Andreasen v. Progressive Express Ins. Co.

United States District Court for the Southern District of Florida

August 25, 2017, Decided; August 25, 2017, Entered on Docket

CASE NO. 17-20190-CIV-LENARD/GOODMAN

Reporter
276 F. Supp. 3d 1317 *; 2017 U.S. Dist. LEXIS 142455 **

JOHN ANDREASEN, Plaintiff, v. PROGRESSIVE EXPRESS INSURANCE COMPANY, Defendant.

Prior History: *Andreasen v. Progressive Express Ins. Co., 2017 U.S. Dist. LEXIS 112522 (S.D. Fla., July 18, 2017)*

Counsel: **[**1]** For JOHN ANDREASEN, Plaintiff: David Allen Hagen, LEAD ATTORNEY, Law Office of David A. Hagen, P.A., Miami, FL; Roy D. Wasson , LEAD ATTORNEY, Miami, FL.

For Progressive Express Insurance Company, a foreign corporation, Defendant, Cross Defendant: Stuart Jeffrey Freeman, Brasfield, Freeman, Goldis & Cash, P.A., St. Petersburg, FL.

For Fulton Company, Inc., Defendant, Cross Claimant: Martin David Berg, LEAD ATTORNEY, Miami, FL.

Judges: JOAN A. LENARD, UNITED STATES DISTRICT JUDGE.

Opinion by: JOAN A. LENARD

Opinion

[*1319] ORDER ADOPTING OMNIBUS REPORT AND RECOMMENDATIONS CONCERNING MOTIONS TO REMAND, DROP A PARTY, AND TO REALIGN THE PARTIES (D.E. 78), DENYING PLAINTIFF'S MOTION TO REMAND (D.E. 15), DENYING AS MOOT DEFENDANT'S MOTION TO DROP PARTY (D.E. 37), DENYING AS MOOT DEFENDANT'S MOTION TO REALIGN PARTIES (D.E. 54), AND DENYING AS MOOT DEFENDANT'S MOTION TO DISMISS CROSSCLAIM (D.E. 59)

THIS CAUSE is before the Court on the Omnibus Report and Recommendations Concerning Motions to Remand, Drop a Party, and to Realign the Parties, ("Report," D.E. 78), issued by Magistrate Judge Jonathan Goodman on July 18, 2017. Plaintiff John Andreasen filed Objections on July 31, 2017, ("Objections," D.E. 80), to which Defendant Progressive **[**2]** Express Insurance Company ("Progressive") filed a Response on August 3, 2017, ("Response," D.E. 82). Upon review of the Report, Objections, Response, and the record, the Court finds as follows.

I. Background

In 2008, Plaintiff was working for Fulton Company Inc. ("Fulton") and driving a company car when he sustained injuries in an automobile accident caused by Carlos Hernandez, an uninsured motorist who died as a result of the accident. (See Am. Compl. ¶¶ 5, 11, 13.) Progressive, which insured Fulton's fleet of three automobiles under Commercial Auto Liability Insurance Policy Number 01716746-5 (the "Policy"), paid Plaintiff's claim in the amount of the Policy's $500,000 non-stacked Uninsured/Underinsured Motorist ("UM/UIM") coverage limits. (Id. ¶¶ 19-20.)

On December 20, 2016, Plaintiff instituted this lawsuit, filing a six-count complaint in state court against Progressive and Annette Hernandez ("Hernandez"), as the Personal Representative of the Estate of Carlos Hernandez. (D.E. 1-1 at 5.) The original complaint alleges a single count of negligence against Hernandez and the following claims against Progressive: (1) breach of uninsured motorist coverage contract; (2) declaratory judgment—policy **[**3]** construction; (3) reformation of policy; (4) bad faith handling of an insurance claim; and (5) coverage by estoppel. (See id. at 5-21.) Plaintiff claims that Progressive must stack coverage for all three vehicles listed under the Policy and, therefore, he is entitled to additional coverage.[1]

