Lucy Utu v. Manor Care of Fountain Valley CA, LLC, et al.
8:22-cv-01656-JVS-JDE

TENTATIVE Order Regarding
Motion to Substitute [11] and Motion to Remand [12]

Plaintiff Lucy Utu ("Utu") moves to substitute Defendant Doe 1 as Dr. Mary A. Tran ("Dr. Tran") and accordingly, remand this action to state court for lack of subject matter jurisdiction. (Dkt. Nos. 11, 12). Defendant Manor Care of Fountain Valley CA, LLC ("Manor Care") opposed. (Dkt. Nos. 22, 23). Utu replied. (Dkt. Nos. 26, 27).

For the following reasons, the Court **DENIES** the motions.

I. BACKGROUND

This case concerns allegations of elder abuse and medical negligence over a nursing facility's care and conduct over one of its patients. (See Ntc. Removal, Ex. A ("Complaint"), Dkt. No. 1-1). The following facts are taken from Utu's Complaint.

Utu was a resident patient at Manor Care, a nursing facility. (Id. ¶ 8). Utu alleges that one of Manor Care's staff dropped Ms. Utu during a transfer on May 13, 2021. (Id. ¶¶ 9–10). Manor Care's own policies and procedures require two people to transfer a patient, not one person. (Id. ¶ 10). The California Department of Public Health concluded that Manor Care violated federal regulations regarding this improper transfer. (Id. ¶ 11). On April 6, 2022, Utu was taken to the hospital, where it was discovered that she suffered from bedsores on her buttock, sepsis, and a UTI. (Id. ¶ 12). She claims that her injuries were the direct result of Manor Care failing to rotate her. (Id. ¶ 12). Accordingly, has brought three claims against Manor Care and Doe Defendants in state court: (1) elder abuse; (2) violation of Cal. Health & Safety Code § 1430; and (3) medical negligence. (See generally Compl. ¶¶ 8–14).

Utu originally filed suit in state court on August 5, 2022. (Id.) Manor Care removed the action to this Court on September 7, 2022. (Dkt. No. 1). Utu filed

the instant motions to substitute Doe Defendant 1 and remand the action to state court on October 3, 2022. (Dkt. Nos. 11, 12). Two days later, Utu filed an ex parte application to substitute Dr. Tran and remand. (Dkt. No. 15). This Court struck its previous order granting the ex parte and denied the order without prejudice pending the instant motions. (See Dkt. Nos. 16, 18, 21). Manor Care opposed, (Dkt. Nos. 22, 23), and Utu replied, (Dkt. Nos. 26, 27).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 15 generally governs motions to amend a complaint to add new parties and allegations. Several district courts in the Ninth Circuit have referred to a split of authority as to whether an amendment to add a nondiverse defendant is governed under Fed. R. Civ. P. 15(a) or 28 U.S.C. § 1447(e). Marroquin v. Target Corp., No. 19-00341, 2019 WL 2005793, at *4 (C.D. Cal. May 7, 2019) (collecting cases). However, the "weight of authority" in this circuit finds that section 1447(e) governs. Id. (collecting cases). And therefore, Rule 15(a)'s liberal approach to amendments does not apply "when a plaintiff seeks to amend its complaint after removal to add a diversity-destroying defendant." Proportion Foods, LLC v. Master Prot., LP, No. 19-1768, 2019 U.S. Dist. LEXIS 72858, at *2 (C.D. Cal. Apr. 30, 2019); see, e.g., Greer v. Lockheed Martin, 2010 U.S. Dist. LEXIS 91695, 2010 WL 3168408, at *4 (N.D. Cal. Aug. 10, 2010). To do so would allow plaintiff to "improperly manipulate the forum of an action." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1087 (C.D. Cal. 1999). Accordingly, courts in this district scrutinize an amendment seeking to join a diversity-destroying defendant under 28 U.S.C. § 1447(e).

Section 1447(e) states that "if 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." Id. According to the Ninth Circuit, the "language of § 1447(e) is couched in *permissive* terms and it clearly gives the district court the discretion to deny joinder." Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir. 1998) (emphasis added). Remands "under § 1447(e) are . . . mandatory because, once the diversity-destroying defendant has been joined under that subsection, the district court's only option is to remand. Demartini v. Demartini, 964 F.3d 813, 819 (9th Cir. 2020). But if a district court does not join the diversity-destroying defendant, § 1447(e) "does not authorize remand" because it is the "joinder that is

discretionary, not the remand." Id.

