2019

DAVIS COUNTY, Petitioner/Plaintiff, vs. JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC, Respondents/Defendants. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

DAVIS COUNTY, Petitioner/Plaintiff, vs. JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC, Respondents/Defendants.	**REPLY BRIEF OF PETITIONER** Supreme Court Case No. 20190487-SC District Court Case No. 180700870

Interlocutory appeal from an order of the Honorable David M. Connors
in the Second Judicial District Court

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ARGUMENT

I. THE DISTRICT COURT'S INHERENT AUTHORITY DOES NOT EXTEND TO THE TRANSFER OF VENUE IN THIS CASE.

District courts do not have unbridled inherent authority to override applicable statutes and rules. Respondents' brief fails to even address the scope of the inherent authority of district courts in this State and instead simply reiterates that district courts have some inherent authority and that there are ostensible benefits to the transfer of Davis County's case away from a proper venue. (Respondents' Brief, 11-13.)

There is no dispute that "courts maintain a certain degree of inherent power to properly discharge their duties." *W. Water, LLC v. Olds*, 2008 UT 18, ¶ 42, 184 P.3d 578. However, that inherent power is necessarily limited where a statute or rule applies. *See, e.g.*, *In re Evans*, 42 Utah 282, 130 P. 217, 224 (1913) (holding that a court's inherent powers "may, within certain limits, be abridged, and the procedure with respect to the exercise of them be regulated, by legislation"); *Chen v. Stewart*, 2004 UT 82, ¶ 50, 100 P.3d 1177 (cleaned up) (holding that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their judicial duties"); *W. Water*, 2008 UT 18 at ¶ 42 (holding that the "certain degree of inherent power [Utah courts have] to properly discharge their duties" stems from and is therefore "limited by statute or constitution").

Statutes enacted by the legislature and the rules and case law promulgated by this Court constitute the outer bounds of a court's inherent authority. Indeed, the scope of "authority is not a matter for the courts to define at our preference and whim." *Utah*

Transit Auth. v. Local 382 of Amalgamated Transit Union, 2012 UT 75, ¶ 20, 289 P.3d 582. The scope of a court's inherent authority is properly limited by statutes and rules, rather than determined by each court on an ad hoc basis. Thus the district court's ruling, relying on its inherent authority to transfer Davis County's case outside the bounds of the venue statute, is erroneous.

II. THE DISTRICT COURT'S DECISION DID NOT REST ON RULE 42.

Respondents' attempt to shoehorn the district court's ruling into a Rule 42 analysis is as perplexing as it is spurious. Respondents erroneously argue that the district court's order can be affirmed, even in the absence of inherent authority to transfer venue, because the "rules provide for an alternative source of power for the court's temporary consolidation order," specifically Rule 42 of the Utah Rules of Civil Procedure. (Respondents' Brief, 13.) Respondents' brief actually argues that, "[a]lthough it did not cite the rule directly, the district court invoked the powers granted by rule 42." (Respondents' Brief, 14.) To be clear, the district court did not invoke Rule 42 in granting the motion to transfer venue, and it explicitly denied the separate motion to consolidate brought under Rule 42. Reliance on Rule 42 cannot be inferred from the Venue Order, particularly where the only mention of the rule in that order is a statement that another court had declined to consolidate opioid cases outside of its judicial district under Rule 42. (R. 6875.) The district court explicitly set forth its reasoning and authority in its Venue Order:

> Accordingly, this Court, exercising its inherent authority to manage its cases and dockets, concludes that a limited transfer of venue for pretrial proceedings will promote the ends of justice and the efficient administration of pending cases and

> dockets. Therefore, the Court transfers the venue of pre-trial proceedings only, to Summit County in Utah's Third District Court."

(R. 6877.) The district court emphatically did not rely on Rule 42 in making its ruling to transfer venue.

Even if the Venue Order can somehow be read to implicitly rely on Rule 42, Rule 42 does not grant a district court *any* authority to transfer venue of a case, and it does not permit consolidation of any case outside of a court's geographical district. Rule 42 only allows a district court to consolidate actions that are already "pending before" it when those actions involve common questions of law or fact. *See* Utah R. Civ. P. 42(a).[1]

Under the rules of statutory interpretation, the phrase "pending before the court" in Rule 42 must be read to refer not to the level of district court in general but to individual geographical district courts. This Court interprets "court rules, like statutes and administrative rules, according to their plain language." *Burns v. Boyden*, 2006 UT 14, ¶ 19, 133 P.3d 370. This Court further has a "duty to read and interpret statutory provisions in harmony with other provisions in the same statute and with other related statutes." *State v. Jeffries*, 2009 UT 57, ¶ 9, 217 P.3d 265.