[*1320] On January 17, 2017, Progressive—a foreign corporation with its principal place of business in Ohio, (see id. at 6 ¶ 4)—removed the case to this Court pursuant to *28 U.S.C. §§ 1332* and *1441* on the basis of diversity jurisdiction. (D.E. 1.) Although the original Complaint alleges that Hernandez is a resident of Florida, (D.E. 1-1 at 5 ¶ 2), Progressive's Notice of Removal indicates that Hernandez had not yet been served with process and, in any event, Plaintiff fraudulently joined Hernandez. (D.E. 1 at 7 ¶ 4.) Also on January 17, 2017, Progressive filed a Motion to Dismiss the Complaint for Failure to State a Claim. (D.E. 6.)

On January 31, 2017, Plaintiff filed an Amended Complaint as a matter of right under *Federal Rule of Civil Procedure 15(a)(1)(B)*, asserting the following: (1) Count I: Breach of Insured Motorist Coverage Contract as to Progressive; (2) Count II: Declaratory Judgment Action—Policy Construction; (3) Count III: Reformation of Policy; (4) Count IV: Bad Faith Handling **[**4]** of an Insurance Claim; and (5) Coverage by Estoppel. (D.E. 13.) The Amended Complaint names Progressive and, for the first time, Fulton, as the party Defendants; Hernandez is not named in the Amended Complaint. (See id.) The Amended Complaint alleges that Fulton is a Florida Corporation. (Id. ¶ 5.)

On February 1, 2017, Plaintiff filed a Motion to Remand, arguing that the addition of Fulton to the case destroyed diversity. (D.E. 15.) Progressive responded to the Motion to Remand, arguing that Fulton's addition constitutes fraudulent joinder and that Fulton is not a necessary party. (D.E. 19.)

On March 3, 2017, Progressive filed a Motion to Drop Party, arguing that the Court should drop Fulton as a party under *Federal Rule of Civil Procedure 21*.[2] (D.E. 37.) Plaintiff responded to the Motion to Drop Party, arguing that *Rule 21* does not provide a mechanism for a co-defendant to request the dropping of another defendant. (D.E. 43.)

On April 7, 2017, Fulton filed an Answer to Plaintiff's Amended Complaint and a Crossclaim against Progressive. (D.E. 53.)

On April 10, 2017, Progressive filed a Motion to Realign the Parties, arguing that Fulton's Answer to Plaintiff's Amended Complaint and Crossclaim against Progressive illustrate that **[**5]** Plaintiff and Fulton share the same interests in this case and, therefore, should be aligned together. (D.E. 54.) Plaintiff responded to the Motion to Realign Parties, arguing that although Plaintiff and Fulton "may have a 'common enemy' and are seeking the same relief against Defendant Progressive, that does not change the adversarial position between

[1] "Stacking is a judicial creation, based on the common sense notion that an insured should be entitled to get what is paid for. Thus, if the insured pays separate premiums for uninsured motorist protection on separate vehicles, the insured should get the benefit of coverage for each individual premium paid." *United Servs. Auto. Ass'n v. Roth, 744 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 1999)*. Under Florida insurance law, an anti-stacking provision in an auto insurance policy is valid only if it satisfies the statutory requirements of "notice to the insured, knowing acceptance by the insured, and filing of revised premium rates[.]" *Rando v. GEICO, 556 F.3d 1173, 1180 (11th Cir. 2009)*.

[2] *Rule 21* provides, in relevant part: "On motion or on its own, the court may at any time, on just terms, add or drop a party."

[Plaintiff] and Fulton and transforms [sic] Fulton into a co-plaintiff." (D.E. 58 at 4.)

On April 25, 2017, Progressive filed a Motion to Dismiss Fulton's Crossclaim for failure to state a claim upon which relief can be granted. (D.E. 59.)

On May 15, 2017, the Court referred to Judge Goodman (1) Plaintiff's Motion to Remand, (2) Progressive's Motion to Drop Party, and (3) Progressive's Motion to **[*1321]** Realign Parties (as well as some related matters). (D.E. 66.)

