

DOCKET # X06-UWY-CV-14-6025333-S : SUPERIOR COURT
:
ROBIN SHERWOOD, et al., : J.D. OF WATERBURY
:
v. : COMPLEX LITIGATION DOCKET
:
STAMFORD HEALTH SYSTEM, :
D/B/A STAMFORD HOSPITAL : OCTOBER 24, 2016

MOTION TO STAY THIRD-PARTY ACTION

Third-party defendants Johnson & Johnson and Ethicon, Inc. (collectively “Ethicon”) move to stay the third-party action commenced against them by defendant Stamford Health System, Inc. d/b/a Stamford Hospital (the “Hospital”) until such time as the plaintiffs’ direct claims against Ethicon, which are now pending before the United States District Court for the Southern District of West Virginia in Multi-District Litigation (“MDL”) No. 2327, are resolved by a final judgment. Absent this relief, Ethicon is faced with the duplication of effort and resources and the prospects of inconsistent judgments in these proceedings and in the previously filed action pending before the federal MDL. Moreover, staying the trial of the third-party action would promote judicial economy and would not prejudice the Hospital or the plaintiffs.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

The plaintiffs, Robin Sherwood and Greg Hoelscher, claim to have suffered injury as the result of the implantation of certain devices into Ms. Sherwood in a procedure performed at Stamford Hospital in April 2006. Complaint ¶ 47. The devices were allegedly manufactured by third-party defendants Ethicon and American Medical Systems, Inc. (“AMS”).

In April 2013, the plaintiffs brought an action against Ethicon and AMS in MDL No. 2327 to recover damages for their alleged injuries. Among other things, the plaintiffs brought claims for negligence, strict liability (manufacturing defect, failure to warn, defective product and design defect), common law fraud, fraudulent concealment, constructive fraud, negligent misrepresentation, negligent infliction of emotional distress, breach of express warranty, breach of implied warranty, violation of consumer protection laws, gross negligence, unjust enrichment, and loss of consortium. *See* MDL Complaint, attached as Exhibit A, at 4-5. The MDL litigation remains pending.

In August 2014 -- thus, while their action was pending before the MDL -- plaintiffs brought this action in Connecticut Superior Court against the Hospital under the Connecticut Product Liability Act (“CPLA”), Conn. Gen. Stat. §§ 52-572m *et seq.*, alleging, among

other things, that the Hospital was liable for selling a product that was defective, dangerous, and unfit for use. *See* Complaint, at ¶ 61. The plaintiffs' claims against the Hospital arise out of the same procedure in April 2006 that gives rise to the plaintiffs' claims against Ethicon in the MDL litigation. The case was transferred to the Complex Litigation Docket in October 2014. *See* Dkt. No. 103.86.

In August 2015 the Hospital impleaded Ethicon and AMS as third-party defendants pursuant to Conn. Gen. Stat. § 52-577a(b).¹ The sole ground for the third-party claims against Ethicon is that, in the event plaintiffs are found at trial to be injured as alleged in their Complaint against the Hospital, then Ethicon is liable to plaintiffs under the CPLA. *See* Third Party Complaint at ¶¶ 22-23. Specifically, the Hospital alleges that "if anyone is responsible for plaintiffs' injuries, to the extent she is injured, it is the third party defendants." *Id.* at ¶ 23.

The plaintiffs' case against the Hospital is scheduled for jury selection and trial in January 2017. At status conferences held in this matter on May 31, 2016 and September 26, 2016, the Court informed the parties that it will proceed only with the plaintiffs' case -- and not the third-party action -- at that trial. While the Court's intention in that regard is clear,

¹ Plaintiffs have settled their claims against AMS in MDL No. 2327 and the Hospital has withdrawn its third-party complaint as against AMS. *See* dkt. # 152.

the status of the third-party action as it relates to the first trial has not been determined. This procedural posture results in substantial ambiguity and potentially extreme prejudice to Ethicon.

Ethicon accordingly seeks a formal order staying the third-party action until such time as the plaintiffs' previously filed case against Ethicon presently pending in the MDL has been finally determined.

II. ARGUMENT

A. This Court has discretion to stay the third-party action.

It is well established that a trial court's authority to stay an action is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Lee v. Harlow, Adams & Friedman, P.C.*, 116 Conn. App. 289, 311-12 (2009) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Indeed, the Practice Book makes express provision for such authority in third-party actions:

When any civil action in which ... a third party has been brought in is reached for trial, the judicial authority hearing the case may order separate trials of different parts of the action and may make such other order respecting the trial of the action as will do justice to the parties and expedite final disposition of the case.

Practice Book § 10-11(e); *see also* Conn. Gen. Stat. § 52-102a(f) (in a third-party action “court ... may order separate trials of different parts of the action and may make such other order respecting the trial of the action as will do justice to the parties and expedite final disposition of the case”). In addition, Practice Book § 23-14 provides that the judicial authority in a Complex Litigation Docket matter “may stay any ... proceedings ... and may enter any appropriate order which facilitates the management of the complex litigation cases.”

“In the absence of a statutory mandate, the granting of an application or a motion for a stay of an action or proceeding is addressed to the discretion of the trial court.” *Voluntown v. Rytman*, 21 Conn. App. 275, 287 (1990). While “[i]t is not possible to reduce all of the considerations involved in stay orders to a rigid formula,” *Griffin Hosp. v. Comm’n on Hosps. & Health Care*, 196 Conn. 451, 458 (1985), “in recent years Connecticut trial courts have often evaluated six primary factors in ruling on motions to stay.” *Indian Harbor Ins. Co. v. Am. Guarantee & Liability Ins. Co.*, No. X04HHDCV146049335S, 2015 WL 1244524, at *3 (Conn. Super. Feb. 23, 2015) (footnote omitted) (copies of unreported decisions are attached as Exhibit B). These factors are:

(i) similarity of subject matter between actions; (ii) promotion of judicial economy; (iii) possibility of causing injustice or prejudice to the plaintiff; (iv) whether the foreign suit was initiated to forestall the domestic suit; (v) possibility of conflicting judicial decisions; and (vi) ability of the court to monitor parallel litigation.