The idea that cases "pending before the court" under Rule 42 necessarily means cases pending before the same geographical district court is supported by both the plain

[1] On February 22, 2019, the Summit County district court heard arguments from Defendants in this case (and in other opioid cases) that all of the opioid cases in Utah should be consolidated under Rule 42. (Add. B, 2.) Davis County argued that the Summit County Court did not have the authority to cross the geographical district lines to consolidate all of the cases in question, including Davis County's case. This is because Rule 42 only offers this power in relation to actions that "are pending before the court." Utah R. Civ. P. 42(a).

language of the rule and by reading that phrase in harmony with the rest of the provisions of the rule. Rule 42(a)(1) states that "[t]he presiding judge may assign the case to another judge for good cause." Utah R. Civ. P. 42(a)(1). This reference to a presiding judge only makes sense if the rule is referring to the geographical district courts. A presiding judge is assigned to preside over each geographical district court within Utah. *See* Utah Code Ann. § 78A-5-106. The presiding judge in one judicial district does not have the authority to assign cases from its district to a judge outside of its district, nor does the presiding judge have the authority to reach outside of its district to take cases away from another judicial district. Thus, Rule 42, under its plain meaning and to give meaning to the rest of its provisions, necessarily refers to individual geographic district courts when it refers to cases "pending before the court."

Respondents' arguments to the contrary are not well taken. First, there is no support either in the rule itself or in case law for the idea that Rule 42 implicitly allows a court to transfer a case away rather than consolidate cases before it. Second, harmonizing rules and statutes related to transferring and consolidating cases indicates that Rule 42 is limited to cases before the same geographical district. Respondents argue that the judicial districts in the state of Utah "are best understood as administrative boundaries that carry no substantive weight" and that the "district lines do not segregate the district court into individual district courts distinct from one another." However, this is an untenable interpretation of the geographical divisions of the district courts in Utah, under both Rule 42 and other Utah law. Section 78A-5-101 of the Utah Code distinguishes between "the district court," which "is a trial court of general jurisdiction," and "a district court,"

which "shall be located in the county seat of each county." Utah Code Ann. § 78A-5-101(1), (4). Further, the Utah Constitution provides that "[g]eographic divisions for all courts of record except the Supreme Court may be provided by statute." Utah Const. art VIII, § 6; *see also* Utah Code Ann. § 78A-1-102 ("The district and juvenile courts shall be divided into eight geographical divisions.") It would be nonsensical and superfluous to assume that the geographical divisions of the courts of the state of Utah carry no substantive weight when both rules and statutes rely on those geographical divisions.

Because the language of Rule 42(a) is plain on its face, there is very little Utah case law interpreting the rule and virtually none directly on point. In fact, Davis County has been unable to find a case in Utah based on Rule 42(a) where cases pending in different jurisdictions were involuntarily consolidated in a different district from where the plaintiff originally filed. There is, however, some relevant federal case law. Indeed, it is well-settled that Utah Rule 42(a) was patterned after Federal Rule 42(a).[2] "Because the Utah Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, where there is little Utah law interpreting a specific rule, we may [also] look to the

[2] In fact, prior to December 1, 2007, the portions of Utah Rule 42(a) and Federal Rule 42(a) at issue were identical. The pertinent part of both rules read as follows: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Fed. R. Civ. P. 42(a) (eff. July 1, 1966); Utah R. Civ. P. 42(a) (eff. Nov. 1, 2003 (current)). Although Federal Rule 42(a) was subsequently amended on December 1, 2007, "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules.[,]" these changes were "intended to be stylistic only." *See* Notes of Advisory Committee on 2007 Amendments, Fed. R. Civ. P. 42. Therefore, for all intents and purposes, the pertinent parts of Utah Rule 42(a) and Federal Rule 42(a) are identical.

