IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OCOTILLO REAL ESTATE INVESTMENTS I LLC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:14-CV-3259-N
	§	
LEXINGTON INSURANCE COMPANY, *et al.*,	§	
	§	
Defendants.	§	

ORDER

This Order addresses Plaintiff Ocotillo Real Estate Investments I LLC d/b/a Longhorn Self Storage's ("Ocotillo") motion to remand [10]. The Court denies the motion.

I. THE INSURANCE DISPUTE

This action arises from an insurance claim Ocotillo submitted to Defendants Tudor Insurance Company ("Tudor") and Lexington Insurance Company ("Lexington") (collectively, "Carrier Defendants") regarding property loss from hail. Ocotillo filed suit against Defendants in state court on August 1, 2014. In its suit, Ocotillo alleges claims for violations of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act (the "DTPA"), breach of contract, and negligence. On September 9, 2014, Carrier Defendants removed the state court action to this Court. Ocotillo now moves to remand.

II. LEGAL STANDARD FOR IMPROPER JOINDER

A defendant may remove a state court action to federal court if he establishes the federal court's original jurisdiction over the action. 28 U.S.C. § 1441(a); *see also Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397 (5th Cir. 1998) ("[I]t is the defendant's burden to establish the existence of federal jurisdiction over the controversy."). Thus, to remove a case, a defendant must show that the action either arises under federal law or satisfies the requirements of diversity. 28 U.S.C. § 1441(b). "Because removal raises significant federalism concerns, the removal statute is strictly construed 'and any doubt as to the propriety of removal should be resolved in favor of remand.' " *Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008) (quoting *In re Hot-Hed, Inc.*, 477 F.3d 320, 323 (5th Cir. 2007)). A district court must remand a case if, at any time before final judgment, it appears that the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c).

As a general matter, a federal court must remand a removed case where, as here, one of the defendants "is a citizen of the State in which [the] action is brought." *Id.* at § 1441(b); *see also Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006) (describing the "in-state defendant barrier"). Such a case may remain in federal court, however, if the defendant shows the plaintiff improperly joined the in-state defendant. *Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 390 (5th Cir. 2000). The Fifth Circuit recognizes two ways to establish improper joinder: " '(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.' " *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir.

2004) (en banc) (quoting *Travis v. Irby*, 326 F.3d 644, 646–47 (5th Cir. 2003)). Where the defendant alleges the latter, he must demonstrate that "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* "In deciding whether a party was improperly joined, we resolve all contested factual issues and ambiguities of state law in favor of the plaintiff." *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d at 278, 281 (5th Cir. 2007) (citation omitted). The Fifth Circuit "has endorsed a summary judgment-like procedure for reviewing [improper] joinder claims[,]" whereby "a federal court may consider summary judgment-type evidence . . . when reviewing a[n improper] joinder claim." *Griggs v. State Farm Lloyds*, 181 F.3d 694, 700 (5th Cir. 1999) (internal quotation marks omitted). However, "[t]he burden of persuasion on those who claim [improper] joinder is a heavy one." *Travis*, 326 F.3d at 649 (citation omitted).

III. OCOTILLO IMPROPERLY JOINED AGENT DEFENDANTS

Carrier Defendants argue that Ocotillo improperly joined Defendants Bigham-Kliewer Insurance Agency, Inc. and Carrie K. Hensley (collectively, "Agent Defendants"), both citizens of Texas, to prevent removal. In its complaint, Ocotillo asserts claims against Agent Defendants for violation of the Texas Deceptive Trade Practices Act (the "DTPA") and negligence. Carrier Defendants argue that, because these claims are subject to a two-year statute of limitations, they are time barred and Ocotillo cannot establish a cause of action against Agent Defendants. The Court agrees.

Under Texas law, negligence and DTPA actions are subject to a two-year statute of limitations. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a); TEX. BUS. & COM. CODE ANN. § 17.566. "As a general rule, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). "When a cause of action accrues is normally a question of law." *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011). "When insurance benefits are the subject of any of the extra-contractual claims at bar, the statute of limitations begins to run when the insurer denies the claim for those benefits." *Painter Family Invs., LTD., L.L.P. v. Underwriters at Lloyds*, 836 F. Supp. 2d 484, 491 (S.D. Tex. 2011); *see also Cigna Ins. Co. v. Simmons*, 35 F.3d 561 (5th Cir. 1994) (considering claims for negligence and violations of the DTPA and the Insurance Code and stating that "[u]nder established Texas law, . . . limitations begin to run on the date the carrier denies the claim").