Id. An analysis of these factors supports a stay of the third-party action in this matter.

B. The unique circumstances of this case warrant the entry of an order staying the third-party action.

1. Similarity of the subject matter.

The nature of the plaintiffs' claim against Ethicon in the MDL proceeding and the plaintiffs' claim against the Hospital are virtually identical. As the Hospital's third-party claim against Ethicon is essentially for indemnification for the plaintiffs' claim, there is a distinct similarity in the subject matter of the two actions.

2. Judicial Economy.

The interest of judicial economy weighs strongly in favor of imposing a formal stay of the third party action. "[O]ne can safely presume inefficiency if multiple courts in multiple states are being asked to resolve substantially the same issues." *Thamert v. Blyth, Inc.*, No. FSTCV156026426S, 2016 WL 3202589, at *2 (Conn. Super. May 16, 2016). Moreover, given the Court's intention to proceed with the trial on only the plaintiffs' claims against the

Hospital, the Court has already effectively stayed the third-party claim. The order sought would formalize that order and thereby prevent prejudice to Ethicon.

As noted above, the plaintiffs have not brought a direct action against Ethicon in this Court, although they have asserted essentially the same claims against Ethicon in the MDL suit. *See* Ex. A (MDL Complaint). Had the plaintiffs asserted a direct action against Ethicon in this action, there is no question that the Hospital's third-party action against Ethicon would be inappropriate and, thus, would be ordered stricken. *See Kyratas v. Stop & Shop, Inc.*, 205 Conn. 694, 702-03 (1988) ("We hold that the product liability act has abrogated common law indemnification principles in this area."). In such a case, Ethicon would be entitled to participate in the defense of the plaintiffs' CPLA claims. Thus, it is precisely because the plaintiffs have not asserted such a claim that Ethicon has been placed in a procedural quagmire.

Because Ethicon is not a party to the plaintiffs' case, it has no independent ability to participate at the scheduled trial to defend the plaintiffs' CPLA claims. Nor does it have the ability to defend against the CPLA claims asserted against the Hospital -- the Hospital has not tendered the defense of the plaintiffs' case against it to Ethicon, and it has rejected Ethicon's offer to provide a defense to it in this case.

Yet, following the unlikely event of a plaintiffs' verdict at the trial, the Hospital intends to seek indemnification from Ethicon by virtue of its third-party claim. In that event, Ethicon will not be precluded from litigating issues determined in the first trial, including the existence and extent of the Hospital's liability to the plaintiffs. *See* Restatement (2d) of Judgments § 57(1).

In relevant part, Section 57(a) of the Restatement provides (emphasis added):

when one person (the indemnitor) has an obligation to indemnify another (the indemnitee) for a liability of the indemnitee to a third person, and an action is brought by the injured person against the indemnitee and the indemnitor is given reasonable notice of the action and an opportunity to assume or participate in its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:

- (a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
- (b) The indemnitor is precluded from relitigating issues determined in the action against the indemnity if:
 - (i) the indemnitor defended the action against the indemnitee; or
 - (ii) the indemnitee defended the action with due diligence and reasonable prudence.

Here, while Ethicon has notice of the plaintiffs' claims, Ethicon has been denied the "opportunity to assume or participate in" defense of those claims by virtue of the Hospital's

failure to tender the defense and its refusal to accept Ethicon's offer to defend the action. *See also Mount Vernon Fire Ins. Co. v. Morris*, 90 Conn. App. 525, 538 (2005) (holding "an unexercised right to participate does not result in preclusion").

Under these circumstances, any plaintiffs' judgment from the trial of the plaintiffs' claims against the Hospital will have no preclusive effect on the Hospital's third-party action against Ethicon, and Ethicon will be entitled to a full trial on all aspects of the claim giving rise to the Hospital's liability. The interests of judicial efficiency thus militate strongly in favor of staying the third-party action.

Unless and until the plaintiffs' direct claim against Ethicon has been determined in the plaintiffs' pending action in the MDL, it would be inefficient and unfair to force Ethicon to defend essentially those same claims in the third party-action.

3. Absence of Prejudice

There is no prejudice to the plaintiffs by granting the relief requested by Ethicon: the motion pertains only to the third-party action, to which the plaintiffs are not parties. Moreover, there is no prejudice to the Hospital by the requested stay. Should the Hospital prevail at the scheduled January trial, the third-party claim against Ethicon will be moot. *See Third-Party Complaint at Claim for Relief ¶ 1*. And even in the event of a plaintiffs' verdict

in the first trial, it is likely that there will be an appeal by the Hospital given the significant legal issues implicated by the Hospital's defenses, including the statute-of-limitations defense and the dispositive claim that it is not a "product seller" within the meaning of the CPLA. The stay on execution of any civil judgment imposed as a matter of right pursuant to Practice Book § 61-11 would sufficiently protect the Hospital's interests pending the determination of that appeal.

4. Motivation for the foreign suit.

The fourth factor looks to whether the "the foreign suit was initiated to forestall the domestic suit." *Indian Harbor Ins. Co.*, 2015 WL 1244524, at *3. Here, the MDL action was not initiated by Ethicon but against Ethicon. *See Thamert*, 2016 WL 3202589 at *2 ("There does not appear to be any suggestion that the [foreign] proceedings were preemptive in nature, with the goal of 'ousting' the Connecticut court of primacy."). And, in any event, the plaintiffs commenced the MDL proceeding before they filed this action in Connecticut. *See Indian Harbor Ins. Co.*, 2015 WL 1244524, at *4 ("A stay ... is often appropriate if the Connecticut action commences after the foreign action."). This factor, accordingly, weighs in favor of granting a stay.

5. Possibility of Conflicting Decisions.

It is possible that the two proceedings could produce inconsistent liability determinations, with the plaintiffs prevailing on their claims against the Hospital and yet failing to prevail in their federal action against Ethicon.

6. Ability of the court to monitor the MDL litigation.

The plaintiffs' MDL claim is pending in federal court on a docket that is available to the parties and the public electronically. With the parties' assistance, this Court will be able to monitor the process of the MDL litigation. *See Thamert*, 2016 WL 3202589 at *3 ("The court's ability to monitor proceedings in another jurisdiction presumably is a factor of limited import and limited differentiation, in an era of computerized court records and various modes of electronic communications.").