Federal Rules of Civil Procedure for guidance." *2010-1 RADC/CADC Venture, LLC v. Dos Lagos, LLC*, 2017 UT 29, ¶ 18 n.4, 408 P.3d 313 (internal citations omitted).

Federal Rule 42(a), like Utah Rule 42(a), allows a district judge to order consolidation of actions "before the court" that "involve a common question of law or fact." Fed. R. Civ. P. 42(a). The federal rule has been consistently construed to prohibit consolidation of actions not pending before the same court, in other words pending in different geographical districts,[3] even within the same state.[4] The United States District Court for the District of Utah reached the same result. *Calder v. Blitz U.S.A., Inc*., No. 2:07-CV-387-TC-PMW, 2010 WL 2639971, at *4, 2010 U.S. Dist. LEXIS 63934, at

[3] *See, e.g., Swindell-Dressler Corporation v. Dumbauld,* 308 F.2d 267, 273 (3rd Cir. 1962) ("a cause of action pending in one jurisdiction cannot be consolidated with a cause of action pending in another jurisdiction. [Rule 42(a)] will not permit such a course. The cases to be consolidated must be 'pending before the court.'"); *Oregon Egg Producers v. Andrew,* 458 F.2d 382, 383 (9th Cir. 1972) ("Rule 42 applies to cases that are properly before the same court. Because this case is not properly before the district court in Washington, Rule 42 cannot be invoked."); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 47 (2d Cir. 1961) ("Rule 42(a) of the Federal Rules of Civil Procedure provides for consolidation only where the two actions 'are pending before the court.' By no stretch of the imagination can the Alabama action be considered as now pending before the New York court[.]"); *Silver v. Goodman*, 234 F. Supp. 415 (D. Conn. 1964) ("Rule 42(a) pertains only to the consolidation of actions pending before the same court; it does not authorize transfer of a cause to a different district for consolidation with a case pending in the transferee court."); *Cummings v. ConGlobal Indus., Inc.*, No. 07-CV-409-TCK-SAJ, 2008 WL 656000, at *2, 2008 U.S. Dist. LEXIS 17634, at *4-8 (N.D. Okla. Mar. 6, 2008) (affirming sanctions for failing to identify valid legal basis to support Motion to Consolidate as even a "cursory review of the plain language of Rule 42(a) indicate[s] that both cases must be pending before the *same* court in order for consolidation to be proper" and "relevant authority discussing Rule 42(a) also makes this point clear.").

[4] *Espanol v. Avis Budget Car Rental, LLC,* No. 8:10-CV-944-T-35-AEP, 2012 WL 12902912, at *1-2, 2012 U.S. Dist. LEXIS 195970, at *4-5 (M.D. Fla. Oct. 12, 2012) (holding that the court lacked authority under Rule 42(a) to consolidate cases pending in other district courts, including another district court within the same state).

*10-11 (D. Utah June 28, 2010) (holding that an action pending in federal district court in Utah could not be consolidated with an action before federal district court in Texas).[5] In addition, other state courts interpreting language similar to Utah's Rule 42(a) have reached the same conclusion.[6]

When faced with this same evidence related to the limits of Rule 42, both the Third District Court and the Second District Court declined to use Rule 42 to consolidate cases outside of their own geographical district boundaries. The Summit County court declined to "use an untested interpretation of Rule 42 to consolidate matters pending in other judicial districts" and consolidated only those opioid cases pending in the Third Judicial District. (Add. B, 4-6.) The Davis County district court in this case cited the Summit County ruling and stated that "it is not appropriate for this Court to consider taking a position that would be inconsistent with the position already taken in the Summit County case on the issue of consolidation of cases from outside the Third District." (R. 6875, 6877.)

In sum, Respondents' argument on Rule 42 relies on unfounded conjecture that the district court relied on Rule 42 in transferring Davis County's case. The district court

[5] All unreported cases cited in this brief are attached hereto in Addendum D.

