IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
No. 5:19-cv-00488-D

GEMINI INSURANCE COMPANY,

Plaintiff,

v.

HARRAH'S NC CASINO COMPANY, LLC, CAESARS ENTERTAINMENT CORPORATION, OLD REPUBLIC INSURANCE COMPANY, and EASTERN BAND OF CHEROKEE INDIANS,

Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Plaintiff Gemini Insurance Company ("Plaintiff") replies to the Brief in Opposition to the Motion to Remand of Defendants Harrah's NC Casino Company, LLC ("Harrah's"), Caesars Entertainment Corporation ("Caesars"), and Old Republic Insurance Company ("Old Republic").

SUPPLEMENTAL FACTS

The Removing Defendants note that The Cherokee Trial Court recently granted the defendants' motions to dismiss the wrongful death action. [DE: #28-2]. On December 12, 2019, the plaintiff in the wrongful death action appealed that order.[1]

Plaintiff served its state court Amended Complaint on October 29, 2019. The Removing Defendants contend that "[t]he Court's record does not contain any information to service of the Amended Complaint." [DE: #26, p. 3]. However, the Removing Defendants themselves filed the Amended Complaint and included its accompanying Certificate of Service. [DE: # 1-4, p. 15].

[1] On December 20, 2019, Terry Brown, counsel for the Removing Defendants, executed an affidavit in which he referenced and attached the order dismissal of the Cherokee Court of the Eastern Band of Cherokee Indians. [DE: # 28, 9 and #28-2]. He did not reference or attach the December 12, 2019 Notice of Appeal. Plaintiff has attached the Notice of Appeal as **Exhibit A**.

ARGUMENT

A. Plaintiff properly served and joined EBCI.

Despite the Removing Defendants' claims, Plaintiff properly served and joined EBCI, as is evident from the Affidavit of Service. [DE: #11-1]. According to the U.S. Department of the Interior's Tribal Leaders Directory[2], Richard Sneed was elected Principal Chief of EBCI on May 25, 2017.[3] Additionally, pursuant to Removing Defendants' own brief, Plaintiff served the Complaint upon Richard Sneed, EBCI's Principal Chief. [DE: #26, p. 9]. Accordingly, Plaintiff properly served and joined EBCI, making its consent necessary for the removal of this matter.

Nevertheless, the Removing Defendants claim the "averments [that EBCI has been properly served] have been specifically contradicted by counsel for the Band." [DE: #26, p. 3, n. 2]. In support of this statement, the Removing Defendants rely not upon any declaration or affidavit of EBCI but rather a Declaration of Neal Krokosky, Senior Counsel for Litigation, of Caesars. [DE: #27]. Despite his representation in the declaration that the facts set forth therein were true and correct, Mr. Krokosky has no personal knowledge of the circumstances surrounding attempts at service of process upon EBCI. Rather, Mr. Krokosky claims to rely on the representations of Dale Curriden at The Van Winkle Firm who Mr. Krokosky describes as EBCI's "outside counsel." [DE: #27, ¶ 2].[4] In an October 23 2019 email attached to Mr. Krokosky's declaration, Mr. Curriden relates that he "spoke with Mike McConnell, the Tribe's

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[2] The Tribal Leaders Directory provides contact information for federally recognized tribes.
[3] https://www.bia.gov/bia/ois/tribal-leaders-directory/tribes/eastern-cherokee
https://web.archive.org/web/20191015144116/https://ebci.com/government/

[4] The Removing Defendants make no representations whether Mr. Curriden represents EBCI in this dispute. Further, they make no representations whether Mr. Curriden analyzed the issue of service. In fact, in his October 23, 2019 email to Mr. Curriden, Mr. Krokosky notes that he "presume[s]" EBCI would retain Curriden in the coverage case, suggesting Mr. Krokosky had no knowledge of whether Mr. Curriden had actually been retained in this case. [DE: #27-1, p. 2].