II. Report and Recommendations

On July 18, 2017, Judge Goodman issued his Omnibus Report and Recommendations. (D.E. 78.) At the outset, Judge Goodman found that Plaintiff added Fulton as a non-diverse Defendant to destroy this Court's subject-matter jurisdiction over this case. (Id. at 2.) However, he found that the fraudulent joinder doctrine did not apply to the joinder of a non-diverse party **[**6]** after removal. (Id. at 6 (citing *Pacheco de Perez v. AT & T Co., 139 F.3d 1368, 1380 (11th Cir. 1998)* ("The determination of whether a resident defendant has been fraudulently joined must be based upon the plaintiff's pleadings at the time of removal[.]"); *Ibis Villas at Miami Gardens Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co., 799 F. Supp. 2d 1333, 1337 n.1 (S.D. Fla. 2011)* ("The fraudulent joinder doctrine . . . is not the applicable standard on the joinder of a non-diverse defendant after removal.").) Thus, the issue underlying the Parties' motions is whether a plaintiff is able to join a non-diverse party after removal without the Court's involvement. (Id.)

The heart of the issue is the interplay between *28 U.S.C. § 1447(e)* and *Federal Rule of Civil Procedure 15(a)(1)*. (Id. at 7.) *Section 1447(e)* provides that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Judge Goodman explained that *Section 1447(e)* is designed "to avoid a plaintiff's gamesmanship of divesting the court of subject-matter jurisdiction by giving the Court discretion to deny joinder if the added defendant would destroy diversity." (Report at 7.)

However, *Rule 15(a)(1)(B)* appears to provide a loophole where plaintiffs can avoid judicial approval of non-diverse party joinder and force remand. That Rule permits a plaintiff to amend his pleading once as a matter **[**7]** of course—that is, without leave of the Court—within 21 days after the defendant serves a responsive pleading under *Rule 12(b)*, *(e)*, or *(f)*. Here, Plaintiff added Fulton as a party defendant pursuant to *Rule 15(a)(1)(B)* and, in doing so, added a non-diverse defendant without first giving the Court an opportunity to approve or deny joinder at the time the amendment was made. "Thus," as Judge Goodman opined, "we are left with a situation where the fraudulent joinder doctrine and *§ 1447(e)* do not apply and *Rule 15(a)(1)* opens the door for plaintiffs post-removal to divest the court of subject-matter jurisdiction by adding a non-diverse defendant as a matter of course. **This result is untenable**." (Report at 7-8.)

Judge Goodman noted that the Eleventh Circuit "has not decided whether *Rule 15(a)* permits plaintiffs to add non-diverse parties as a matter of course after removal," but considered "the persuasive authority of other jurisdictions that conclude that it does not." (Id. at 8 (citing *Mayes v. Rapoport, 198 F.3d 457, 462 n.11 (4th Cir. 1999)* ("[A] district court has the authority to reject a post-removal joinder that implicates *28 U.S.C. § 1447(e)*, even if the joinder was without leave of court.") (internal citations omitted); *Manera v. Michelin N. Am., Inc., No. 6:15-CV-721-ORL-22TBS, 2015 U.S. Dist. LEXIS 183879, 2015 WL 12850564, at *1-2 (M.D. Fla. July 2, 2015)* (applying Section "*1447(e)* when determining **[**8]** whether to permit a post-removal joinder, regardless of the liberal joinder rules[.]"); *Ascension Enters. Inc. v. Allied Signal, Inc., 969 F. Supp. 359, 360 (M.D. La. 1997)* ("[A] party may not employ *Rule 15(a)* to interpose an

amendment that would deprive the district court of jurisdiction over a removed action. Thus, *§ 1447(e)* trumps *Rule 15(a)*.") (internal quotation marks omitted); *Lyster v. First Nationwide Bank Fin. Corp., 829 F. Supp. 1163, 1165 (N.D. Cal. 1993)* ("[T]he first **[*1322]** amended complaint may not be used to defeat the removal of plaintiff's case to federal court."). Thus, Judge Goodman found that the Court must apply *Section 1447(e)* to determine whether to deny joinder or, alternatively, permit joinder and remand to state court. (Id. at 9.)