Based on this language, courts within the Ninth Circuit have interpreted joinder under section 1447(e) as "less restrictive" than the standard for joinder under Fed. R. Civ. P. 19. E.g., Sagrero v. Bergen Shippers Corp., No. 2:22-cv-04535, 2022 U.S. Dist. LEXIS 172887, at *6 (C.D. Cal. Sep. 23, 2022); Fortner Honey, Inc. v. Allianz Glob. Risks US Ins. Co., No. CV 22-13, 2022 U.S. Dist. LEXIS 179400, at *18 (D. Mont. Aug. 22, 2022) ("[C]ourts need not engage in a full joinder analysis under Fed. R. Civ. 19(a))." Because section 1447(e) does not "state the factors to be considered when making a determination of whether joinder should be permitted" where subject matter jurisdiction would be destroyed, courts in the Ninth Circuit have applied a multi-factor test[1] to this analysis. Murphy v. Am. Gen. Life Ins. Co., 74 F. Supp. 3d 1267, 1278 (C.D. Cal. 2015), accord 3WL, LLC v. Master Prot., Ltd. P'ship, 851 F. App'x 4, 7 (9th Cir. 2021) (unpublished) (upholding district court's denial of joinder where the district court applied the following six-factor test).

Absent binding authority from the Ninth Circuit clarifying the standard to be applied under section 1447(e), this Court applies the following six[2] factors: (1) whether the party sought to be joined is "needed for just adjudication" and would be joined under Fed. R. Civ. P. 19(a); (2) whether the statute of limitations would preclude an original action against the new defendants in state court; (3) whether there has been unexplained delay in requesting joinder; (4) whether joinder is sought solely to defeat federal jurisdiction; (5) whether the claims against the new defendant appear valid; and (6) whether denial of joinder will prejudice the plaintiff. IBC Aviation Servs v. Compania Mexicana De Aviacion, 125 F. Supp. 2d 1008, 1011 (N.D. Cal. 2000); see, e.g., Krantz v. Bloomberg L.P., No. 2:21-CV-06275, 2022 U.S. Dist. LEXIS 33989, at *8 (C.D. Cal. Feb. 3, 2022). This analysis involves a balancing of these factors. Cruz v. Bank of N.Y. Mellon,

[1] At least one court declined to apply this multi-factor test on the grounds that these factors appear to have risen from a predated version of section 1447(e). Glaster v. Dollar Tree Stores, Inc., No. 2:15-cv-00252, 2016 U.S. Dist. LEXIS 4099, at *7 (D. Nev. Jan. 12, 2016).

[2] The Court acknowledges that some courts consider additional factors: (1) the possible prejudice that may result to any of the parties in the litigation; (2) the closeness of the relationship between the new and the old parties; (3) the effect of an amendment on the court's jurisdiction; and (4) the new party's notice of the pending action.

der12-CV-00846, 2012 U.S. Dist. LEXIS 95467, 2012 WL 2838957, at *4 (N.D. Cal. July 10, 2012) ("Any of these factors might prove decisive, and none is an absolutely necessary condition for joinder." (internal quotation marks omitted)).

III. DISCUSSION

Here, Utu argues that the Court should substitute Doe Defendant for Dr. Tran and thus allow joinder on the basis that: (1) failure to join would be fundamentally unfair and would not prejudice Manor Care; (2) the addition of Dr. Tran relates back to the filing of the complaint; (3) Utu's motive is not solely to deprive the Court of jurisdiction; (4) there is no unexplained delay in requesting joinder; (5) denial of joinder will prejudice Utu; and (6) the statute of limitations "could" preclude a separate action against Dr. Tran in state court. (See generally Mot. Substitute ("Mot."), Dkt. No. 11-1).

Because the amendment of a diversity-destroying defendant under § 1447(e) is "not separable from the remand," Demartini, 964 F.3d at 825, the Court considers both motions in tandem.

A. "Necessary" Party Fed. R. Civ. P. 19(a)

Here, Utu does not make a showing in her motion that Dr. Tran is a necessary party. (See Mot. 1–3 (analyzing joinder under Rule 20 instead of Rule 19(a)). Nonetheless, the Court finds that Dr. Tran is not considered a necessary party.

