UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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EVA MALLEK,

Plaintiff,

-against-

REPORT & RECOMMENDATION
17-CV-5949-KAM-SJB

ALLSTATE INDEMNITY COMPANY,
KEVIN SCHAEFER,
JOHN DOE,
JANE DOE,

Defendants.
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BULSARA, United States Magistrate Judge:

This insurance coverage action was initiated by Plaintiff Eva Mallek ("Mallek") in New York State Supreme Court on September 8, 2017. Mallek, proceeding *pro se*, named Allstate Indemnity Company ("Allstate") and Kevin Schaefer ("Schaefer") as defendants along with unnamed John and Jane Does.[1] On October 11, 2017, Allstate removed the case to this Court, and Mallek filed a motion to remand on October 20, 2017. The Honorable Kiyo A. Matsumoto referred the motion to remand on December 21, 2017. For the reasons stated below, the Court respectfully recommends that the motion to remand be denied.

Factual Background and Procedural History

Mallek commenced her lawsuit in New York Supreme Court, Queens County on September 8, 2017 via summons and complaint. (Dkt. No. 1 ("Notice of Removal"), Ex.

[1] Plaintiff sued "Allstate," not "Allstate Indemnity Company." (*See* Notice of Removal at 1; *see also* Answer to Complaint by Allstate Indemnity Company, Kevin Schaefer dated October 18, 2017, Dkt. No. 7 at 1). Allstate Indemnity Company has identified itself as the proper party defendant, and neither Plaintiff nor Defendants have claimed that Plaintiff intended to sue an Allstate entity other than Allstate Indemnity Company. Defendants have not moved to dismiss on the grounds that the wrong party has been sued.

2 ("Compl.") at 1). The Complaint names Allstate, its "agent and representative" Schaefer, and unidentified John and Jane Does "representing Allstate" as defendants. (*Id.*).

Mallek is proceeding *pro se*. She brought this lawsuit for Defendants' failure to honor her homeowner's insurance following a fire. (*Id.* ¶ 1). On or about September 14, 2015, a fire destroyed the "structure and contents" of Mallek's home at 88-20 207th Street, Queens Village, NY. (*Id.*). Her homeowner's policy had a value of $358,000 and covered temporary living expenses. (*Id.*). Mallek, before she was married, and her parents, who are now deceased, occupied the subject property beginning in 1977. (Compl. ¶ 8). Prior to their death, Mallek held title along with her parents, and now holds sole title to the property. (*Id.* ¶ 8).

Mallek alleges that Allstate took various steps to deprive her of the benefit of the insurance policy. She claims that Allstate tampered with Mallek's sworn statement she submitted with her claim for insurance benefits (*id.* ¶ 2); Allstate failed to provide her with the full text of the insurance policy (*id.* ¶ 3); and denied the claim she made on or about September 14, 2015 (*id.* ¶ 4). Mallek also outlines other complaints she has made about Allstate's alleged misconduct, including filing a complaint with the New York State Attorney General's Office (Compl. ¶ 5); the "NYS Regulatory Agency" (*id.* ¶ 6); and with the "Departmental Disciplinary Committee" about Allstate's attorneys (*id.* ¶ 7). The Attorney General's Office referred Mallek to the New York State Department of Financial Services, Financial Frauds and Consumer Protection Division. (*Id.* ¶ 5).

The Complaint contains various factual allegations defending Mallek's entitlement to insurance proceeds. Mallek alleges that Allstate was aware that she personally did not live at the residence at the time of the fire, that she lived in Forest

Hills, Queens, and that as of 2007, her father lived alone in the residence. (*Id.* ¶¶ 9; 11, 13-14). She denies that she ever hid or concealed her Forest Hills address from Allstate (Compl. ¶ 10) or otherwise claimed that she lived somewhere else. (*Id.*).

The Complaint contains a claim for breach of contract. (*Id.* ¶¶ 12-23). Mallek alleges she entered into a contract with Allstate on or about March 2015 to insure the structure and contents of 88-20 207th Street, Queens Village, New York; the contract also covered certain living expenses. (*Id.* ¶¶ 12-13). On or about September 14, 2015, Mallek submitted a claim through Allstate's website to cover damage caused by fire. (*Id.* ¶ 15). Mallek states that she met all reasonable conditions necessary for her to receive reimbursement for damage to the property's structure, but this claim was denied.[2] (*Id.* ¶ 22). Mallek also made several claims for her father's living expenses, but each of those claims was denied. (*Id.* ¶ 18). Mallek alleges that after the fire, her father was residing in a Red Cross shelter/hotel until he passed away in 2016. (*Id.*). In denying these claims (both for the structure and living expenses), Mallek alleges that Allstate acted in bad faith. (*Id.* at 7). Mallek seeks $358,000 plus other expenses and debts that resulted from Allstate's breach of contract. (*Id.* ¶ 24). She also seeks damages for pain and suffering (*id.* ¶ 29), refunds of insurance premiums (*id.* ¶¶ 30-31), and damages sufficient to discourage future misconduct (*id.* ¶ 32).

