

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
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WALESKA FERRER-RODRIGUEZ, RAY
RIVERA-MONTALVO,

Plaintiffs,

v.

DR. EFRAIN GONZÁLEZ-DROZ, et al.,

Defendants.

Civil No. 12-1841 (JAF)

5
6 **OPINION AND ORDER**

7 In this case, Plaintiffs filed a complaint against their child’s former doctor,
8 Dr. Efraín González-Droz (“González”). (Docket No. 1.) Plaintiffs’ complaint alleged
9 that González’s substandard care led to their stillborn baby’s death in 1998. (Id.)
10 Plaintiffs later filed an amended complaint that added González’s insurer, Suscripción
11 Conjunta de Seguros de Responsabilidad Médico-Hospitalaria (“SIMED”), as a
12 codefendant. (Docket No. 31.) Before the court is González’s motion to dismiss under
13 Fed. R.Civ.P.12(b)(1) and (6). (Docket No. 27.) Plaintiffs oppose. (Docket No. 33.) For
14 the following reasons, we grant in part and deny in part González’s motion.

15 **I.**

16 **Background**

17 While this case has a long and varied procedural history, the legal issues presented
18 in this motion are relatively straightforward. We, therefore, restate only the history
19 necessary to resolve the present motion.

1 Plaintiffs are a father and mother who allege that Dr. González’s negligent
2 medical care led to their stillborn baby’s death in 1998. (Docket No. 31 at 1.) Plaintiffs
3 first brought suit against González in 1999 in the local Commonwealth courts. (Docket
4 No. 31 at 9.) After many years of discovery proceedings, Plaintiffs moved for voluntary
5 dismissal of their claims in 2007. (Id.) Plaintiffs then filed suit twice in the United States
6 District Court for the District of Puerto Rico. (Id.) During “all times pertinent,” SIMED
7 has been the insurance provider for González. (Id. at 2.) SIMED also provided González
8 with legal representation during González’s bankruptcy proceedings in the United States
9 Bankruptcy Court for the Eastern District of California. (Docket No. 33 at 2.)

10 Plaintiffs’ first federal case was dismissed for want of federal subject-matter
11 jurisdiction. See Ferrer-Rodriguez v. González-Droz, Civ. No. 08-1416 (D.P.R. Nov. 17,
12 2008) (Docket No. 16.) The judge found that because SIMED and Plaintiffs were both
13 citizens of Puerto Rico, there was not complete diversity. Id. at 2. Plaintiffs then filed
14 another federal case that did not include SIMED as a defendant. See Rivera-Montalvo v.
15 González-Droz, Civ. No. 09-2163 (D.P.R. Nov. 12, 2009) (Docket No. 1.) Plaintiffs’
16 second federal case was dismissed without prejudice in January 2012, after González was
17 discharged as a debtor in a Chapter 7 bankruptcy proceeding in the Bankruptcy Court for
18 the Eastern District of California.¹ See Rivera-Montalvo v. González-Droz, Civ. No. 09-
19 2163 (D.P.R. Jan. 26, 2012) (Docket No. 25.) On October 5, 2012, Plaintiffs filed this
20 case. (Docket No. 1.)

¹ González attaches copies of the bankruptcy court’s discharge order and docket report. (Docket Nos. 27-3; 27-4.) See also In Re González, No. 11-28613-C-7 (Bankr. E.D. Cal. Dec. 5, 2011). A chapter 7 bankruptcy discharges “all debts that arose before the date of the order for relief.” 11 U.S.C. § 727(b).

1 F.3d 358, 362–63 (1st Cir. 2001). A movant may base a challenge to the sufficiency of
2 the plaintiff’s assertion of subject-matter jurisdiction solely on the pleadings. Id. at 363.
3 In that case, we take the plaintiff’s “jurisdictionally-significant facts as true” and “assess
4 whether the plaintiff has propounded an adequate basis for subject-matter jurisdiction.”
5 Id. at 363; see Pejepscoot Indus. Park, Inc. v. Maine Cent. R.R. Co., 215 F.3d 195, 197
6 (1st Cir. 2000). On a motion under 12(b)(1), we may review materials outside the
7 pleadings to determine whether subject-matter jurisdiction exists. González v. United
8 States, 284 F.3d 281 (1st Cir. 2002) (citations omitted).