Federal Rule of Civil Procedure 19(a) mandates the joinder of necessary parties. See Fed. R. Civ. P. 19(a). A party is considered "necessary" if that party's (1) presence is necessary to ensure "complete" and consistent relief among existing parties or (2) interest would be impeded if the action proceeds without the absent party. Fed. R. Civ. P. 19(a)(1). The term "complete relief" in Rule 19(a) refers to relief between the named parties, not as between a named party and an absent person sought to be joined. Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 662 F.2d 534, 537 (9th Cir. 1981). The goal of Rule 19(a)(1) is to protect the interests of the extant parties by affording complete adjudication of the dispute. Defendants who "are only tangentially

related to the cause of action or would not prevent complete relief" are not "necessary" parties. IBC Aviation, 125 F. Supp. 2d at 1012.

Joinder is justified if the failure to join the absent party will lead to "separate and redundant actions." Id. at 1011–12. But the absentee party need not be joined simply because the absentee may cause future litigation. See Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (9th Cir. 1983) ("Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19.").

First, the Court finds that complete relief can still be afforded between Utu and Manor Care, despite the absence of Dr. Tran in this suit. Under California law, a facility is liable for a physician's malpractice if the physician is actually employed or is the ostensible agent of the hospital. Magallanes de Valle v. Doctors Med. Ctr. of Modesto, 80 Cal. App. 5th 914, 914 (2022). The Complaint does not make any allegations or claims that Dr. Tran is an employee or an independent contractor, so the Court will not speculate as to Dr. Tran's relationship to Manor Care.

The Complaint makes no claim or allegations of vicarious liability such that liability would depend on the outcome of claims asserted against Dr. Tran. Most, if not all, of the allegations are aimed at Manor Care's failure to properly staff its facility and failure to follow proper health and safety policies and procedures. (See Compl. ¶¶ 8–14). There are no specific factual allegations aimed at Dr. Tran or any physician. Rather, the Complaint identifies Manor Care's day-to-day "staff" who transferred Ms. Utu from her bed resulting in a fall on May 13, 2021, (id. ¶ 10), and Manor Care's "managing agents," identified as "owners, Director of Nursing, and Administrator" who had the authority to set policies and "authorized the wrongful conduct" committed against Ms. Utu, (id. ¶ 14). Nor does Ms. Utu seek to add any additional factual allegations that address Dr. Tran's involvement in supervising or ratifying the wrongful conduct. But even if this Court were to accept Utu's theory of vicarious liability, complete relief can nonetheless be afforded without joining Dr. Tran as an employee.

Joinder of an employee is unnecessary for complete relief because an employer who is vicariously liable is "fully liable." Meggs v. NBCUniversal

Media, LLC, No. 2:17-cv-03769, 2017 WL 2974916, at *5 (C.D. Cal. July 12, 2017). Indeed, it has "long been" held that joining joint tortfeasors in a single lawsuit is not necessary to afford complete relief. Temple v. Synthes Corp., 498 U.S. 5, 7 (1990). The Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party." Id. Furthermore, it is "long-settled California law" that if a "tortious act has been committed by an agent acting under the authority of [her] principal, the fact that the principal thus becomes liable does not of course exonerate the agent from liability." Liepmann v. Camden Co., No. 19-7348, 2019 U.S. Dist. LEXIS 184472, at *2 (C.D. Cal. Oct. 22, 2019) (quoting Perkins v. Blauth, 127 P. 50, 52 (Cal. 1912)); Sagrero v. Bergen Shippers Corp., No. 2:22-cv-04535, 2022 U.S. Dist. LEXIS 172887, at *7 (C.D. Cal. Sep. 23, 2022) (denying joinder of employee because plaintiff may still seek redress from absent employee defendants individually); see also Perez v. City of Huntington Park, 7 Cal. App. 4th 817, 820 (1992) (noting that a plaintiff "who seeks to hold an employer liable for injuries caused by employees acting within the scope of their employment is not required to name or join the employees as defendants").

Second, without offering any factual allegations, Utu argues that Dr. Tran may not be an employee, but an independent contractor, which would preclude a finding of vicarious liability against Manor Care. (Reply 1). Utu urges that joining Dr. Tran is necessary "in case" a trier of fact concludes that Dr. Tran, and not Manor Care, is ultimately liable. (Id.)

Under California Law, a hospital can be liable for its independent contractor physician's negligence under the ostensible agency theory: unless the patient was clearly notified that the treating physicians were not hospital employees and there was no reason to believe that the patient was unable to understand or act on that information, the facility can be liable for its physicians on staff—despite not controlling, directing, or supervising the physician. Wicks v. Antelope Valley Healthcare Dist., 49 Cal. App. 5th 866, 884 (2020) (discussing the two elements of ostensible agency theory). Ostensible agency as been inferred from the mere fact that the plaintiff sought treatment at the hospital without being informed that the doctors were independent contractors. Magallanes de Valle v. Doctors Med. Ctr. of Modesto, 80 Cal. App. 5th 914, 914 (2022).