III. CONCLUSION

The factors discussed above weigh in favor of an order staying the Hospital's third-party claim against Ethicon. Moreover, as the Court has already established that only the first-party claim will be tried in January, granting a formal stay will provide the parties to the third-party claim with needed certainty as to how and when that claim will proceed to trial

and alleviate the substantial prejudice to Ethicon of having to simultaneously defend essentially the same claim in two different fora.

For the foregoing reasons, Ethicon respectfully moves for a stay of the third-party action until such time as there has been a final determination of the plaintiffs' previously filed MDL case against Ethicon.

Respectfully submitted,

THIRD PARTY DEFENDANTS,
JOHNSON & JOHNSON AND ETHICON,
INC.,

By: /s/ Robert R. Simpson

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Their Attorneys

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on October 24, 2016, a copy of the foregoing MOTION TO STAY THIRD-PARTY ACTION was sent via email to the following counsel of record:

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/s/ Robert R. Simpson

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

In Re: Ethicon Inc., Pelvic Repair System Products Liability Litigation
MDL No. 2327

Civil Action No. 2:13-CV-6820

SHORT FORM COMPLAINT

Come now the Plaintiff(s) named below, and for Complaint against the Defendants named below, incorporate The First Amended Master Complaint in MDL No. 2327 by reference.

Plaintiff(s) further show the court as follows:

1. Female Plaintiff

Robin C. Sherwood*

2. Plaintiff's Spouse (if applicable)

Greg Hoelscher

3. Other Plaintiff and capacity (i.e., administrator, executor, guardian, conservator)

n/a

4. State of Residence

Connecticut

5. District Court and Division in which venue would be proper absent direct filing.

Middle District of Georgia, Athens Division

6. Defendants (Check Defendants against whom Complaint is made):

A. Ethicon, Inc.

B. Ethicon, LLC

- C. Johnson & Johnson
- D. American Medical Systems, Inc. ("AMS")
- E. American Medical Systems Holdings, Inc. ("AMS Holdings")
- F. Endo Pharmaceuticals, Inc.
- G. Endo Health Solutions Inc. (f/k/a Endo Pharmaceuticals Holdings, Inc.)
- H. Boston Scientific Corporation
- I. C. R. Bard, Inc. ("Bard")
- J. Sofradim Production SAS ("Sofradim")
- K. Tissue Science Laboratories Limited ("TSL")
- L. Mentor Worldwide LLC
- M. Coloplast A/S
- N. Coloplast Corp.
- O. Coloplast Manufacturing US, LLC
- P. Porges S.A.

7. Basis of Jurisdiction

- Diversity of Citizenship
- Other: _____

A. Paragraphs in Master Complaint upon which venue and jurisdiction lie:

1, 2, 3, 4, 5, 9, 10, 11

B. Other allegations of jurisdiction and venue:

American Medical Systems, Inc. ("AMS") is a Delaware corporation with its principal place of business in Minnesota. All acts and omissions of AMS as described in the Master Complaint were done by its agents, servants, employees and/or owners acting in the course and scope of their respective agencies, service, employment and/or ownership.

8. Defendants' products implanted in Plaintiff (Check products implanted in Plaintiff)

- Prolift
- Prolift +M
- Gynemesh/Gynemesh PS
- Prosima
- TVT
- TVT-Oturator (TVT-O)
- TVT-SECUR (TVT-S)
- TVT-Exact
- TVT-Abbrevo
- Other

AMS Monarc Subfascial Hammock

9. Defendants' Products about which Plaintiff is making a claim. (Check applicable products):

- Prolift
- Prolift +M
- Gynemesh/Gynemesh PS
- Prosima
- TVT

- TVT-Oturator (TVT-O)
- TVT-SECUR (TVT-S)
- TVT-Exact
- TVT-Abbrevo
- Other

AMS Monarc Monarc Subfascial Hammock

10. Date of Implantation as to Each Product:

April 12, 2006

11. Hospital(s) where Plaintiff was implanted (including City and State):

Stamford Hospital

Stamford, Connecticut

12. Implanting Surgeon(s):

Dr. Brian J. Hines, M.D.

13. Counts in the Master Complaint brought by Plaintiff(s):

- Count I – Negligence
- Count II – Strict Liability – Manufacturing Defect
- Count III – Strict Liability – Failure to Warn
- Count IV – Strict Liability – Defective Product

- Count V – Strict Liability – Design Defect
- Count VI – Common Law Fraud
- Count VII – Fraudulent Concealment
- Count VIII – Constructive Fraud
- Count IX – Negligent Misrepresentation
- Count X – Negligent Infliction of Emotional Distress
- Count XI – Breach of Express Warranty
- Count XII – Breach of Implied Warranty
- Count XIII – Violation of Consumer Protection Laws
- Count XIV – Gross Negligence
- Count XV – Unjust Enrichment
- Count XVI – Loss of Consortium
- Count XVII – Punitive Damages
- Count XVIII – Discovery Rule and Tolling
- Other Count(s) (Please state factual and legal basis for other claims below):

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Robin C. Sherwood and Greg Hoelscher
(b) County of Residence of First Listed Plaintiff Fairfield
(c) Attorneys (Firm Name, Address, and Telephone Number)
Blasingame, Burch, Garrard & Ashley, P.C.
440 College Avenue, Suite 320
Athens, GA 30603 (706) 354-4000

DEFENDANTS
Ethicon, Inc., et al.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
4 4
5 5
6 6

IV. NATURE OF SUIT

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes checkboxes for various legal categories like Insurance, Personal Injury, Property Rights, etc.

V. ORIGIN
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC SEC. 1332
Brief description of cause:
PERSONAL INJURIES DUE TO DEFECTIVE PRODUCTS

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 75,001.00
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 04/02/2013 SIGNATURE OF ATTORNEY OF RECORD /s/ Henry G. Garrard, III

EXHIBIT B

2015 WL 1244524

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

INDIAN HARBOR INS. CO. et al.

v.

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY et al.