Interim Attorney General" and therefore "**understood** the Tribe has not yet been properly served" because "service was attempted by sending the Summons and Complaint to the Principal Chief, but he is not the agent for service on the tribe." [DE: #27-1, p. 2] (emphasis added). Accordingly, Mr. Krokosky apparently relies on the hearsay statements of Mr. Curriden who apparently relies on the hearsay statements of Mr. McConnell for the proposition that service may not have been proper. This is insufficient, both because the unsworn statements of Mr. Curriden and Mr. McConnell are hearsay and because neither Mr. Krokosky nor Mr. Curriden have personal knowledge surrounding the circumstances of service of EBCI. (In fact, it is unclear from the email exchange whether Mr. McConnell has personal knowledge of service). The Removing Defendants did not offer affidavits or declarations from Mr. Curriden or Mr. McConnell (although, presumably, they could have done so). Further, the Removing Defendants' conclusory statements are not sufficient to meet their burden to establish federal jurisdiction. *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 151 (4th Cir. 1994).

Additionally, the Removing Defendants make no argument that EBCI did not actually receive the Summons and Complaint or that a specific error, if any, renders service improper. Generally, in North Carolina, in the event service is issued on someone other than the registered agent, courts have held that such errors do not necessarily mean that service was improperly issued. For example, in *Fender v. Deaton*, 130 N.C. App. 657, 663, 503 S.E.2d 707, 711 (1998), the North Carolina Supreme Court held that service was proper despite being accepted by someone other than the intended defendant because the defendant failed to present evidence that the receiver was not acting as the defendant's agent. Based on the Removing Defendants' own evidence [DE: #27-1, p. 2], it is undisputed that the Summons and Complaint were served on EBCI's Principal Chief and that EBCI was on notice that EBCI was named as a defendant in the

declaratory judgment action. Further, to the extent that the Removing Defendants contend that the service at issue was not proper service, EBCI did not move to dismiss on service grounds.

Finally, the Removing Defendants contend that "the fact that [Plaintiff] sought a summons for the Band from this Court strongly suggest there was no service of the Underlying Lawsuit on the Band." [DE: #26, p. 9]. Of course, Plaintiff sought a new summons because the Removing Defendants failed to provide any evidence that it served EBCI with the Notice of Removal at the time of the removal, and as such, a new summons was required to alert EBCI of the removal and the new forum of the litigation. In fact, as Plaintiff previously noted, the Removing Defendants failed to include a certificate of service with their Notice of Removal and failed to provide any evidence of service of the removal papers upon EBCI until December 20, 2019, more than a month and a half after the initial removal to this Court.[5]

B. Plaintiff failed to secure the consent of EBCI to the removal.

It is undisputed that Plaintiff failed to secure the consent of EBCI to remove the case. By producing their exchange of emails with EBCI's outside counsel, the Removing Defendants have officially confirmed that EBCI never consented to the removal. Specifically, in emails on October 21 and 30, 2019, Mr. Krokosky asked Mr. Curriden directly if EBCI consented to the removal. [DE: #27-1, p. 2-3]. Never did Mr. Curriden consent. In fact, in the October 23, 2019 email, Mr. Curriden stated that "[a]s for the Tribe's consent to removal, I don't have an answer for you at this point, since the Tribe is still in the process of determining the extent to which it will participate in the declaratory judgment action." [DE: #27-1, p. 2]. As such, Removing Defendants have failed to comply with 28 U.S.C. § 1446(b)(2)(A) and remand is required.

[5] In his affidavit, Terry Brown, counsel for the Removing Defendants, admits that the Removing Defendants failed to serve EBCI with the Notice of Removal for more than a month after the removal [DE: #28, p. 2, ¶ 9]. When they finally elected to serve EBCI with those papers, the Removing Defendants served EBCI, Principal Chief, Richard Sneed. [*Id*.]

C. Defendants are both interested and necessary parties.

This is an insurance coverage dispute, and under the circumstances, the insureds are necessary parties. "When declaratory relief is sought, all persons shall be made parties who have or claim **any interest which would be affected by the declaration**, and no declaration shall prejudice the rights of persons not parties to the proceedings." *Id*. at § 1-260 (emphasis added). Harrah's, Caesars, and EBCI all have an interest in the declaratory judgment action.