Here, the Complaint is completely devoid of any factual allegations concerning whether Dr. Tran was an independent contractor or an employee of Manor Care. Indeed, there are no allegations directed at physicians at all. If Dr. Tran was an true independent contractor (and not an ostensible agent), then this could prevent Utu from recovering completely from Manor Care if Manor Care points the finger at Dr. Tran for failing to order follow up care resulting from the fall.

However, the Complaint does not provide any factual allegations or make any claims to support this finding. Therefore, the Court finds that Utu has failed to carry her burden in showing that complete relief cannot be afforded without Dr. Tran's presence. See Bureau of Consumer Fin. Prot. v. Chou Team Realty Llc, No. SACV 20-43, 2020 U.S. Dist. LEXIS 152772, at *7 (C.D. Cal. June 3, 2020) (this Court finding that the party moving for joinder failed to meet his burden of showing that the absentee parties are required parties under Rule 19).

Second, no ruling by this Court in this case would risk inconsistent results or obligations. Inconsistent obligations occur when an existing party "cannot comply with one court's order without breaching the order of another court" that pertains to the same incident. Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 976 (9th Cir. 2008) (quoting Delgado v. Plaza Las Americas, Inc., 139 F.3d 1, 3 (1st Cir. 1998)). Inconsistent results "occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum." Id.

Here, while parallel state and federal actions are disfavored, Utu does not explain how having the cases proceeding in parallel presents a danger of inconsistent verdicts or inconsistent factual determinations. If Manor Care "successfully defends" against the claims in this Court, there is no danger of Manor Care "losing" on another claim arising from the same incident in a different forum. Id. Nor would Manor Care be in danger of having inconsistent obligations. Given that no theory of vicarious liability is pled, a verdict for or against Manor Care will have no effect on Dr. Tran's liability.

Accordingly, this Court finds that this factor weighs against joinder.

B. Statute of Limitations

Courts consider whether the statute of limitations would prevent the filing of a separate action against the absent defendant if joinder is denied. Marroquin, 2019 WL 2005793, at * 6. "When a claim is timely filed in state court and then removed, a finding that the statute of limitations would preclude the filing of a new, separate action against a party whose joinder has been denied in the federal proceeding, may warrant remand." Murphy, 74 F. Supp. 3d at 1284. When the statute of limitations on plaintiff's state-law claims "has expired before the federal court has determined that it should relinquish jurisdiction over the case," then remand is "generally preferable." Id.

Utu argues that a separate action "could" be time barred, but she fails to identify any specific separate actions would be pursued. The Court assumes that the basis for the separate action would be medical malpractice given that she seeks to add a physician as a defendant to claims of medical negligence and elder abuse. In opposition, Manor Care argues that this factor should not weigh in favor of joinder because (1) any negligence claim against Dr. Tran would have been time barred by the filing of the Complaint anyway and (2) the relation-back doctrine does not to any proposed claim against Dr. Tran.

The Court agrees with Manor Care. Under California law, the statute of limitations for medical malpractice is "three years after the date of injury" or "one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." Cal. Civ. Proc. Code § 340.5 (West 2007). There are two "injuries" at issue: the fall that occurred on May 31, 2021, and the injuries resulting from the failure to turn Ms. Utu, which were discovered on April 6, 2022.

With regard to the fall on May 31, 2021, there is no feasible argument that Ms. Utu did not "discover" this injury until later, given the physical nature of her serious fall.[3] Therefore, the statute of limitations for medical malpractice based on this injury expired on May 31, 2022. Yet Ms. Utu filed her complaint on August 5, 2022, long after the statute had expired for this injury. With respect to the other

[3] Ms. Utu suffered an occipital hematoma and left subarachnoid hemorrhage requiring thirteen staples to her scalp. (Compl. ¶ 10).

injuries, the discovery of such injuries occurred on April 6, 2022. Thus, the statute has not yet expired on this claim. However, "if a statute of limitations does not bar a plaintiff from filing suit in state court, a federal court may be less inclined to permit joinder . . . because [she] could theoretically seek relief from state court." Baker v. Nutrien AG Sols., Inc., No. 1:21-cv-01490, 2022 U.S. Dist. LEXIS 140125, at *13 (E.D. Cal. Aug. 5, 2022) (quoting Vasquez v. Wells Fargo Bank, N.A., 77 F. Supp. 3d 911, 922 (N.D. Cal. 2015).