Mallek has also made a number of other allegations, which in light of her *pro se* status the Court interprets as stating additional causes of actions. They are claims for gross negligence (*id.* ¶ 25) and defamation (*id.* ¶¶ 26-27).

[2] Allstate's position is that the policy only provided coverage for her personal property if she was a resident in the house, and Mallek's false statements voided any coverage she might have otherwise had.

Discussion

I. Removal on Basis of Diversity Jurisdiction

The federal removal statute, 28 U.S.C. § 1441(a), provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." In other words, an action may be removed from state court, "if the district court has original subject matter jurisdiction over the plaintiff's claim." *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 271 (2d Cir. 1994).

A district court has original subject matter jurisdiction in a diversity action. The requirements of diversity jurisdiction are in 28 U.S.C. § 1332. Section 1332(a)(1) provides that diversity jurisdiction exists only when the opposing parties in the lawsuit are "citizens of different States." This is a "complete" diversity requirement. That is, all the parties on one side of the case must be citizens of a different state from each of the parties on the other side. *See St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 80 (2d Cir. 2005) ("Diversity is not complete if any plaintiff is a citizen of the same state as any defendant.") (citing *Strawbridge v. Curtiss*, 7 U.S. 267 (1806)). When removal is based upon the district court's diversity jurisdiction, the requirements of 1332(a)(1) apply; thus, the removing party must show that there is complete diversity between plaintiff and defendants.[3]

In evaluating whether removal—on the basis of diversity jurisdiction—is proper, the Court's "inquiry cannot be limited to the complaint, as it often can be when removal

[3] Diversity jurisdiction only exists if the amount in controversy is greater than $75,000. *See* 28 U.S.C. § 1332(a). This is not an issue in this case.

is based on federal question jurisdiction, because certain matters critical for determining diversity jurisdiction, such as the citizenship of the parties or the amount in controversy, may not appear in the state court complaint." 14B Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3723 (4th ed. 2017); *see also Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010) ("[I]f subject matter jurisdiction is contested, courts are permitted to look to materials outside the pleadings. Such materials can include documents appended to a notice of removal or a motion to remand that convey information essential to the court's jurisdictional analysis.") (citations omitted); 28 U.S.C. § 1446(a) (notice of removal should include a short and plain statement, copy of all process, pleadings, and orders).

Ultimately, federal courts must "construe the removal statute narrowly" and resolve "any doubts against removability." *Lupo*, 28 F.3d at 274; *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 201 (2d Cir. 2001) ("[T]he removal statute, like other jurisdictional statutes, is to be strictly construed."). The party seeking removal bears the burden of demonstrating that requirements for removal have been met. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000).

Mallek is proceeding *pro se*. The court must liberally construe Mallek's pleadings, and "interpret them 'to raise the strongest arguments that they suggest.'" *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)); *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002) ("Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, [the Court] must construe *pro se* complaints liberally[.]") (quotations omitted). "The policy of liberally construing pro se submissions is driven by the understanding that '[i]mplicit in the right to self representation is an obligation on the

part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). The foregoing applies equally to a motion to dismiss, *Abbas*, 480 F.3d at 640, as to a motion that implicates the Court's subject matter jurisdiction. *See Caires v. JP Morgan Chase Bank N.A.*, No. 16-CV-2694, 2016 WL 8673145, at *2 (S.D.N.Y. Nov. 4, 2016), *report and recommendation adopted*, 2017 WL 384696 (Jan. 27, 2017).

A. Removal on the Basis of Diversity Jurisdiction

Mallek is a citizen of New York. (Notice of Removal ¶ 2). Allstate is an Illinois corporation with its principal place of business in Illinois.[4] (*Id.* ¶ 3). Schaefer is a New York resident. (*Id.* ¶ 4). Schaefer's presence means that complete diversity is lacking—a New York citizen is both a plaintiff and a defendant—and this Court could not exercise diversity jurisdiction. Allstate, however, argues that Schaefer is fraudulently joined, and his presence should be disregarded in determining whether complete diversity exits. The argument is analyzed below.