To begin, Plaintiff is asking the Court to determine Old Republic's obligations to EBCI as an additional insured under a policy of insurance issued by Old Republic to Caesars, bearing policy number MWZY 308055 ("the Policy"). As the named insured on the Policy, Caesars is an interested party. Furthermore, Caesars is an interested party as the sole member of CEOC, LLC, one of two members of Harrah's [DE: #1, p. 3], which is an interested party by virtue of the contract it entered with EBCI. (It is that contract which obligates Harrah's to make certain that EBCI is an insured on its policy.) Because the Policy was not issued to Harrah's but provides coverage to those Harrah's has contracted with to provide insurance by virtue of the relationship between Caesars and Harrah's, Caesars' presence in the declaratory judgment action is imperative to determine how EBCI becomes an additional insured under the Policy.

Furthermore, in determining Old Republic's obligations to EBCI under the Policy, Plaintiff is necessarily asking the Court to interpret the contract giving rise to EBCI's status as an additional insured, the Amended and Restated Management Agreement ("the Agreement"). The Agreement was executed by Harrah's and EBCI. It is evident based on Removing Defendants' own arguments about the interpretation of the Agreement that there is a dispute which must be resolved in order for the Court to determine Old Republic's obligations to EBCI under the Policy. In essence, Removing Defendants contend in both their notice of removal and

memorandum in opposition to Plaintiff's motion to remand that Plaintiff mistakenly interprets the Agreement to obligate Harrah's to obtain insurance coverage for EBCI for the underlying incident. [DE: #26, pp. 16-17] [DE: #1, ¶ 21]. In making that argument, the Removing Defendants underscore the nature of the dispute and the need for declaratory relief. This dispute must be resolved in conjunction with Old Republic's obligations to EBCI under the Policy because Old Republic's obligations arise out of Harrah's obligations to EBCI under the Agreement. Therefore, as parties to the Agreement, both Harrah's and EBCI are interested parties in the declaratory judgment action.

Further, EBCI, Harrah's, and Caesars are necessary parties required to be bound by the declaration relating to the Policy and the Agreement. "A necessary party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Smith v. USAA Cas. Ins. Co.*, 819 S.E.2d 610, 617 (N.C. Ct. App. 2018). "In other words, a necessary party is one whose interest will be directly affected by the outcome of the litigation." *See id*. "[A] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Id*. Had Plaintiff not joined these parties, it risked dismissal for failure to join necessary parties.

In *Smith*, the North Carolina Court of Appeals vacated the trial court's order in a declaratory judgment action and remanded for joinder of necessary parties. *Smith*, 819 S.E.2d 610 at 617. Thus, it is imperative that plaintiffs join all necessary parties to a declaratory judgment action from the outset, lest they risk consequences for failing to do so.

D. The Removing Defendants' personal jurisdiction argument is premature.

The Removing Defendants' personal jurisdiction arguments are premature. They will have a full and fair opportunity to address the issues of personal jurisdiction once the motion to

remand has been decided. In fact, Removing Defendants currently have motions to dismiss pending in this Court based in part based on the issue of personal jurisdiction. [DE: #12-15]. Motions to remand, however, are decided on the issue of subject matter jurisdiction.

Furthermore, Removing Defendants rely on the proposition that "a court can address the issue of personal jurisdiction before it considers the proprietary of remand." [DE: #26, p. 10]. Although Removing Defendant cite *Lolavar v. de Santibanes*, 430 F.3d 221, 226 (4th Cir. 2005) for this proposition, Removing Defendants neglect to explain when a court can address the issue of personal jurisdiction before it considers the proprietary of remand. Only when a court has before it "a straight forward personal jurisdiction issue presenting no complex state-law question, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 576, (1999). Here, neither element is present. The EBCI personal jurisdiction issue posed by Removing Defendants is not straight-forward because EBCI is a federally recognized tribe whose waiver of sovereign immunity must be ascertained, as Removing Defendants themselves claimed. [DE: #26, p. 18]. Further, that issue is properly raised by EBCI if it chooses to do so, not the Removing Defendants in the remand setting.

E. The procedural deficiencies in the removal merit remand.

The Removing Defendants acknowledge multiple procedural defects in the removal which they only corrected after Plaintiff identified them in the motion to remand. The Removing Defendants attempt to address each defect in isolation, but the cumulative effect of the deficiencies suggest that the removal was flawed and the case should be remanded.