No. Xo4HHDCV146049335S.

|
Feb. 23, 2015.

Opinion

SHERIDAN, J.

*1 Before the court are motions filed by Republic Services, Inc. (“Republic”), John Sexton Sand & Gravel Corp. (“Sexton”), Congress Development Company (“Congress Development”), Allied Waste Transportation, Inc. (“Allied Transportation”), and Allied Waste Industries, Inc. (“Allied Industries”) (hereinafter collectively “the defendant-intervenors”) seeking a stay of all proceedings in this action pending the resolution of another action in the Illinois courts. Two of the original defendants in this action, American Home Assurance Company and National Union Fire Insurance Company, have joined in seeking a stay for essentially the same reasons. Opposing the entry of a stay are the plaintiffs, Indian Harbor Insurance Company and Greenwich Insurance Company. The parties were heard at argument on November 10, 2014.

I. FACTS AND BACKGROUND OF PROCEEDINGS

On December 23, 2009, certain residents of Hillside, Illinois filed a lawsuit in Illinois state court captioned *Gwendolyn Amber et al. v. Allied Waste Transportation, Inc. et al.*, No. 09 L 15741 (Cook County, Ill.) (“*Amber* lawsuit”). The plaintiffs sought damages for bodily injury and property damage allegedly arising from the operation

of a municipal solid waste landfill. The named defendants were Congress, as owner of the landfill, Sexton and Allied Transportation as general partners of Congress, and Allied Industries as a guarantor of Allied Transportation's obligations. The intervenor-defendants sought insurance coverage under policies issued by Greenwich and Indian Harbor for defense and indemnity costs arising from the *Amber* lawsuit.

On May 20, 2010, Greenwich and Indian Harbor brought a declaratory judgment action against Sexton, Congress Development, Allied Transportation and Allied Industries in Illinois state court, captioned *Greenwich Insurance Co. and Indian Harbor Insurance Co. v. John Sexton Sand & Gravel Corp. et al.*, No. 10 CH 21805, (Cook County, Ill.) (hereinafter referred to as the “Illinois action”). Greenwich and Indian Harbor sought a judgment declaring that they had no duty under their insurance policies to defend or indemnify Sexton, Congress Development, Allied Transportation or Allied Industries in connection with the *Amber* lawsuit.

On June 1, 2010, Indian Harbor filed a second declaratory judgment action in the U.S. District Court for the Northern District of Illinois against Allied Transportation, Allied Industries, Congress Development and Republic,¹ seeking to determine coverage under a pollution and remediation legal liability policy it had issued to Republic for the period from July 30, 2009 to July 30, 2010.

In response, the defendants in the Illinois action filed a counterclaim in state court against Indian Harbor asserting they were entitled to coverage under the pollution liability policy which was the subject of the federal lawsuit, and moved to allow Republic to intervene in the Illinois action. They then asked the Northern District of Illinois District Court to abstain from proceeding with the federal lawsuit, in favor of allowing all coverage questions to be decided in one proceeding in Illinois state court. The federal district court ultimately declined jurisdiction and dismissed the case so that “all related issues could be resolved in one comprehensive action.” *Indian Harbor Ins. Co. v. Republic Services, Inc.*, No. 10 C 3310, 2010 WL 3701308, at *4 (N.D.Ill. Sept. 10, 2010).

*2 On September 23, 2010, Greenwich and Indian Harbor filed an amended complaint in the Illinois action

seeking a declaration that they had no duty to defend or indemnify in connection with the *Amber* lawsuit under their commercial liability policies, excess and umbrella policies, and the pollution liability policy. As a result, all insurance policy coverage issues were aggregated in the Illinois action.

On May 20, 2011, the defendants filed a motion for summary judgment in the Illinois action, asserting that Greenwich and Indian Harbor had a duty to defend them against the *Amber* lawsuit. On October 28, 2011, the Illinois trial court ruled in favor of the defendants Allied Transportation, Allied Industries, Congress Development and Republic and held, among other things, that Greenwich had a duty to its insureds to defend the *Amber* lawsuit.

On March 7, 2014, Greenwich and Indian Harbor filed this declaratory judgment action suit against the defendant insurers American Home Assurance Company (“American Home”) and National Union Fire Insurance Company of Pittsburgh, Pennsylvania’s (“National Union”) and American Guarantee & Liability Insurance Company (“American Guarantee”) and Zurich American Insurance Company (“Zurich”). The complaint alleges that the defendant insurers issued liability policies which provide coverage for the *Amber* lawsuit. Greenwich and Indian Harbor seek equitable contribution from the defendant insurers for defense and indemnity costs paid in connection with the *Amber* lawsuit and/or to be equitably subrogated to the rights of the insureds may have against the defendant insurers under their respective policies.

On August 19, 2014, Allied Transportation, Allied Industries, Congress Development and Republic were granted permission to intervene in this case based on their direct interest in the claims asserted against the defendant insurers in this case and the finding that their interests were not adequately represented by the defendant insurers.

American Home, National Union, American Guarantee and Zurich have filed motions to strike Greenwich and Indian Harbor’s complaint on numerous grounds, including that Greenwich and Indian Harbor have no right to seek contribution or subrogation under Illinois’ “targeted tender” rule, which provides that under certain circumstances an insured can select one insurer to bear the entire cost of defending and indemnifying a claim. (See Docket Entries # s 114 and 120.)

There are, at present, several motions pending in the Illinois action which the moving parties claim bear directly on the contribution, subrogation, “other insurance” and “targeted tender” issues that are to be decided in this action.²

II. ANALYSIS

“[W]here an action is pending in one state, the court of another state in which another action, involving the same parties and subject matter, is brought, may grant a stay of proceedings in the latter action.” *Sauter v. Sauter*, 4 Conn.App. 581, 585 (1985). “In the absence of a statutory mandate, the granting of an application or a motion for a stay of an action or proceeding is addressed to the discretion of the trial court ... [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” (Citation omitted; internal quotation marks omitted.) *Lee v. Harlow, Adams & Friedman, P.C.*, 116 Conn.App. 289, 311–12, 975 A.2d 715 (2009).