B. "Fraudulent Joinder"

"[A] plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1998) (collecting cases). To establish a "fraudulent joinder" "the defendant must demonstrate, by clear and convincing evidence, either that there has been outright

[4] A corporation's citizenship "is determined by its place of incorporation or its principal place of business[.]" *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc.*, 30 F.3d 298, 302 (2d Cir. 1994).

fraud committed in plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Id.* at 461; *see also Whitaker*, 261 F.3d at 207 ("Joinder will be considered fraudulent when it is established that there can be no recovery . . . under the law of the state on the cause alleged.") (quotations omitted). The defendant bears a "heavy burden" in demonstrating that there has been a fraudulent joinder. *Pampillonia*, 138 F.3d at 460-61; *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994) ("The burden of persuasion upon those who cry fraudulent joinder is indeed a heavy one.") (quotations omitted).

If there is a "fraudulent joinder," the court may ignore "the presence of a non-diverse defendant" in determining whether diversity jurisdiction attaches, and whether the removal was proper. *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004); *Quinn v. Post*, 262 F. Supp. 598, 602 (S.D.N.Y. 1967) ("[T]he pleading cannot defeat the nonresidents' right to removal if the resident defendants have no real connection with the controversy.").[5]

Allstate does not allege that Mallek has committed "outright fraud" by adding Schaefer. It argues only that she cannot state a cause of action against him under New York law.

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[5] Fraudulent joinder differs from fraudulent misjoinder. "In the typical fraudulent joinder situation, a diverse defendant argues that the plaintiff is attempting to join a non-diverse defendant against whom the plaintiff has no real claim solely to defeat federal jurisdiction. In the fraudulent *misjoinder* situation, by contrast, a diverse defendant argues that a plaintiff has added claims to the complaint—either claims by other non-diverse plaintiffs or claims against other non-diverse defendants—which, although perhaps valid, are nevertheless not properly joined under the applicable permissive joinder rules." *In re Propecia (Finasteride) Prod. Liab. Litig.*, No. 12-CV-2049, 2013 WL 3729570, at *4 (E.D.N.Y. May 17, 2013) (citations omitted) (emphasis in original), *report and recommendation adopted*, Minute Order dated June 6, 2013.

Although removal is determined by federal law, the question of whether plaintiff can recover against the non-diverse defendant is determined by state substantive law. *See Fed. Ins. Co. v. Tyco Int'l Ltd.*, 422 F. Supp. 2d 357, 378 (S.D.N.Y. 2006) ("The test . . . is uniformly whether plaintiff can establish a claim under state, not federal law.") (quotations omitted). Relatedly, the court must use *state* pleading rules in analyzing whether the plaintiff has stated a viable state law claim against the non-diverse defendant. *Gensler v. Sanolfi-Aventis*, No. 08-CV-2255, 2009 WL 857991, at *3 n.3 (E.D.N.Y. Mar. 30, 2009) ("Though the parties cite principally to federal procedural rules, the better view is that state procedural rules apply in evaluating a claim of fraudulent joinder."); *Kuperstein v. Hoffman-Laroche, Inc.*, 457 F. Supp. 2d 467, 471-72 (S.D.N.Y. 2006) (relying on state procedural rules because the purpose of fraudulent joinder analysis is to determine whether a *state* court might permit a plaintiff to proceed with his claims).

"[I]n general, there need be only a possibility that a right to relief exists under the governing law to avoid a court's finding of fraudulent joinder, and the plaintiff's ultimate failure to obtain a judgment is immaterial." 14B Wright & Miller § 3723. In other words, "there is no requirement that [the plaintiff's] recovery in state court be reasonably likely." *Battaglia v. Shore Parkway Owner LLC*, 249 F. Supp. 3d 668, 672 (E.D.N.Y. 2017) (quotations omitted). Defendants can only prevail on a fraudulent joinder argument if there is "no possibility" that plaintiff could recover against the non-diverse defendant. *Id.*; *Pampillonia*, 138 F.3d at 460-61.

As a threshold matter, Allstate argues that Schaefer is fraudulently joined because the Complaint contains no allegation or cause of action specifically directed

against him. In other words, the Complaint has no claim *at all* against Schaefer. Allstate's argument is without merit.

The Summons and Complaint names and lists Schaefer as a defendant. (Compl. at 1). On the second page Mallek prefaces all her allegations in capital letters and bold with a title: **THEFT BY ALLSTATE, REPRESENTATIVES AND COUNSEL VIA BREACH OF CONTRACT MECHANISM.** (*Id.* at 2). Schaefer was the agent who sold the insurance policy to Mallek, and is encompassed by the Complaint's reference to "representatives." (*Id.*). Furthermore, Mallek attaches an offer letter to renew the insurance agreement to the Complaint; that offer letter has Schaefer's name and New York address on the first page. (Compl., Ex. 1). Schaefer signed the letter as "Your Allstate Agent." (*Id.* at 2). The offer letter contains the renewal agreement, which also lists Schaefer as "Your Allstate Agent." (*Id.* at 3). All of this evinces a clear intent to sue Schaefer, and in light of the liberal interpretation accorded to *pro se* pleadings, it is appropriate to conclude that Mallek intended to bring a claim against and sue Schaefer individually.