On March 1, 2012, Lexington's third-party claim administrator notified Ocotillo that "Lexington Insurance Company has concluded that the hail damage observed occurred prior to their policy period and they have advised us that they must respectfully deny coverage for your claim at this time." Pl.'s Mot. Remand App. 009. On March 19, 2012, Tudor sent Ocotillo a letter notifying Ocotillo that Tudor had completed its investigation of the claim and "must deny coverage . . . ." Carrier Defs.' Resp. App. 004 [14]. These letters communicated an unequivocal decision to deny coverage. *See Knott*, 128 S.W.3d at 222 ("We do not require an insurer to include 'magic words' in its denial of a claim if an insurer's

determination regarding a claim and its reasons for the decision are contained in a clear writing to the insured."). Upon receipt of the denial letters, Ocotillo had enough information to enable it to go to court and seek a judicial remedy. Thus, the causes of action against Agent Defendants accrued in March 2012.[1]

Having determined when Ocotillo's cause of action against the Agent Defendants accrued, the Court turns to whether Carrier Defendants' subsequent conduct somehow affected accrual. First, Ocotillo maintains that because Carrier Defendants were reassessing the insurance claim as late as 2013, its claims are not time barred. Courts have explicitly rejected this argument. As one court has aptly noted, under such an interpretation of the law "an insurer faced with a request for reconsideration of a denial of coverage would be put to the choice between refusing it outright, thereby risking a bad faith claim, or considering the request and restarting the limitations period." *Pace v. Travelers Lloyds of Texas Ins. Co.*, 162 S.W.3d 632, 634–35 (Tex. App. – Houston [14th Dist.] 2005, no pet.) (footnote omitted); *see also Castillo v. State Farm Lloyds*, 210 F. App'x 390, 394 (5th Cir. 2006) ("We agree with the district court that letters from Appellant's counsel requesting, *inter alia*, that State

[1]"The discovery rule exception operates to defer accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001). Although Ocotillo maintains that the discovery rule should apply, "[a]pplication of the discovery rule is limited to those cases where there has been no outright denial of the plaintiff's claim." *Davis v. Aetna Cas. & Sur. Co.*, 843 S.W.2d 777, 778 (Tex. App. – Texarkana 1992, no writ). Here, Carrier Defendants expressly denied the claim. Even if the discovery rule applied to Ocotillo's claim, however, the result would be no different. When Ocotillo received Carrier Defendants' denial letters it should have known of the facts that gave rise to its claim against Agent Defendants.

Farm reopen the claims do not toll or extend the limitations period following the claims decisions." (citing *Pace*, 162 S.W.3d at 634–35)). Accordingly, the Court declines to adopt this approach.

Second, Ocotillo argues that its claim did not accrue until it knew of the details surrounding the denial, which it maintains did not occur until it received a meteorology report that "clearly laid out [the] position for denial of Plaintiff's claim" or until Carrier Defendants "refus[ed] to admit liability during mediation." Pl.'s Mot. Remand 9–10. However, Ocotillo did not need to have every piece of information regarding the denial to know that it suffered injury. The law is clear. "Once the insured knows that the insurer has not paid a claim, the insured has sufficient facts to seek a judicial remedy." *Fernandez v. Mut. of Omaha Ins. Co.*, 2014 WL 3729639, at *4 (S.D. Tex. 2014). Ocotillo provides no support for its argument that it somehow needed to know every detail surrounding the denial before it could pursue a judicial remedy. Accordingly, the Court determines that neither the receipt of the meteorology report nor the Carrier Defendants' conduct during mediation had an effect on when the claims against the Agent Defendants accrued.

Third, Ocotillo maintains that by asserting claims for additional payments, it reset the statute-of-limitations clock. Ocotillo cites *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 954 (Tex. App. – Corpus Christi 1998, no pet.), for its statement that "[t]imely claims for additional payments may begin the statute of limitations running anew." Ocotillo maintains that, because it sent a letter notifying Carrier Defendants of additional damages to its gutters, doors, and trim in July 2014, the statue of limitations restarts as of that date. The Court notes

that Ocotillo's letter maintains that the insurance adjustors already had this information and that it was "reaffirm[ing] that portion of the claim." Pl.'s Reply App. 004. Even assuming this information is appropriately categorized as a claim for additional payments, the Court determines that Ocotillo's submission does not affect the accrual date. *Pena* is distinguishable. As the Fifth Circuit noted, "[t]he limitations period [in *Pena*] was only reset, however, by the insurer's reconsideration of and partial payment for the earlier denied claim." *Watson v. Allstate Texas Lloyd's*, 224 F. App'x 335, 340 n.17 (5th Cir. 2007). That is not the situation before this Court. Here, there is no indication that Carrier Defendants reconsidered their unequivocal denials. Ocotillo's July 2014 letter did not reset the statute of limitations.

Because the statute of limitations bars Ocotillo's claims against Agent Defendants, Ocotillo cannot establish a cause of action against them. Applying the doctrine of improper joinder, the Court does not consider the citizenship of the Agent Defendants in determining whether remand is proper. Because there is diversity jurisdiction and the in-state defendant barrier does not apply, the case was properly removed and the Court denies the motion to remand.

CONCLUSION

Because the Court finds that Ocotillo improperly joined Agent Defendants, the Court denies Ocotillo's motion to remand.

Signed January 9, 2015.

David C. Godbey
United States District Judge