Further, procedural deficiencies persist. In the original November 1, 2019 Supplemental Removal Cover Sheet [DE: #1-2], the Removing Defendants represented that EBCI had not been

served and declined to answer the question relating to EBCI's consent to removal. [DE: #27-1].[6] However, that failure to consent is reflected in the October 2019 emails the Removing Defendants filed, and as such, should have been identified in the cover sheet. [DE: #27-1].

In the December 6, 2019 Amended Removal Cover Sheet, the Removing Defendants claim they do not know whether EBCI was served which suggests that removal was improper. Further, the Removing Defendants again failed to state that EBCI had not consented to removal.

In light of their failure to properly comply with the removal procedures, it evident that the Removing Defendants cannot meet the heavy burdens imposed on such parties.

F. The "First Affidavit of Terry Brown" is invalid under North Carolina law.

In their opposition brief, the Removing Defendants attached the Frist Affidavit of Terry Brown. [DE: #28]. However, this affidavit does not comport with North Carolina law. Specifically, the notary, Ms. Williams, affixed an electronic signature to the affidavit. However, in North Carolina, a notary must sign by hand in ink. *See* N.C.G.S. § 10B-35 ("When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate."). Ms. Williams did not do so. Further, a "notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method." *See id*. However, Ms. Williams signed electronically.

Further, the affidavit does not include the notary's seal. As such, it is invalid. *See* N.C.G.S. § 10B-20 ("A notarial act . . . shall be attested by all of the following: . . . (3) the clear and legible appearance of the notary's stamp or seal . . ."). The law also requires that "[t]he notary shall place the image or impression of the seal near the notary's signature on every paper record notarized." N.C.G.S. §10B-36(b). However, no seal appears on the affidavit.

[6] The question was not conditioned on whether the defendant had been served with process.

G. The Removing Defendants seek to litigate liability instead of coverage issues.

The Removing Defendants dispute the factual accuracy of the allegations in the underlying wrongful death action and state that because the accident actually occurred off the property contemplated or governed by the Agreement, no insurance could apply or require the defense and indemnity of EBCI by Old Republic. However, an insurer has a duty to defend "[w]hen the pleadings state facts demonstrating that the alleged injury is covered by the policy. . . whether or not the insured is ultimately liable." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 377 (N.C. 1986). EBCI is a named defendant in the underlying wrongful death action because the plaintiff contends that it was responsible for administering and managing the area where the accident occurred. Whether correct or not, the plaintiff in that action pleaded that EBCI was responsible for that area. Even if that allegation is incorrect, even if the facts stated in the wrongful death complaint are inaccurate, and even if a trial court vindicates the defendants based upon the falseness of the allegations, it is the allegations themselves, true or not, which trigger the duty to defend. It is irrelevant to the coverage that the plaintiff's allegations were rejected. As such, the contention that EBCI could not be liable in the wrongful death action because the accident actually occurred off the property contemplated by the Agreement is incorrect because the plaintiff in that case pleaded that they were.

CONCLUSION

Plaintiff requests that this Court grant its motion to remand.

Respectfully Submitted,

January 3, 2020

/s/ James M. Dedman, IV

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CERTIFICATE OF COMPLAINCE

Pursuant to Local Rule 7.2(f)(3), Plaintiff certifies that this Memorandum complies with the applicable word limit. The number of words in this memorandum is 2,788.

/s/ James M. Dedman, IV

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Defendants.

CERTIFICATE OF SERVICE

Pursuant to the Local Civil Rules of Practice and Procedure for the Eastern District of North Carolina, I certify that on January 3, 2020 I filed the foregoing document with the Court's Electronic Case Filing ("ECF") system. The act of filing this document with the Court's ECF system automatically generated a Notice of Electronic Filing ("NEF"), which constitutes proof of service of the filed document upon all registered users. As such, service has been accomplished through the NEF for parties and counsel who are registered users of the Court's ECF system. I have served all unregistered entities and/or parties by regular U.S. Mail.

Respectfully Submitted,

/s/ James M. Dedman, IV

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