As such, it is appropriate to analyze whether any viable claim under New York law exists against Schaefer. "New York has liberal pleading rules, especially for a summons with notice, which require that a plaintiff need only provide 'at least basic information concerning the nature of a plaintiff's claim and the relief sought.'" *MBIA Ins. Corp. v. Royal Bank of Canada*, 706 F. Supp. 2d 380, 394 (S.D.N.Y. 2009) (quoting *Parker v. Mack*, 61 N.Y.2d 114, 117 (N.Y. 1984)).

Mallek has stated three causes of action: breach of contract; gross negligence; and defamation. As explained below, for none of the claims could Mallek state a viable cause of action.

1. Breach of Contract

Schaefer was—without dispute—Allstate's agent, and under New York law cannot be liable for an insurer's breach of contract. *GEICO v. Saco*, Nos. 12-CV-5633 & 15-CV-634, 2015 WL 4656512, at *4 (E.D.N.Y. Aug. 5, 2015) (collecting cases where insurance adjuster was not liable for insurer's contractual breach). That is because under New York law an "agent will not be personally bound, unless upon clear and explicit evidence, of an [agent's] intention to substitute, or to superadd his personal liability for, or to, that of the principal." *Mencher v. Weiss*, 306 N.Y. 1, 10 (N.Y. 1953) (quotations omitted); *see also Savoy Record Co. v. Cardinal Exp. Corp.*, 15 N.Y.2d 1, 6-7 (N.Y. 1964) ("The obligation of a guarantor is, admittedly, a heavy one, and the courts should refrain from foisting such an obligation upon a party, be he individual or corporation, who simply signs as agent, absent the requisite clear and unequivocal evidence, to be gathered from the writing itself, that he intended to assume such a liability."). This is where the absence of specific facts about Schaefer in the Complaint hurts Mallek. There is no "clear and explicit evidence," or even allusion to such evidence (such as through documents, conversations or interactions Mallek may have had with Schaefer) from which the Court could infer that Schaefer assumed liability for the insurance contract from Allstate or that he personally provided guarantees in addition to those provided by Allstate. As a result, Mallek's breach of contract claim is like every other such claim brought against an insurance agent—one for which there is no possibility of relief. *See, e.g.*, *Saco*, 2015 WL 4656512, at *5 (GEICO employees cannot be liable for breach of insurance contract under New York law); *see also Bardi v. Farmers Fire Ins. Co.*, 687 N.Y.S.2d 768, 772 (3rd Dep't 1999) (insurance adjusters, as carrier's agents, could not be held liable under insurance contract).

Quite separately, as a non-signatory to the agreement Schaefer cannot be liable for breach of contract. (*See* Notice of Removal, Ex. 1). A non-signatory can only be liable for breach of contract if he is an alter-ego of the signatory, manifests an intent to be bound by the contract, is in privity with the signatory, or assumes the obligations under the agreement. *See M.S.S. Const. Corp. v. Century Sur. Co.*, No. 15-CV-2801, 2015 WL 6516861, at *9 (S.D.N.Y. Oct. 28, 2015) (collecting cases). There is no allegation from which any of those circumstances can be inferred to exist and as a result, there is no basis under New York law to impose liability for breach of contract on Schaefer. *See, e.g.*, *Bellino Schwartz Padob Advert., Inc. v. Solaris Mktg. Grp., Inc.*, 635 N.Y.S.2d 587, 588 (1st Dep't 1995) ("[The lower] court properly dismissed the first cause of action for breach of contract as against defendant Titan, which was not a signatory to the agreement between defendant Solaris and plaintiff[.]").

2. Negligence

Because there are no separate factual allegations about Schaefer in the Complaint, his liability, if any, for negligence would have to flow from Allstate's liability. A negligence or gross negligence claim cannot exist against Allstate because of the written insurance agreement. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (N.Y. 1987). Put differently, for Mallek to have a negligence claim, there must be some duty that Allstate had that is not embodied in the contract itself. And there is no such duty that is evident in the complaint or the supporting exhibits. The allegations that are the bases for her negligence claim are in one way or another a breach of contract allegation. For example, the negligence count begins with an allegation that the failure

to pay claims resulted in "elder abuse," (Compl. ¶ 25), but this is just another way of saying that Allstate had an obligation to pay Mallek under the contract, but failed to do so. Had the alleged breach of contract not occurred (because Allstate paid the insurance claim), there would be no negligence claim. Mallek's negligence allegations are "merely a restatement, albeit in slightly different language, of the implied contractual obligations asserted in the cause of action for breach of contract." *Clark-Fitzpatrick*, 70 N.Y.2d at 390. As the New York Court of Appeals has explained, "where a party is merely seeking to enforce its bargain, a tort claim will not lie." *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316 (N.Y. 1995). Since there can be no negligence claim against Allstate, there cannot be any viable negligence claim against Schaefer either.