*3 “It is not possible to reduce all of the considerations involved in stay orders to a rigid formula.” *Griffin Hospital v. Commission on Hospitals & Health Care*, 196 Conn. 451, 458, 493 A.2d 229 (1985). However, in recent years Connecticut trial courts have often evaluated six primary factors in ruling on motions to stay.³ They are as follows: (i) similarity of subject matter between actions; (ii) promotion of judicial economy; (iii) possibility of causing injustice or prejudice to the plaintiff; (iv) whether the foreign suit was initiated to forestall the domestic suit; (v) possibility of conflicting judicial decisions; and (vi) ability of the court to monitor parallel litigation. The court will discuss each of these considerations in turn.

A. Similarity of Subject Matter Between the Two Actions

The defendant-intervenors argue that this action involves essentially the same subject matter as the Illinois action

because it concerns defense costs and indemnity arising from the *Amber* lawsuit, the same insurance policies issued by Greenwich and Indian Harbor, and the same issues relating to subrogation and contribution from “other insurers.” In opposing the stay, the plaintiffs argue that the Illinois and Connecticut cases are “entirely different, involving different parties and different issues.”

A motion to stay is appropriate when a domestic action involves “the same parties and subject matter” as a foreign action. *Sauter v. Sauter*, *supra*, 4 Conn.App. at 584. However, a stay does not require that each action have identical parties. “It is within this [court's] discretion to grant a stay of proceedings when there are some parties named in a latter action that are not named in a previous action involving the same issues.” (Citations omitted; internal quotation marks omitted.) *Lincoln Life & Annuity Co. of N. Y. v. Lockwood Pension Services, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 08 5019142 (November 28, 2008, Domnarski, J.). Nor does a stay require identical theories of recovery, causes of action or legal remedies. A stay may be granted where “the issues ... have as their lynchpin the resolution of the issues” common to both cases. *Lewis v. Primerica Corp.*, Superior Court, Judicial District of Fairfield at Bridgeport, Docket No. 255328 (May 10, 1990, Jones, J.).

The court has thoroughly reviewed the pleadings, decisions and transcripts related to the Illinois action that were submitted with the memoranda accompanying the arguments on the instant motions. Although each complaint may assert different causes of action, the plaintiffs have not demonstrated to the court's satisfaction that the central issues underlying the Illinois and Connecticut actions are so dissimilar that they should be allowed to proceed simultaneously. It is clear that contribution, subrogation and “other insurance” issues are common to the resolution of both actions.

Moreover, it appears that the “lynchpin” determination that will guide the resolution of those issues in both cases is the application of Illinois’ “targeted tender” doctrine. The “targeted” or “selective” tender doctrine provides that an insured covered by multiple insurance policies may target or select which insurer will defend and indemnify it with regard to a specific claim. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill.2d 102, 107 (2007). When an insured targets or selects an insurer to defend and indemnify it, the targeted insurer then has the

sole responsibility to defend and indemnify the insured. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill.App.3d 512, 532 (2010). Thus, the targeted tender doctrine is used to determine which insurer has the duty to defend an insured when the insured is covered by multiple insurance policies. *American Service Insurance Co. v. China Ocean Shipping Co. (Americas), Inc.*, 2014 IL App. (1st) 121895.

*4 As previously stated, there are motions to strike pending before this court based, in part, on the application of the targeted tender doctrine. There are also motions pending before the Illinois court relying upon the targeted tender doctrine. Clearly, there are overlapping significant and potentially dispositive legal issues in both cases.

B. Promotion of Judicial Economy

Judicial economy “is overarching and must control. It would allow the parties to concentrate their time and energies in one forum, thereby avoiding unnecessary expense, duplications of pleadings and discovery, confusion, and perhaps inconsistent rulings. Single forum litigation will also discourage races to the courthouse and thereby avoid the dissipation of the resources of all concerned.” *Travelers Ins. Co. v. Howmet Corp.*, Superior Court, judicial district of Hartford, Docket No. CV 95 0550685 (September 27, 1997, Teller, J.).

In the present case, judicial economy argues strongly in favor of a stay and resolution of all important issues in a single forum. At the outset, it cannot be denied that the Illinois courts have invested significant effort in adjudicating various aspects of this dispute, leading to a depth of familiarity with the parties, the facts, and the legal issues which it would be wasteful for this court to reinvent and duplicate. Also, there are several motions currently pending in the Illinois court which may render adjudication unnecessary for a significant portion of the plaintiffs' claim in this case. In part, those decisions require interpreting and applying the concept of targeted tender, which is a doctrine of Illinois law. It makes little sense to adjudicate the legal issues related to the targeted tender rule twice, in different proceedings in different states, based on the same parties and the same underlying facts. For these reasons, the court concludes that judicial economy will be promoted by the entry of a stay and the

avoidance of duplicative, parallel litigation in different states.

C. Possibility of Injustice or Prejudice to the Plaintiff

Any prejudice the plaintiffs may arguably suffer as a result of a stay in the present case is limited, because “a stay, unlike a dismissal, leaves the court in a position to monitor the progress being made in the parallel litigation, and to reassert its jurisdiction over the parties’ dispute if the interests of justice so dictate.” *Travelers Ins. Co. v. Howmet Corp.*, Superior Court, judicial district of Hartford—New Britain, Docket No. CV 950550685 S (Sept. 29, 1997, Teller, J.)

The parties will proceed with the Illinois litigation and when, or if, a decision or judgment is rendered in Illinois which is conclusive of the rights of any parties asserted in this litigation, this court can, and will, resume the proceedings as appropriate.

D. Whether the Foreign Suit was Initiated to Forestall the Domestic Suit

A stay should not be granted if under the circumstances “it appears that the foreign suit was instituted merely to forestall the domestic suit.” *Sauter v. Sauter*, *supra*, 4 Conn.App. at 585. A stay, however, is often appropriate if the Connecticut action commences after the foreign action. See *Sack Distributors Corp. v. Advanced Digital Data*, Superior Court, judicial district of Hartford, Docket No. CV 06 5004113 (December 13, 2006, Wagner, J.T.R.).

*5 In the present case, the relative timing of the two actions is not a dominant consideration.