In analyzing the considerations relevant to this inquiry, see *Small v. Ford Motor Co., 923 F. Supp. 2d 1354, 1357 (S.D. Fla. 2013)* (citing *Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987)*, Judge Goodman found that: (1) "Plaintiff's behavior strongly suggests that his real agenda is to include an additional defendant merely to defeat diversity jurisdiction and to get this case back to state court[,]" (id. at 11); (2) "Plaintiff's behavior in seeking the amendment [was] dilatory because Plaintiff was clearly aware of Fulton's alleged involvement not just at the inception of the case but as early as 2008[,]" (id. at 12); (3) "Plaintiff has not demonstrated that he would be significantly injured if the amendment is not allowed[,]" (id. at 18); and (4) the balance of the equities weigh against remand, **[**9]** (id. at 19). Accordingly, Judge Goodman recommends denying Plaintiff's Motion to Remand. (Id. at 20.)

With respect to Progressive's Motion to Drop Fulton as a Defendant, Judge Goodman rejected Plaintiff's argument that *Rule 21* does not provide a mechanism for a co-defendant to request the dropping of another defendant, and cited cases that had granted such relief. (Id. at 21 (citing *DIRECTV, Inc. v. Kitzmiller, No. Civ.A. 03-3296, 2004 U.S. Dist. LEXIS 5263, 2004 WL 834703, at *1 (E.D. Pa. Mar. 31, 2004)*; *Blaske v. Burger King Corp., Civ. No. 4-91-243, 1991 U.S. Dist. LEXIS 16414, 1991 WL 238998, at *2 (D. Minn. Oct. 9, 1991)*; *Nash v. Hall, 436 F. Supp. 633, 635 (W.D. Okla. 1977)*).) Accordingly, Judge Goodman recommends granting Progressive's Motion to Drop Party, and denying as moot Progressive's Motion to Realign Parties.[3] (Id. at 22.)

III. Objections

On July 31, 2017, Plaintiff filed Objections to Judge Goodman's Report. (D.E. 80.) First, Plaintiff objects to Judge Goodman's recommendation to deny the Motion to Remand, arguing that the Court lacks discretion to deny Fulton's joinder under *Section 1447(e)*. (Obj. at 2-4.) Second, Plaintiff objects to Judge Goodman's recommendation to grant Progressive's Motion to Drop Party, arguing that Fulton was properly joined and, therefore, the Court lacks subject matter jurisdiction over this matter and must remand. (Id. at 4-5.) He further argues that even if this Court has subject matter jurisdiction, Fulton is a necessary party to the reformation **[**10]** of policy claim. (Id. at 5-7.) Judge Goodman did not consider this latter argument because Plaintiff failed to include it in his Response to Progressive's Motion to Drop Party. (See Report at 20-21.)

IV. Legal Standard

Upon receipt of the Magistrate Judge's Report and the Parties' Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)*; accord *Fed. R. Civ. P. 72(b)(3)*. The court must conduct a de novo review of any part of the Report that has been "properly objected to." *Fed. R. Civ. P. 72(b)(3)*; see *28 U.S.C. § 636(b)(1)* (providing that the district court "shall **[*1323]** make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and

[3] The Court deems Judge Goodman's recommendation to grant Progressive's Motion to Drop Party as an alternative to his recommendation to deny Fulton's joinder, because if the Court denies Fulton's joinder under ***Section 1447(e)*** then there will be no party to drop from the case under *Rule 21*.

recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)*. The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *28 U.S.C. § 636(b)(1)*. Portions of the Report that are not properly objected to will be evaluated for clear error. See *Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006)*; *Cuevas on Behalf of Juarbe v. Callahan, 11 F. Supp. 2d 1340, 1342 (M.D. Fla. 1998)*.