9 **B. Rule 12(b)(6)**

10 A plaintiff’s complaint will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)
11 if it alleges sufficient facts to establish a plausible claim for relief. See Fed.R.Civ.P.
12 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly,
13 550 U.S. 544, 570 (2007)). In assessing a claim’s plausibility, the court must construe the
14 complaint in the plaintiff’s favor, accept all non-conclusory allegations as true, and draw any
15 reasonable inferences in favor of plaintiff. San Geronimo Caribe Project, Inc. v. Acevedo-
16 Vila, 687 F.3d 465, 471 (1st Cir. 2012) (citation omitted).

17 **III.**

18 **Analysis**

19 We first address the arguments raised in González’s motion to dismiss. Then, we
20 raise sua sponte a potential hurdle to federal subject-matter jurisdiction.

21 **A. González’s Motion to Dismiss**

22 González argues that this court lacks jurisdiction to hear the merits of Plaintiffs’
23 claim. (Docket No. 27.) Specifically, González argues that because he was discharged as

1 a debtor in a “no asset” bankruptcy proceeding, Plaintiff is barred from pursuing an
2 action against him.² (Id.) Plaintiffs acknowledge that they are barred from collecting a
3 debt against González, but argue that they are allowed to include González as a nominal
4 defendant for the limited purpose of pursuing their claims against SIMED. (Docket
5 No. 33.)

6 Plaintiffs’ position is correct. “Although § 524(a)(2) prohibits actions brought to
7 collect a discharged debt from the debtor, it permits suits—even those brought to collect
8 on debts a debtor has discharged—that formally name the debtor as a defendant but are
9 brought to collect from a third party.”³ In re Paul, 534 F.3d 1303, 60 Collier Bankr. Cas.
10 2d (MB) 375, Bankr. L. Rep. (CCH) P 81289 (10th Cir. 2008) (collecting cases.). There
11 is an abundance of authority holding that a plaintiff may pursue a claim against an insurer
12 by naming a discharged debtor as the nominal defendant. See generally 3A Bankr. Serv.
13 L. Ed. § 28:56 (2013) (“Following debtor’s discharge, a creditor may establish the
14 debtor’s nominal liability for a claim solely for the purpose of collecting the debt from a
15 third party, such as an insurer or guarantor.”) (citing 11 U.S.C § 524(e); In re Hayden,
16 477 B.R. 260 (Bankr. N.D. Ga. 2012)).

17 González places much emphasis on the so-called “majority rule” that in no-asset
18 bankruptcies, a debtor’s debts are discharged regardless of whether the creditor received
19 timely notice of the bankruptcy proceedings. (Docket No. 27.) This argument fails.

² A no asset bankruptcy is one in which the bankrupt claims in his filing that he has no assets to distribute to ordinary creditors. Colonial Sur. Co. v. Weizman, 564 F.3d 526, 530-31 (1st Cir. 2009).

³ The relevant text of 11 U.S.C. § 524(a)(2) provides: “A discharge in a case under [the Bankruptcy Code]—operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor.”

1 First, in Colonial Sur. Co. v. Weizman, 564 F.3d 526, 530-31 (1st Cir. 2009), the First
2 Circuit rejected this interpretation of § 523(a)(3), holding it inconsistent with Congress'
3 intent. See id. (“Nothing in the language or history of the 1978 revision of section
4 523(a)(3) indicates that Congress aimed to carve out no asset bankruptcies from what we
5 perceive to be a general rule that listing the creditor is a condition of discharge.”)
6 (Boudin, J.). Second, González’s argument ignores the fact that Plaintiffs are suing
7 González as a nominal defendant only, in order to pursue their claim against SIMED.
8 This is clearly permitted under the statute.⁴ See, e.g., In Re Doughty, 195 B.R. 1, 4
9 (Bankr. D. Mass. 1995) (“[A]fter discharge and expiration of the automatic stay, actions
10 aimed at collecting such an obligation from a debtor's liability insurer are permissible,
11 even when they involve the debtor as a nominal defendant.”) (collecting cases).