[6] *See, e.g.*, *Figg & Muller Engineers, Inc. v. Petruska*, 477 N.E.2d 968, 970-971 (Ind. App. 1985) (affirming trial court ruling that Rule 42 did not authorize consolidation of cases pending in two different counties and holding "the plain language of Trial Rule 42(A) authorizes only consolidation of actions pending before the court, it does not authorize transfer of actions from one court's jurisdiction to that of another for consolidation"); *Kindred v. State*, 540 N.E.2d 1161, 1168 (Ind. 1989), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007) (acknowledging the holding of the Indiana Court of Appeals in *Figg & Muller Engineers, Inc.* and stating "[w]e see no basis to disturb that holding as it comports with the plain language of the statute[.]").

unquestionably did not rely on Rule 42, and any parsing of that rule need not be undertaken. But, as the foregoing analysis demonstrates, Rule 42 does not get Respondents anywhere. Rule 42 as written and as interpreted only permits courts to consolidate cases pending before it in its own geographical judicial district and does not permit a court to unilaterally transfer cases to courts outside its judicial district.

III. THE UTAH CHANGE OF VENUE STATUTE IS VALID AND PROHIBITS THE TRANSFER MADE IN THIS CASE.

Respondents' attempt to distract this Court with speculative constitutional arguments is unavailing.

First, as Respondents note, this Court must "avoid addressing a constitutional issue unless required to do so," particularly where, as here, "the case can be decided on the preferred grounds of statutory construction." *State v. Wood*, 648 P.2d 71, 82 (Utah 1982). Notably, Respondents shy away from the venue statute itself, and indeed invite this Court to "put[] aside the text of the statute." (Respondents' Brief, 18.) This is because the venue statute prohibits the transfer of venue of Davis County's case to Summit County. The governing rules of statutory construction provide that this Court must start with "the plain language of the statute itself" and "presume that the expression of one term should be interpreted as the exclusion of another." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863. The plain language of the change of venue statute allows a transfer for trial where one of four grounds applies. Utah Code Ann. § 78B-3-309. The statute, on its face, does not permit a transfer for pretrial discovery alone; a case transferred under the statute is transferred for all further

proceedings, up to and including trial. In Davis County's case there is not even a colorable argument that one of the four grounds apply, and, under the rules of statutory interpretation, the venue statute must be read to prohibit the transfer for pretrial proceedings. (*See* Petitioner's Brief, § I.)

Second, the venue statute does not present a separation of powers issue. It is clear that the current provisions of Utah's constitution grant this Court, the Utah Supreme Court, the power to make rules of procedure and evidence:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

Utah Const. art VIII, § 4. This grant of power, however, is not exclusive. The constitution also grants the legislature the ability to make those same rules, as long as it does so with a two-thirds majority in both houses. Respondents acknowledge this legislative power to enact venue provisions. (Respondents' Brief, p. 22; r. 7126.) But Respondents then erroneously conflate the power of this Court with that of a district court. The constitution grants a district court no powers of rulemaking, procedural or otherwise. It is only the Utah Supreme Court that has rulemaking authority.

This Court, ostensibly vested with the power of making venue rules for the last thirty-five years, has not implemented venue rules. Instead, it has allowed the legislature to continue to enact those rules as it has done for over one hundred years. Not only has this Court not implemented venue rules under its procedural rulemaking authority, it has continually interpreted and enforced the venue statutes. There is zero evidence that *Hale*

v. Barker or other pre-1984 cases interpreting the change of venue statute were relying on the constitution to do so or were in any way abrogated by the 1984 constitutional changes. In fact, Respondents acknowledge that the *Hale* case does not reference the constitution at all and provide no citation to any change of venue case that does so. *See Hale v. Barker*, 70 Utah 284, 259 P. 928, 931 (1927). Even after the 1984 constitutional change, this Court and other Utah courts continued to interpret and enforce the change of venue statute. *See, e.g.*, *Butterfield v. Sevier Valley Hosp.*, 2010 UT App 357, ¶ 13, 246 P.3d 120; *Mallory v. Brigham Young Univ.*, 2012 UT App 242, ¶ 40, 285 P.3d 1230, *rev'd on other grounds*, 2014 UT 27, 332 P.3d 922; *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 53, 233 P.3d 461.