E. Possibility of Conflicting Decisions

Where two actions are similar, “there is a potential for conflicting judicial decisions, conflicting decisions which create a confused and unsettled state of law [that] should be avoided if possible.” (Citations omitted; internal quotation marks omitted) *Lincoln Life & Annuity Co. of N. Y. v. Lockwood Pension Services, Inc.*, *supra*, at Docket No. CV 08 5019142.

In the present case, the court believes it is in the interests of justice to avoid conflicting decisions on the application of the targeted tender rule to these parties and under these facts. Whenever possible and practicable, questions requiring the application of Illinois law should be analyzed and decided by Illinois trial and appellate courts.

F. Ability of this Court to Monitor Proceedings in Illinois

The pleadings, decisions and transcripts which were appended to the various memoranda related to this motion make it abundantly clear that, with the assistance of the parties, the court is fully able to monitor the progress of the Illinois action.

III. CONCLUSION

For the reasons stated, the court concludes that the relevant considerations weigh in favor of adjusting the rights of the parties during the pendency of this litigation until a final determination on the merits in the Illinois action. A stay of the present action will promote judicial economy, cause no prejudice to plaintiffs, and avoid the possibility of conflicting judicial decisions.

Therefore, the defendant-intervenors' motion to stay these proceedings is hereby GRANTED and will remain in effect until further order of the court. To assist the court in monitoring the Illinois litigation, counsel for the defendant-intervenors is further ORDERED to file, in this court (under docket number X04 HHD–CV14–6049335–S) within thirty (30) days of the date of issuance, copies of any future judgments and/or written decisions, rulings or opinions on dispositive motions rendered in *Greenwich Insurance Co. and Indian Harbor Insurance Co. v. John Sexton Sand & Gravel Corp. et al.*, No. 10 CH 21805, (Cook County, Ill.) in the courts of the state of Illinois.

All Citations

Not Reported in A.3d, 2015 WL 1244524

Footnotes

- 1 Republic's role in this dispute was brought about by the fact that it is "connected, in some manner" to Allied Transportation, Allied Industries and Congress Development. "[Allied Industries] allegedly merged with Republic in 2008 and [Allied Industries] is allegedly a guarantor of the obligations of [Allied Transportation], which is allegedly a general partner of [Congress Development]." *Indian Harbor Ins. Co. v. Republic Services, Inc.*, No. 10 C 3310, 2010 WL 3701308, at *1 (N.D.Ill. Sept. 10, 2010). On the basis of this, Republic sought insurance coverage from Greenwich and Indian Harbor in connection with the *Amber* lawsuit.
- 2 The Illinois court scheduled a hearing on January 20, 2015 for several motions, including a "Motion for Partial Summary Judgment regarding Contribution, Subrogation and Reimbursement" and "Defendant's/Counterplaintiff's Motion for Partial Summary Judgment Barring the Insurer's Contribution Claims on the Basis of Targeted Tender." (See November 19, 2014 Defendant Intervenor's Supplemental Brief (Docket Entry # 153)).
- 3 See, e.g., *Sabo v. Housatonic Ins. & Financial Services, LLC*, Superior Court, Judicial District of Fairfield, Housing Session at Bridgeport, Docket No. BPSP-081872 (July 3, 2014, Rodriguez, J.) [58 Conn. L. Rptr. 711]; *Arras v. Regional School District # 14*, Superior Court, Judicial District of Waterbury at Waterbury, Docket No. UWY CV 13 5016462 S (Nov. 19, 2013, Shapiro, J.); *Polymer Resources, LTD v. Polysource, LLC*, Superior Court, Judicial District of Stamford-Norwalk at Stamford, Docket No. FSTCV12-6016070S (May 7, 2013, Jennings, J.T.R.) [56 Conn. L. Rptr. 51]; *Marubeni Specialty Chemicals, Inc. v. Goldschneider*, Superior Court, Judicial District of Stamford-Norwalk at Stamford, Docket No. FST CV 11 6010045 S (September 28, 2011, Adams, J.T.R.); *KI, Inc. v. KP Acquisition Partners, LLC*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Complex Litigation Docket, Docket No. X05-CV-09-6002474-S (September 24, 2010, Blawie, J.); *Lincoln Life & Annuity Co of N.Y. v. Lockwood Pension Services, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 08 5019142 (November 28, 2008, Domnarski, J.).

2016 WL 3202589

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

John THAMERT

v.

BLYTH, INC.

No. FSTCV156026426S.

|

May 16, 2016.

Attorneys and Law Firms

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Opinion

POVODATOR, J.

*1 This is a proceeding in which the plaintiff, a shareholder in defendant Blyth, is challenging an agreement by which The Carlyle Group would acquire, nominally through a merger, all of the outstanding stock in Blyth. The plaintiff questions the extent to which directors of Blyth honored their obligations to their shareholders. The defendants have moved for a stay, identifying similar actions pending in Delaware, some of which proceedings were commenced prior to this case.

The factual background for this action does not appear to be in dispute. On August 31, 2015, defendant Blyth announced that it had entered into an agreement under which The Carlyle Group would acquire all of Blyth's outstanding shares of common stock in what has been characterized as a merger; ¶ 43 of amended complaint (# 104.00). The merger was approved by defendant Blyth's board of directors, and was completed on October 13, 2015; ¶ 44.

According to the defendants, the approval by the Board of Directors had been unanimous. Acceptance by shareholders was less conclusive; a number of shareholders commenced legal proceedings challenging the merger, starting within days of the initial announcement of the merger. As recited in # 109.00, there are at least seven other such actions pending, with seven identified proceedings pending in the Delaware Chancery Court.¹ The earliest of those matters is recited to have been commenced on September 2, 2015. This case was commenced with process dated September 9, 2015, first served on or about September 15, 2015 and subsequent days (see, return of service).

The defendants have filed a motion for stay, claiming that this proceeding should be held in abeyance pending the proceedings in the Delaware Chancery Court. In oversimplified terms, the claim is that there are multiple cases with a head-start over this one, that the Delaware court has expertise in handling such matters, that it would be a duplication of effort to have proceedings on parallel tracks in multiple states, etc. The plaintiff insists that his proceeding should be allowed to continue, that the Delaware court would not allow a jury trial on any of the issues, and that the risks and costs associated with multiple proceedings in multiple jurisdictions has been overstated by the defendants.