At least as to the claims arising from the first injury, a denial of joinder would not bar a claim against Dr. Tran that would not have already been time barred. Utu can still pursue claims arising from the subsequent injuries in state court. Because joinder would not preclude any claims that would have not otherwise been time barred, there is no harm resulting from denying joinder of Dr. Tran.

Given that Utu has not identified any claim that would "relate back" to the August 5, 2022 filing of the Complaint, the Court does not apply that analysis here.

The Court concludes that this factor weighs against joinder.

C. Prejudice to Parties

Aside from Utu's claim that her claims against Dr. Tran would be time barred, Utu also argues that she would be prejudiced from the increased litigation costs of having to pursue two separate actions. Utu provides no authority for this proposition. In any event, general arguments of increased litigation costs are unavailing.

The Court finds that this factor weighs against joinder.

D. Improper Motive

Because parties should not abuse the amendment process to forum shop between federal and state court, courts have an obligation to sniff out any improper motives behind diversity-destroying amendments. The Ninth Circuit has mandated that courts look "with particular care at [plaintiff's] motive in removal

cases, when the presence of a new defendant will defeat the court's diversity jurisdiction and will require a remand to the state court." Desert Empire Bank v. Ins. Co. of N. America, 623 F.2d 1371, 1376 (9th Cir. 1980).

Manor Care argues that the timing of Utu's request to join Dr. Tran is suspect, given that she did not seek to add Dr. Tran until after Manor Care had removed this action, obtained expert advice on Dr. Tran's liability on exactly the same day removal occurred, and did not identify Dr. Tran by name or the basis of removal when counsel met and conferred the following day about removal.

Counsel for Manor Care, Mr. Bootier, points to a statement allegedly made by counsel for Utu, Mr. Pick, which suggests that Mr. Pick intended to destroy diversity by picking a name out of a hat after learning that the action had been removed. (Bootier Decl. ¶ 2, Dkt. No. 22-1 (claiming Mr. Pick stated that Mr. Bootier "would have to explain to individuals why they had been named in a lawsuit.")). The implication of this statement is that Mr. Pick did not have a legitimate reason for remand at the time of the September 8 call and conjured up a diversity-destroying defendant after learning of case's removal. Mr. Pick contends that this statement was never made, and that his failure to name Dr. Tran in this call was because he was only "reasonably" certain that Dr. Tran is a California citizen. (Pick Decl. ¶ 4, Dkt. 11-2).

Furthermore, Utu argues that any suspicion about timing should be squarely rejected because she sought to add another diversity-destroying defendant, a nurse, *after* this Court had remanded this action back to state court but before the Court struck that order. (See Pick Decl. ¶ 8, Dkt. No. 26-1; id. Ex. 2, at 1, Dkt. No. 26-3 (showing Ms. Utu's filing of the second Doe amendment within four hours of the court's order remanding the case). The inference to be drawn from the second amendment, Utu argues, is that she had no improper motive to add Dr. Tran because she would have no reason to add another diversity-destroying defendant after her "supposed nefarious" plan of destroying diversity had already been complete. (Reply 4).

The Court gives the benefit of doubt to Ms. Utu given the prompt filing of her second amendment. However, this factor alone is not dispositive in determining whether to permit joinder.

E. Unexplained Delay

In determining whether there was unexplained delay, courts "must consider whether the 'moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'" Murphy, 74 F. Supp. 3d at 1284 (quoting Jackson v. Bank of Haw., 902 F.2d 1385, 1388 (9th Cir. 1990)).

Utu filed her amendment approximately two months after filing her complaint, and she had Dr. Tran's identity from medical records since July 15, 2022. (See Pick Decl. ¶ 2, Dkt No. 11-2). She explains that this delay was justified despite having Dr. Tran's ascertainable from the medical records because she needed time to investigate whether there were any facts giving rise to Dr. Tran's liability as a physician. She claims that she was ignorant of such facts until a healthcare professional opined on September 7, 2022, that Dr. Tran was negligent. (Reply 5). This is also the same day that Manor Care removed the action to this Court. However, it is unclear *when* Utu sought out this professional opinion. Ms. Utu could have waited to review the records and to seek an opinion until September 7, in which case the delay in seeking an opinion would not have been justified.

While Utu has provided an explanation for this relatively short delay, the Court finds that this factor leans in favor of denial given the suspect timing. Utu does not explain when she sought a professional opinion, and it appears seemingly convenient that the opinion was provided on the same day the action was removed.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motions.

IT IS SO ORDERED.

The Court **VACATES** the November 7, 2022, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday November 21, 2022, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will

become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.