12 Assuming that there are no other jurisdictional obstacles, Plaintiffs will be allowed
13 to name González as a nominal defendant for the limited purpose of pursuing their claims
14 against SIMED. Additionally, to comply with § 524(a), Plaintiffs will be required to
15 indemnify González for any expenses he incurs defending against this action, excluding
16 discovery costs. See In Re Paul, 534 F.3d at 1307 (“[R]equiring a debtor to bear such
17 collateral burdens of litigation as those relating to discovery (as opposed to the actual
18 defense of the action and potential liability for the judgment), does not run afoul of §
19 524(a)(2).”) (collecting cases).

⁴ § 524(e) provides, in pertinent part: “[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”

1 **B. Diversity Jurisdiction**

2 We now raise sua sponte another potential challenge to our subject-matter
3 jurisdiction. Plaintiffs' complaint argued that diversity was present under 28 U.S.C.
4 § 1332. (Docket No. 1 at 1.) Diversity may have been present before SIMED was added,
5 as González is a citizen of California. (Docket No. 31 at 2.) But, on May 30 of this year,
6 Plaintiffs filed an amended complaint that added SIMED as a codefendant. (Id.) SIMED
7 is presumably a citizen of Puerto Rico. See Ferrer-Rodriguez v. González-Droz, Civ.
8 No. 08-1416 (D.P.R. Nov. 17, 2008) (Docket No. 16) (finding SIMED to be a citizen of
9 Puerto Rico). Because the statute has been interpreted to require complete diversity
10 between all defendants, see Gabriel v. Preble, 396 F.3d 10, 13 (1st Cir. 2005), jurisdiction
11 exists here only if Plaintiffs are bona-fide citizens of Florida, as they claim. (Docket
12 No. 31 at 1.) In their earlier federal case in 2008, Plaintiffs described themselves, and
13 were found to be, citizens of Puerto Rico, not Florida. See Ferrer-Rodriguez v.
14 González-Droz, Civ. No. 08-1416 (D.P.R. 2008) (Docket Nos. 1; 16.)

15 The history of this case raises a concern that Plaintiffs may be attempting to
16 manufacture jurisdiction where none exists. After Plaintiffs' first federal case was
17 dismissed for want of jurisdiction, Plaintiffs filed a second case in federal district court.
18 See Rivera-Montalvo v. González-Droz, Civ. No. 09-2163 (D.P.R. Nov. 12, 2009)
19 (Docket No. 1.) In the second case, Plaintiffs' complaint did not include SIMED as a
20 defendant. (Id.) Comparing the complaints in those two cases, we suspect that Plaintiffs
21 may have intentionally omitted SIMED in the second case in order to create diversity
22 jurisdiction. To our knowledge, the district court in the second federal case never

1 addressed the jurisdictional question. Eventually, Plaintiffs' complaint was dismissed
2 because of González's discharge in the Chapter 7 bankruptcy proceedings. See Rivera-
3 Montalvo v. González-Droz, Civ. No. 09-2163 (D.P.R. Jan. 26, 2012) (Docket No. 25.)

4 In this case, Plaintiffs repeated the same tactics they used in the second federal
5 case. Their initial complaint here did not name SIMED as a defendant. (Docket No. 1.)
6 Only later did Plaintiffs amend their complaint to include SIMED. (Docket No. 31.)
7 Plaintiffs may have a perfectly good explanation for this. But, judging by the history of
8 this case, and drawing on our experience as a judge in this district, we suspect that
9 Plaintiffs may be trying to manipulate diversity jurisdiction. We will not tolerate any
10 attempts to manufacture federal subject-matter jurisdiction.

11 For the foregoing reasons, González's motion is **GRANTED IN PART** and
12 **DENIED IN PART**. Plaintiffs will be allowed to name González as a nominal
13 defendant for the limited purpose of pursuing their claims against SIMED, on the
14 condition that Plaintiffs indemnify González for any expenses he incurs defending
15 against this action, excluding discovery costs. At our previously-scheduled conference
16 **set for June 20, 2013, at 1:30 P.M.**, we will hold an evidentiary hearing on the question
17 of diversity jurisdiction. Plaintiffs must be prepared to show that diversity jurisdiction
18 exists here.

19 **IT IS SO ORDERED.**

20 San Juan, Puerto Rico, this 13th day of June, 2013.

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S/José Antonio Fusté
JOSE ANTONIO FUSTE
U. S. DISTRICT JUDGE