3. Defamation

Under New York law, "the elements of a defamation claim are 'a false statement, published without privilege or authorization to a third party, constituting fault . . . and it must either cause special harm or constitute defamation per se.'" *Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 169 (2d Cir. 2003) (quoting *Dillon v. City of New York*, 704 N.Y.S.2d 1, 5 (1st Dep't 1999)). The only reference to defamation in the Complaint is the conclusory allegation by Mallek that the Defendants "defam[ed] her character and good name." (Compl. ¶ 27). That is an insufficient basis from which this Court could imagine a potential defamation claim against Schaefer. Defamation is certainly not a common claim raised against insurance companies or their agents. And for one to be pled there would have to be some evidence or allegation of publication to the third party. There is none. There would also have to be some identifiable false statement; a colloquial allegation of defamation is not sufficient. In the absence of any facts from which defamation could possibly be inferred, the Court concludes that there

is no viable defamation claim against either Schaefer. *See, e.g.*, *Treppel v. Biovail Corp.*, No. 03-CV-3002, 2005 WL 427538, at *8 (S.D.N.Y. Feb. 22, 2005) ("Plaintiff does not point to any statements or actions attributable to any of the . . . Defendants . . . that could sustain a claim for defamation or any other tort."); *Satler v. Larsen*, 520 N.Y.S.2d 378, 381 (1st Dep't 1987) ("It is very basic that a cause of action for defamation is not sustainable if no defamatory statement has been made.").

4. Other potential claims against Schaefer

In light of the Plaintiff's *pro se* status the Court has endeavored to identify any other cause of action that may be inferred from the factual allegations in the Complaint. Mallek alleges that Allstate engaged in bad faith conduct. "[P]arties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 125 (2d Cir. 2013) (quoting *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 80 (2d Cir. 2002)). However, "'New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.'" *Cruz*, 720 F.3d at 125 (quoting *Harris*, 310 F.3d at 80). Consequently, "when a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant." *Cruz*, 720 F.3d at 125. Mallek's claim of bad faith by Allstate is coextensive with her breach of contract claim that Allstate failed to abide by its agreement to cover damage to her home.

Though it is possible to infer that Mallek is alleging that Allstate engaged in fraud, that is not a viable cause of action against Allstate under New York law. That is for the same reason there is no negligence claim—a tort claim can exist in the face of a

written contract only if there is some duty independent of what is embodied in the agreement. *See, e.g.*, *N.Y. Health & Racquet Club, Inc. v. NIA/Kornreich Liab. Co.*, 736 N.Y.S.2d 369, 370 (1st Dep't 2002) ("[S]ince the fraud alleged by plaintiff is not extrinsic to the contract to procure and monitor proper marine insurance, it may not be utilized to convert the action to one for fraud.").

The New York Court of Appeals addressed a similar set of claims brought by New York University (NYU) against an insurance company that refused a claim under a crime liability insurance policy, after a bookstore employee and a vendor schemed to bill the university for merchandise it never received. *New York Univ.*, 87 N.Y.2d at 313-14. NYU argued that the insurance company had engaged in a "sham investigation," engaged in bad faith practices, and took vindictive action by not renewing NYU's policy after the claim was submitted. *Id.* The Court of Appeals dismissed each of the tort claims because the claims merely recharacterized a contract breach. It reasoned:

> To the extent that [NYU] alleges that defendants engaged in a "sham" investigation to perpetuate their allegedly fraudulent scheme, those allegations merely evidence plaintiff's dissatisfaction with defendants' performance of the contract obligations. . . . [NYU] argues that [defendants] provided an inadequate basis for defendants to deny plaintiff's claim. That allegation does not state a tort claim, it merely raises a question for the fact finder determining the breach of contract claim.

New York Univ., 87 N.Y.2d at 319. Read in the most generous light, Mallek's claims about Allstate's improper denials of her various claims, its misconduct and bad faith in dealing with her and her father, and their post-claim dealings with her, are in one way or another restating a breach of contract claim. (Indeed, that is what she labels the claim, and only refers to potential tort claims in passing). As in NYU, there is no separate tort or fraud claim apart from the breach of contract. Again, if there is no tort

or fraud claim against Allstate, because there are no specific facts about Schaefer in the Complaint, he cannot be liable.