The parties submitted briefs and exhibits in support of their respective positions, and the court heard argument on February 8, 2016. The parties appear to agree that the decision implicates the court's discretion, rather than any mandate to grant or deny a stay under these circumstances.

The court has identified a useful starting point for this analysis. In a recent trial court decision, *Indian Harbor Insurance Co. v. American Guarantee & Liability Insurance Co.*, Judicial District of Hartford, No. X04HHDCV146049335S, 2015 WL 1244524 (February 23, 2015), the court identified and discussed the factors that generally are deemed appropriate for consideration in connection with a motion for stay, given other proceedings pending in other jurisdictions.

*2 [W]here an action is pending in one state, the court of another state in which another action, involving the same parties and subject matter, is brought, may grant a stay of proceedings in the latter action. In the absence of

a statutory mandate, the granting of an application or a motion for a stay of an action or proceeding is addressed to the discretion of the trial court ... [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

It is not possible to reduce all of the considerations involved in stay orders to a rigid formula. However, in recent years Connecticut trial courts have often evaluated six primary factors in ruling on motions to stay. They are as follows: (i) similarity of subject matter between actions; (ii) promotion of judicial economy; (iii) possibility of causing injustice or prejudice to the plaintiff; (iv) whether the foreign suit was initiated to forestall the domestic suit; (v) possibility of conflicting judicial decisions; and (vi) ability of the court to monitor parallel litigation. (Internal quotation marks and citations, omitted). *Id.* at *2–3.

Most of these considerations do not require extensive discussion; with respect to shareholder suits following announced or consummated mergers, the analysis necessarily contains at least some relatively “routine” features:

1. There does not appear to be any real question as to similarity of issues; the challenge in all of the cases seems to focus on the fairness of the terms of the merger agreement.
2. Judicial economy is almost a necessary corollary of a determination that the issues are similar; one can safely presume inefficiency if multiple courts in multiple states are being asked to resolve substantially the same issues.
3. The plaintiff focuses much of his attention on the issue of prejudice. He claims that he wants to have a jury determination of such issues as can be presented to a jury. He also points to the substantial reduction in burden (in the sense of inconvenience) on the parties given the centrality of Connecticut to the issues before the court. The defendants counter with the observation that most of the relief sought is equitable in nature and therefore not properly submitted to a jury. (The defendants do not seem to dispute the greater

convenience of access to witnesses and evidence in Connecticut, at least as compared to Delaware.)

4. There does not appear to be any suggestion that the Delaware proceedings were preemptive in nature, with the goal of “ousting” the Connecticut court of primacy. Rather, it appears that most of the dissatisfied shareholders seeking judicial relief gravitated towards the Delaware Chancery court, a not surprising choice of venue/jurisdiction. (The race-quality appears to be more about asserting and maintaining control over the litigation in a forum that is relatively convenient to the early litigants, and less about precluding some other forum from being utilized.)

*3 5. The possibility of conflicting decisions is effectively a corollary of proceedings in multiple jurisdictions, even if there is an effort to apply a single jurisdiction's law. Arguably, there is a modestly increased risk when one court is applying its own “local” state law while another court may be attempting to apply that same law—but as a “foreign” state's law.

6. The court's ability to monitor proceedings in another jurisdiction presumably is a factor of limited import and limited differentiation, in an era of computerized court records and various modes of electronic communication.

These factors are discussed in somewhat greater detail in *Indian Harbor*, but for many cases—including this one—the factors point towards the appropriateness of a stay. The factors either inherently favor issuance of a stay or recognize a minimum and readily correctable downside resulting from a stay.

The court agrees with the defendants that the authorities discussed by the plaintiff have minimal if any persuasive value. None of the cases involve the denial of a stay of a later-filed proceeding in a different jurisdiction, in a contested context. Rather, all of the cases attached as exhibits appear to involve an order without any apparent discussion/analysis or a resolution that appears to have been reached by agreement among the parties which was adopted by the court.

Before addressing those cases, the court notes that the plaintiff provided an extensive footnote, identifying cases in which Delaware Chancery Courts have entered stays. The issue before this court is not whether a Delaware court

in general, or the Delaware Chancery Court in particular, might enter a stay in appropriate circumstances, but rather whether this court should enter such a stay under these circumstances. The fact that Delaware Chancery courts may enter stays as reflected by the list of cases in footnote 1 of the plaintiff's objection, does not truly address the issue at hand, as framed above. The court has reviewed a number of them, and found none of them particularly instructive with respect to the issues here.

For example, in *Kahn v. McCarthy*, No. CIV.A. 4054-CC, 2008 WL 4482704, the decision relates to an application for a temporary restraining order, in September 2008, presumably shortly after that proceeding had been commenced; there is a recitation that an earlier proceeding had been commenced in June of that year in California, and the Delaware proceeding was stayed in favor of that earlier (much earlier?) California proceeding. In other words, it appears that the latter case had been stayed, precisely what is sought here.

In re TGM Enterprises, L.L.C., No. CIV.A. 3565-CC, 2008 WL 4261035, does appear to involve an earlier case being stayed, but it was stayed in favor of a civil case in the Delaware Superior Court, i.e. a court located in the same state/jurisdiction. (By analogy, multiple related cases within Connecticut likely would be consolidated for purposes of trial.)

*4 *In re InfoUSA, Inc. Shareholders Litigation*, No. CIV.A.1956-CC, 2008 WL 762482, did not even involve a stay in favor of separate litigation, but rather was a stay in order to allow an internal investigation (by a Special Litigation Committee). It therefore has no bearing on the current issue. (The court will not continue to analyze/discuss cases cited in the footnote for the relatively unremarkable proposition that Delaware courts can and do enter stays.)

