of the Commonwealth of Pennsylvania. (Pls’ Mot. (Doc. 6). On July 12,

2016 Defendants filed a Brief in Opposition, arguing that diversity of citizenship does exist because: 1) Mr. Frable was fraudulently joined and 2) Mr. Frable is a nominal defendant. (Def.'s Br. in Opp'n. (Doc. 11)).

ANALYSIS

“Because a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists, a removing party who charges that a plaintiff has fraudulently joined a party to destroy diversity of jurisdiction has a ‘heavy burden of persuasion.’” Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (quoting Steel Valley v. Union Switch and Signal Div., 809 F.2d 1006, 1010, 1012 n. 6 (3d Cir. 1987)). The Court of Appeals for the Third Circuit has held that “joinder is fraudulent ‘where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.’” Id. (quoting Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985)).

Defendants have not met their “heavy burden.” They argue that because Defendant Frable is only mentioned by name once in the Complaint, that Plaintiffs have stated no claim against him. They ignore the fact that Counts I-IV of the Complaint are asserted against all Defendants, Mr. Frable included. “A district court must resolve all contested issues of substantive fact in favor of the plaintiff and must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff.” Boyer, 913 F.2d at 111 (3d Cir. 1990) (internal citations omitted). It is alleged that Mr. Frable was the proprietor and general manager of the Outback Steakhouse restaurant where Plaintiff Mrs. Caragein allegedly contracted a vicious food-borne illness. Defendants have failed to articulate that “no reasonable basis in fact or colorable ground” supports Plaintiffs’ claims, particularly in light of the participation theory

of liability in tort under Pennsylvania law. See Wicks v. Milzoco Builders, Inc., 470 A.2d 86, 90 (Pa. 1983). For the same reasons, the Court is not persuaded that Mr. Frable is a “nominal defendant” who should not be considered for purposes of determining diversity of citizenship. (See Doc. 11 at 5-6).

As such, the Court declines to hold that Mr. Frable was fraudulently joined and/or is a nominal defendant. Both he and Plaintiffs are residents of Pennsylvania, and complete diversity of citizenship does not exist. This Court lacks diversity jurisdiction to hear the instant case, and Plaintiffs’ Motion to Remand will be granted

II. ORDER

For the reasons stated above, Plaintiffs’ Motion to Remand (**Doc. 6**), is **GRANTED, and** this case shall be **REMANDED FORTHWITH** to the Court of Common Pleas of Allegheny County, Pennsylvania.

IT IS SO ORDERED.

August 1, 2016

s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record