* * *

The absence of a viable cause of action against Schaefer is a natural result of the background legal principle of New York insurance law: absent a "special relationship" the agent's independent duty to a customer ceases after insurance coverage is purchased. Thereafter, any duties owed to the customer are the carrier's not the agent's. For example, as the New York Court of Appeals has explained, "insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of an inability to do so." *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (N.Y. 1997). Agents have "no continuing duty to advise, guide or direct a client to obtain additional coverage." *Id.* (collecting cases). This is why an agent may be liable for failing to obtain coverage requested by a customer, *see, e.g.*, *The Lab, LLC v. Travelers Prop. Cas. Co. of Am.*, No. 14-CV-7773, 2016 WL 264939, at *2 (S.D.N.Y. Jan. 21, 2016), but not for the breach of the insurance contract itself. *See supra*. And that is why a cause of action against Schaefer based on what Mallek alleges in her motion to remand—that Schaefer failed to oversee Mallek's account properly (Dkt. No. 9 ("Mot.") at 4) after insurance was procured—fail as a matter of law. *See, e.g.*, *Sawyer v. Rutecki*, 937 N.Y.S.2d 811, 813 (4th Dep't 2012).[6]

Indeed, all of the potential causes of action that Mallek asserts against Schaefer—breach of contract; negligence; fraud; bad faith—require there to be some special

[6] Mallek also argues in her motion to remand that Schaefer violated ethical duties owed by insurance agents. (*See* Mot. at 4). The Court is not aware of any basis on which this could constitute a viable cause of action under New York law (or a claim that alleged something other than a breach of contract using different words).

relationship or non-contractual duty. *Curanovic v. N.Y. Cent. Mut. Fire Ins. Co.*, 762 N.Y.S.2d 148, 151 (3rd Dep't 2003) ("Insurance agents generally are not liable for anything more than obtaining the requested coverage, unless there is a special relationship with the insurance customer justifying reliance on the agent's speech[.]"); *Cathy Daniels, Ltd. v. Weingast*, 936 N.Y.S.2d 44, 47 (1st Dep't 2012) ("Here, the allegations in the complaint establish that the parties had nothing more than a typical insurance agent-customer relationship. . . . For [that] reason, the negligence claims were properly dismissed."). There simply is no possible basis to infer that duty or relationship exists with Schaefer:

Certain professionals—because they have unique or specialized expertise—have a *per se* special relationship with their clients or customers. This includes lawyers and engineers, but not insurance agents. *See Murphy*, 90 N.Y.2d at 270 ("[N]o New York court has applied plaintiffs' proffered 'special relationship' analysis to add such continuing duties to the agent-insured relationship[.]"); *Chase Sci. Research, Inc. v. NIA Grp., Inc.*, 96 N.Y.2d 20, 30 (N.Y. 2001) ("While agents and brokers must be licensed, they are not required to engage in extensive specialized education and training."). "Insurance agents . . . are not personal financial counselors and risk managers, approaching guarantor status." *Murphy*, 90 N.Y.2d at 273.

Where there is no *per se* special relationship, the context of the dealings between the insurance agent and customer could potentially give rise to some special relationship. "[S]uch a special relationship may arise where '(1) the agent receives compensation for consultation apart from payment of the premiums . . . (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . .; or (3) there is a course of dealing over an extended period of

time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.'" *Rutecki,* 937 N.Y.S.2d at 812 (quoting *Murphy*, 90 N.Y.2d at 272). There are simply no facts in the Complaint or the attached exhibits from which the Court could infer that there was some possibility of a special relationship between Mallek and Schaefer. As a result, none of the causes of action—either pled in the Complaint or identified by the Court from the factual allegations—could be viable against Schaefer.[7] Therefore, Schaefer has been fraudulently joined, and his citizenship is ignored in determining whether diversity of citizenship exists.

B. The Home State Removal Bar

Allstate's opposition to the remand motion—as well as its initial removal petition—does not address the removal bar in 28 U.S.C. § 1441(b)(2). "A defendant removing a case on diversity grounds must not only demonstrate that the case satisfies the requirements of 28 U.S.C. § 1332(a), but must also clear the additional hurdle of . . . the forum defendant rule." *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013) (quotations omitted). This rule precludes a "forum state defendant," *i.e.* a defendant resident of the state in which the federal district court where removal is sought, from exercising the right of removal. *See* Section 1441(b)(2) ("[A] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[7] In her motion to remand, Mallek argues that Schaefer owed fiduciary duties to her. (Mot. at 2). There is no fiduciary relationship between an insurance agent and a customer, absent some evidence of a special relationship, which is lacking in this case. *Cathy Daniels, Ltd.*, 936 N.Y.S.2d at 47 ("In the absence of a special relationship, a claim against an insurance agent or broker for breach of fiduciary duty does not lie[.]") (collecting cases).