To the extent that the plaintiff is asking the court to focus on the "path not taken" i.e. that the defendants have not moved to stay the Delaware proceedings with the necessarily implied suggestion that they should have done so, the court is not persuaded that the contention is entitled to any significant weight. A necessary aspect of such an argument is the inherent speculation that if the defendants had moved for a stay, in Delaware, the Delaware court would have granted such a stay. The plaintiff has not explained why this court should believe

that a Delaware court would have stayed seven cases pending in Delaware, in favor of a single *later-filed* case pending in Connecticut, when the only likely argument to be made in favor of such a stay in Delaware is the greater convenience with respect to access to records and witnesses in Connecticut. (Inferentially, the plaintiffs in those Delaware cases were not especially concerned about the convenience factor.) Again, the fact that Delaware courts may, when appropriate, enter stays does not inform the decision that this court must make in this case, where there are multiple cases in Delaware and this case was not the first to be filed.

The plaintiff discusses the *Topps* litigation (especially, *In re Topps Co., Inc. Shareholder Litigation*, 859 N.Y.S.2d 907 (Sup.Ct.2007)) at moderate length, including the refusal of the New York Court to enter a stay in favor of the Delaware litigation arising from the same situation. The plaintiff does not note that the New York litigation actually was the earlier-filed litigation, and in its discussion of why it would not grant a stay, the court noted that "[t]he court must consider in which jurisdiction litigation was first commenced ..." as well as other factors. In this case, the plaintiff would presumably prefer the court not to consider the jurisdiction in which litigation first was commenced.

The plaintiff does cite a number of cases that are claimed to support his position, but the court does not agree. The plaintiff cites and discusses *Golumbuski v. U.S. Oncology*, Cause No.2004-14610 (Tex.Dist.Ct., May 10, 2004), but as attached as exhibit A to his submission, it merely recites a denial of a motion to stay, without any rationale for that decision whatsoever. Similarly, *Brody v. Cox Communications*, Civ. Action No.2004CV89198 (Ga.Super.Ct., Sept. 27, 2004), also submitted as an exhibit, involves a denial of a motion for stay, without any explanation or discussion. This court cannot evaluate the persuasiveness of an analysis when the analysis is not presented. For example, was there any unstated but persuasive underlying analysis, or was the decision based on parochialism?

*5 *Hannien v. Pomeroy IT Solutions, Inc.*, No. 09-CI-01270 (Ky.Cty.Ct., July 27, 2009) is similar if lengthier—although the court recites the positions of the parties, the actual resolution lacks any analysis or meaningful discussion: "The court does not find that a stay of the proceedings is appropriate at this time as there

is a risk of prejudice to the Plaintiff if the matter is stayed.” (Even the plaintiff’s claim of prejudice as recited by the court immediately before its conclusion is devoid of substance: “Plaintiff also argues he would be prejudiced by staying his case.”)² Further, it appears that the Delaware case was commenced approximately one week after the Kentucky case, giving the case under consideration primacy in terms of time of filing.

The plaintiff also discusses *Karrash v. Zipcar, Inc.*, Civ. Action No. 13–0038–BLS2 (Mass.Super.Ct., Jan. 25, 2013). The court believes that the case facially is of no value as it is denominated an “agreed order on pending motions” such that it reflects consent by all concerned. Clearly, there is no consent in this case.

Finally, the plaintiff cites and discusses *Teamsters Local 456 v. Republic Services*, Case No. 08–41909(07) (Fl.Cir.Ct., Oct. 6, 2008), but that case only discusses coordinated discovery (apparently vacating an earlier order for expedited discovery). Indeed, to the extent that the Florida court ordered that discovery in other pending matters be made available to the plaintiff in the case under discussion, it suggests that the other pending litigation was given primacy with any substantive proceedings effectively if not actually stayed in Florida. (The court apparently declined to schedule any hearing on the injunctive relief being sought, limiting its orders solely to discovery-related matters.)

Ultimately, the plaintiff has not explained why the defendants should be compelled to resist litigation in two jurisdictions simultaneously, nor has the plaintiff explained why this case should be given pre-eminence over the Delaware litigation. (The court declines any implicit appeal to parochialism/provincialism.) It may be true that the defendants did not seek to stay the earlier-filed Delaware litigation, but the plaintiff has not articulated a reason why it might have been incumbent on them to have done so (without implicitly acknowledging some unknown/unidentified reason to prioritize this litigation).

Conclusion

The court is not inclined to encourage near-literal races to the courthouse steps, giving a primogeniture-quality to the first-to-be-filed case. But neither can the court ignore the fact that once a case is (or in this instance, multiple cases are) pending, some sensitivity needs to be given to the burdensome if not oppressive nature of subsequent filings in different jurisdictions—a sensitivity analogous to the prior pending action doctrine within the Connecticut court system, *Bayer v. Showmotion, Inc.*, 292 Conn. 381, 395–96 (2009).

*6 The court appreciates the possible convenience of litigation in Connecticut—but there is no reason not to believe that the already-pending cases in Delaware will proceed with or without a stay of these proceedings, and there is no reason to believe that the attendant inconvenience of lack of proximity to witnesses and evidence would be likely to motivate a Delaware court to stay seven cases in favor of this one.

The issue of derivative/parallel discovery has not been raised by the plaintiff’s objection, although identified in some of the authorities cited by the plaintiff. The court encourages the parties to discuss such an approach informally, and if a formal order is needed, the court will entertain an appropriate motion. Providing copies of discovery in the Delaware litigation to the plaintiff would seem to be likely to impose, at most, a minimal burden on the defendants, while minimizing the risks of lost time should the Delaware litigation be abandoned and the Connecticut litigation need to be restored to active status.

Accordingly, subject to the possibility of a motion for coordinated (derivative) discovery, the motion for stay of these proceedings, filed by the defendants, is granted.

All Citations

Not Reported in A.3d, 2016 WL 3202589

Footnotes

¹ There is at least a suggestion that there may be additional cases in other jurisdictions. In the application to appear pro hac vice filed on behalf of Attorney Andrew W. Hammond, # 102.00, part of the reason recited why he should be allowed to appear is that he “is currently representing CB Shine Holdings, LLC and CB Shine Merger Sub, Inc., in litigation *in*

other jurisdictions in which that merger is at issue" (emphasis added). The court does not know if the plural "jurisdictions" was intentional.

2 There also is a recitation of the likely convenience of access to witnesses.

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