V. Discussion

Judge Goodman recommends denying Fulton's joinder **[**11]** pursuant to *28 U.S.C. § 1447(e)*, or, alternatively, dropping Fulton as a party pursuant to *Federal Rule of Civil Procedure 21*. (Report at 20-22.) Plaintiff objects, arguing that the Court lacks discretion to deny Fulton's joinder under *Section 1447(e)*. (Obj. at 2-4.) He further argues that because the Court cannot deny Fulton's joinder, it lacks jurisdiction to drop Fulton as a party and must remand this case to state Court; and even if the Court has jurisdiction, it should not drop Fulton as a party because Fulton is a necessary party to the reformation of policy claim. (Id. at 5-7.)

First, Plaintiff objects to Judge Goodman's recommendation that the Court deny Fulton's joinder under *28 U.S.C. § 1447(e)*, arguing that "this Court should follow the weight of authority holding that a district court lacks the discretion to deny joinder of a Defendant as a matter of right by way of an amendment to the complaint filed timely before a responsive pleading under *Rule 15(a)(1)*." (Obj. at 2.)

Frankly, Plaintiff's argument is perplexing considering the overwhelming weight of authority holds the exact opposite. In fact, the only case he cites in support of his argument—which is actually a magistrate judge's report and recommendation—explicitly acknowledges its outlier status, stating: "Given the weight of contrary authority **[**12]** on the issue raised by this motion, I feel akin to the lone salmon swimming upstream against a raging current." *Buffalo State Alumni Ass'n v. Cincinnati Ins. Co., 14-CV-00383-RJA-JJM, 251 F. Supp. 3d 566, 2014 U.S. Dist. LEXIS 196568, at *15 (W.D.N.Y. Nov. 4, 2014)* (internal quotation marks and citation omitted). In fact, a few months before the magistrate judge issued his R&R in Buffalo State, the Chief Judge of the same district, agreeing with "'every federal court that has considered the issue,'" concluded that "'the discretionary decision called for by *§ 1447(e)* is appropriate even when plaintiff has amended as a matter of course under *Rule 15(a)*.'" *Masters v. Erie Ins. Co., 13-CV-694S, 2014 U.S. Dist. LEXIS 19037, at *4 (W.D.N.Y. Feb. 13, 2014)* (quoting *McGee v. State Farm Mut. Auto. Ins. Co., 684 F. Supp. 2d 258, 261 (E.D.N.Y. 2009)* (collecting cases)).

After de novo review, the Court finds that Judge Goodman correctly concluded that the Court retains discretion under *Section 1447(e)* to decide whether joinder of a non-diverse defendant is appropriate, even when the plaintiff has joined the non-diverse defendant by amending the complaint as a matter of right under *Rule 15(a)*. See *Mayes, 198 F.3d at 462 n.11*; *Dillard v. Albertsons, Inc., 226 F.3d 642, 2000 WL 1029031, at *1 (5th Cir. 2000)* (unpublished table decision); *Masters, 2014 U.S. Dist. LEXIS 19037, at *4*; *Manera, 2015 U.S. Dist. LEXIS 183879, 2015 WL 12850564, at *1-2*; *McGee, 684 F. Supp. 2d at 261*; **[*1324]** *Moncion v. Infra-Metals Corp., 01 Civ. 11389 (RLE), 2002 U.S. Dist. LEXIS 24192, at *5 (S.D.N.Y. Dec. 18, 2002)*; *Bevels v. Am. States Ins. Co., 100 F. Supp. 2d 1309, 1312-13 (M.D. Ala. 2000)*; *Ascension Enters., 969 F. Supp. at 360*; *Winner's Circle of Las Vegas, Inc. v. AMI Franchising, Inc., 916 F. Supp. 1024, 1026 (D. Nev. 1996)*; *Whitworth v. Bestway Transp. Inc., 914 F. Supp. 1434, 1435 (E.D. Tex. 1996)*; *Horton v. Scripto-Tokai Corp., 878 F. Supp. 902, 908 (S.D. Miss. 1995)*; *Lyster, 829 F. Supp. at 1165*; *Lehigh Mech., Inc. v. Bell Atl. Tricon Leasing Corp., No. CIV.A. 93-673, 1993 U.S. Dist. LEXIS 10678, 1993 WL 298439, at *3 (E.D. Pa.*