"The ability of a non-forum defendant to remove a case to federal court serves the important function of minimizing the potential impact of local prejudice." *Rivas v. Bowling Green Assocs., L.P.,* No. 13-CV-7812, 2014 WL 3694983, at *3 (S.D.N.Y. July 24, 2014); *see also Hertz v. Friend*, 559 U.S. 77, 85 (2010) ("[D]iversity jurisdiction's basic rationale . . . [is] opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties."). However, that local prejudice is not present for a defendant from the forum state. Section 1441(b)(2)'s bar on removal by a forum state defendant reflects the conclusion that "the defendant who lives in the state where the action is brought has no prima facie reason to fear local prejudice or discrimination against out-of-towners, and thus to seek the protection of federal diversity jurisdiction." *Confer v. Bristol-Myers Squibb Co.,* 61 F. Supp. 3d 305, 306 (S.D.N.Y. 2014) (quotations omitted).

As explained below, the "fraudulent joinder" exception applies with equal force to the forum defendant rule. Schaefer is a resident of New York, and would ordinarily be barred from removing a diversity case to federal court in New York. However, there would be a logical inconsistency in finding that Schaefer is "fraudulently joined"—and thus ignored for the purpose of determining whether the parties are diverse, but then go to consider his presence in the case for the forum defendant rule.

The Second Circuit is clear that the removal statute must be strictly construed and any doubts or ambiguities are to be resolved *against* removal. *See Whitaker,* 261 F.3d at 201; *see also Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013) ("In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability")

(quotations omitted). For the Court to conclude that the fraudulent joinder doctrine should be applied to the removal statute, there must be some textual or statutory basis to do so. There is. Section 1441(b)(2) provides that only a defendant "properly joined and served" is subject to the forum defendant rule.

The fraudulent joinder doctrine—as its name suggests—determines whether a party is properly "joined" for the purposes of determining diversity jurisdiction. It serves the same function in the context of removal. Consequently, several district courts—although not addressing whether the doctrine attaches because of the "properly joined and served" language in Section 1441(b)(2) or because of judicially created common law—have used fraudulent joinder principles to ignore the forum defendant bar against removal. *E.g.*, *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 121 F. Supp. 3d 379, 387 (S.D.N.Y. 2015) (assuming fraudulent joinder of New York defendant not a bar to removal to New York federal court, and denying motion to remand); *Mohammad G. M. Khan v. CXA-16 Corp.*, No. 16-CV-6672, 2017 WL 1906885, at *2 (S.D.N.Y. May 5, 2017) (same); *Wilde v. CSX Transp., Inc.*, No. 14-CV-50S, 2014 WL 4385424, at *2 (W.D.N.Y. Sept. 4, 2014) (same).

The Second Circuit has not decided whether the term "properly joined and served" allows incorporation of the fraudulent joinder doctrine into the removal statute. But the Second Circuit has affirmed at least one dismissal of a denial of a motion to remand, where the fraudulently joined party was an in-forum defendant. *E.g.*, *Whitaker*, 261 F.3d at 207 ("[W]e find no error with the district court's conclusion that Whitaker fraudulently joined RJU [a New York citizen] in an attempt to defeat federal diversity jurisdiction."). If the fraudulent joinder doctrine did not apply to the forum

defendant rule, one would imagine that the Second Circuit would have reversed the district court, and required remand of that case to state court.

This Court recommends that Schaefer's presence in the case be ignored for the purposes of evaluating whether Section 1441(b)(2) bars the removal. To not apply the fraudulent joinder doctrine in determining whether the forum defendant rule applies creates a profound logical inconsistency. The Court would be ignoring Schaefer's presence to determine whether the parties are diverse, but then considering him to be in the case in applying the forum defendant rule. Considering Schaefer to be present in the case would also read "properly joined and served" out of Section 1441(b)(2). This Court has been unable to find a single case in this Circuit where a case has been remanded under the forum defendant rule where the forum defendant was found to be fraudulently joined.[8] The approach consistent with the statutory language, logic, and other district courts is to ignore Schaefer when evaluating whether there is a New York defendant who would bar removal. Ignoring Schaefer, Allstate is presently the only other party in the case; it is not a resident of the forum state of New York, and therefore the forum state defendant rule does not prevent this case from being in this Court.[9]

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[8] In *Morris*, the Seventh Circuit suggested—although did not ultimately decide—that the concept of "fraudulent joinder" could not be read into the removal statute; doing so would potentially expand the right to removal, which runs counter to the requirement that the removal statute be read narrowly. 718 F.3d at 665.

[9] The case was removed by Allstate, and there is no indication that Schaefer (who may not have been served at the time) consented to the removal. Normally the unanimity rule requires all defendants to consent to removal. *See* 28 U.S.C. § 1446(b)(2)(A). However, the fraudulent joinder doctrine is also an exception to the unanimity rule. *Sherman v. A.J. Pegno Constr. Corp.*, 528 F. Supp. 2d 320, 330 (S.D.N.Y. 2007) ("There are exceptions to this rule for defendants who have not been served, unknown defendants, and fraudulently joined defendants.").

In light of the fraudulent joinder of Schaefer, the Court concludes there is complete diversity between the remaining parties and this court has federal diversity jurisdiction over the claims asserted by Mallek. The motion to remand should be denied. *See, e.g.*, *In re Consol. Fen-Phen Cases*, No. 03-CV-3081, 2003 WL 22682440, at *3 (E.D.N.Y. Nov. 12, 2003) (using fraudulent joinder doctrine to analyze contract, quasi-contract and tort claims against non-signatory under New York law, concluding no viable cause of action existed, and denying motion to remand).

II. Claims Against Other Parties

In the Motion to Remand and Complaint and other documents filed with the Court, Mallek makes allegations against other persons and entities. Those allegations do not change the outcome of this Court's recommendation.

The Complaint and Motion contains allegations made against various unnamed John and Jane Doe defendants. In evaluating the propriety of a removal based on diversity of citizenship, "the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1). As a result, the propriety of Allstate's removal is not affected by the citizenship of any Doe defendant.

Mallek states that Allstate's lawyer—Thomas H. Cellilli, III and his law firm Skarzynski Black LLC—are the John Doe defendants, and because they are both New York citizens, their presence in the case defeats diversity. (Reply in Support of Remand, Dkt. No. 18 ("Reply") at 6-7). The argument is without merit. The Doe defendants remain Doe defendants, and the Court has not entered any order substituting them. But, in any event, the propriety of the removal is determined by the operative Complaint. The operative complaint is the original complaint Mallek filed in state court. The Complaint does not make any mention of Cellilli or Skarzynski Black; to the extent

that Mallek wishes to add them to the case, she must file a motion to amend and the Court would then consider whether an amended complaint may be filed. Until and when an amended complaint is filed and served on the new John and Jane Doe defendants, they are not in the case. *Cf. McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 201-02 (2d Cir. 2007) ("A complaint provides a defendant with notice of what the plaintiff's claim is and the grounds upon which it rests. Having received such notice, a defendant may conduct his trial preparation accordingly and is not required, based on the plaintiff's subsequent conduct in litigation, to anticipate future claims that a plaintiff might intend to pursue.") (citations and quotations omitted). And should an amendment be sought, the Court would then consider the subject matter jurisdiction implications of such an amendment.[10]

III. Sanctions and Other Motions

In Mallek's motion to remand, and the reply in support, she argues that the removal by Allstate was undertaken in bad faith. (*See* Mot. at 6-7; Reply at 13). She also filed a second motion to remand (which she labeled as her "third request") in which she also moves for sanctions. (*See* Dkt. No. 21). The Court recommends that the motion for sanctions be denied.[11] The Court has concluded that Allstate's removal was consistent

[10] "Once a case has been removed, the parties may amend the pleadings filed in the state court, in accordance with Federal Civil Rule 15 but, with the exception of amendments to add non-diverse parties that are authorized by Section 1447(e), a pleading amendment normally will not be permitted to oust the federal court of its subject-matter jurisdiction." 14C Wright & Miller § 3738 (4th ed.).

[11] Mallek refers to alleged tampering of documents, such as deposition transcripts, throughout her motions. (*See, e.g.*, Motion for New Sanctions Against Defendants for: Cancelling Plaintiff's 2018 Policy Based on Fraudulent Allegations & Usurping the Authority of the Court dated February 21, 2018, Dkt. No. 22 at 3). The Court can discern no basis on which any of these allegations state a claim against Schaefer, which is the relevant inquiry in the motion to remand.

with the governing legal principles, and on that basis, is recommending Mallek's motion be denied. As such, the removal was not undertaken in bad faith, and there is no basis on which the Court could award sanctions. *See Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu*, No. 11-CV-4383, 2015 WL 4389893, at *18, *24 (S.D.N.Y. July 10, 2015) (denying sanctions pursuant to Rule 11, section 1927 and the Court's inherent authority because all require a finding of bad faith).

IV. Conclusion

For the reasons stated above, this Court respectfully recommends that:

1. The motions to remand (Dkt. Nos. 9 & 21) be denied;

2. The motion for sanctions based on Allstate's removal (Dkt. No. 22) be denied.

Plaintiff may have reservations about prosecuting her case in this Court. But the Court is aware of her *pro se* status and its obligation to hold her pleadings to less stringent standards than those drafted by lawyers and to interpret her filings "to raise the strongest arguments that [they] suggest." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. *See Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate [judge's] report operates as a waiver of any further judicial review of the magistrate [judge's] decision.").

SO ORDERED.

/s/
SANKET J. BULSARA
United States Magistrate Judge

March 12, 2018
Brooklyn, New York