Aug. 2, 1993); cf., *Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 762 (7th Cir. 2009)* (holding that a district judge may reconsider an earlier decision by a magistrate judge **[**13]** allowing joinder of non-diverse parties, when the magistrate judge did not consider *Section 1447(e)*); *Bailey v. Bayer CropScience L.P., 563 F.3d 302, 307-08 (8th Cir. 2009)* (holding that a court may reconsider an earlier order allowing joinder, when the earlier decision did not consider *Section 1447(e)*); *Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484, 1488 (10th Cir. 1991)* (rejecting "assumption that a party may force remand of an action after its removal from state court by amending the complaint to destroy the federal court's jurisdiction over the action"); see also 6 Charles Alan Wright, et al., Federal Practice & Procedure § 1477 (2d ed. 1990). As the Fourth Circuit explained:

> Reading *Rule 15(a)* in connection with *Fed. R. Civ. P. 19* and *21*, and *28 U.S.C. § 1447(e)*, resolves any doubts over whether the district court has authority to pass upon any attempts—even those for which the plaintiff needs no leave of court—to join a nondiverse defendant. See *28 U.S.C. § 1447(e)* ("the court may deny joinder, or permit joinder"); see also *Fed. R. Civ. . 19(a)* ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party . . ."). (emphasis added); *Fed. R. Civ. P. 21* ("Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."). Thus, a district **[**14]** court has the authority to reject a post-removal joinder that implicates *28 U.S.C. § 1447(e)*, even if the joinder was without leave of court.

Mayes, 198 F.3d at 462 n.11 (citations omitted). Accordingly, the Court has discretion under *Section 1447(e)* to deny Fulton's joinder in this case, or, alternatively, to permit joinder and remand. See, e.g., id.

"In deciding whether to permit or deny joinder, the district court must balance the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits." *Small, 923 F. Supp. 2d at 1357* (citing *Hensgens, 833 F. 2d at 1182*). Judge Goodman balanced the relevant considerations and concluded that they weighed in favor of denying joinder. (Report at 9-20.) Plaintiff did not specifically object to this conclusion, and the Court finds that it is not clearly erroneous.[4] Accordingly, the Court adopts Judge Goodman's recommendation to deny Fulton's joinder to this action under, and, consequently, to deny Plaintiff's Motion to Remand.

Having denied Fulton's joinder, Progressive's Motion to Drop Party and Motion to Realign Parties are moot.

[*1325] VI. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Omnibus Report and Recommendations Concerning Motions to Remand, Drop a Party, and to Realign Parties is **ADOPTED AND [**15] SUPPLEMENTED** consistent with this Order;

2. Pursuant to *28 U.S.C. § 1447(e)*, the Court **DENIES** joinder of Fulton Company, Inc. to this action;

3. Fulton Company, Inc. is **TERMINATED** from this case;

4. Plaintiff's Motion to Remand (D.E. 15) is **DENIED**;

5. Progressive's Motion to Drop Party (D.E. 37) is **DENIED AS MOOT**;

6. Progressive's Motion to Realign Parties

[4] In fact, even upon de novo review the Court would agree with Judge Goodman that the balance of interests weighs in favor of denying joinder.

(D.E. 54) is **DENIED AS MOOT**; and

7. Progressive's Motion to Dismiss Crossclaim (D.E. 59) is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida this 25th day of August, 2017.

/s/ Joan A. Lenard

JOAN A. LENARD

UNITED STATES DISTRICT JUDGE