This Court's continued reliance on the venue statutes is not misplaced, as the venue statutes are constitutional. As noted above, the legislature can make procedural rules, provided it does it by a two-thirds vote. Utah Const. art VIII, § 4. This new constitutional requirement was obviously not in effect when the original venue statute was implemented over one hundred years ago.[7] However, a simple perusal of the legislative history of the venue statutes reveals that the change of venue statute has been reenacted by the legislature at least twice since 1984. In 2004, the change of venue

[7] It is interesting to note, though, that the predecessor of the current change of venue statute was passed in 1901 via a unanimous vote in both houses (senate: 10 ayes, 0 nays, 8 absent and not voting; house: 40 ayes, 0 nays, 5 absent and not voting). *See* H.B. 42, 1901 Leg., 4th Reg. Sess. (Utah 1901); *see also* 1901 Utah Laws Ch. 23, § 2934. The venue statute was revised again in 1913 via a unanimous vote in both houses (senate: 14 ayes, 0 nays, 4 absent and not voting; house: 37 ayes, 0 nays, 7 absent and not voting). *See* H.B. 180, 1931 Leg., 10th Reg. Sess. (Utah 1913); *see also* 1913 Utah Laws Ch. 55, § 2934.

statute, then located at Utah Code 78-13-9, was part of Senate Bill 118, which passed both the senate and the house by a unanimous vote.[8] The most recent enactment of the change of venue statute occurred in 2008. The statute, moved to its current location at Utah Code 78B-3-309, was part of House Bill 78, which again passed both the house and the senate by a unanimous vote.[9] Accordingly, there is no separation of powers issue, and the venue statute is applicable and enforceable in this case.

The fact remains that this Court could, in the future and subject to the rulemaking process, enact its own set of venue rules (or even a multi-district litigation rule). However, this Court has not yet chosen to do so, and district courts cannot do so. The district court's transfer in this case therefore ignores the plain language of the venue statute, exceeds the scope of its inherent authority, and, if it is an attempt to make its own venue rule, violates the Utah Constitution.

IV. THE TRANSFER AND CONSOLIDATION OF THIS CASE WITH OTHER OPIOID CASES IN SUMMIT COUNTY WOULD NOT ACHIEVE THE JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF THIS ACTION.

Both the trial court and Respondents assume that the supposed benefits of efficiency accompanying a transfer of venue in this case are a foregone conclusion. (*See* R. 6876; *see also* Respondents' Brief, 13.) However, the idea that there will be efficiency in transferring and consolidating this case with other opioid cases in the Third District

[8] The official vote tally in the senate was 28 yeas, 0 nays, and 1 absent. The official vote tally in the house was 68 yeas, 0 nays, and 7 absent or not voting. *See* S.B. 118, 2004 Gen. Sess. (Utah 2004).

[9] The official vote tally in the house was 69 yeas, 0 nays, and 6 absent or not voting. The official vote tally in the senate was 27 yeas, 0 nays, and 2 absent. *See* H.B. 78, 2008 Gen. Sess. (Utah 2008).

Court is a mirage.

A close examination of the realities of the situation paint a more realistic picture of what consolidation would actually look like.[10] There are currently over 50 defendants in Davis County's case alone, most of which have both a set of local counsel and national counsel. A transfer of this case would bring those defendants, Davis County, and their respective counsel into a morass of other similar, but distinct, opioid cases with a host of additional different defendants, each with their own local and national counsel, along with many other county plaintiffs, each with their own sets of counsel. Each county plaintiff has its own causes of action asserted against many varying and different defendants, and each has its own procedural strategy and idea as to how to move its own case forward. Any movement forward is and will be greatly inhibited by the consolidation of literally hundreds of opinions.

For example, at the hearing on the motion to transfer venue in this case alone, there were many different and contradictory positions just among the Defendants who addressed the trial court. These positions included but were not limited to (1) the Respondents wanting the case to be transferred to Summit County for pretrial

[10] In their Statement of the Case, Respondents argue that transfers and consolidations have been a common occurrence and that "courts in numerous states—Arkansas, California, Illinois, Massachusetts, New York, Pennsylvania, South Carolina, Texas, Utah, and West Virginia—have coordinated the opioid lawsuits filed in different courts throughout those states." (Respondents' Brief, 7.) However, the state of affairs in Utah is entirely different from each of these states. According to Davis County's research, each of the states listed by Respondent either has a state multi-district litigation procedure by which the opioid cases were consolidated or the parties in the cases agreed to consolidation. Utah does not have a multi-district litigation procedure, and Davis County does not agree to a transfer or consolidation in this case.

proceedings (r. 7123-24); (2) the Allergan Defendants wanting the case to stay in Davis County but to be consolidated with the other counties represented by Davis County's counsel (r. 7146-48); (3) the Mallinckrodt Defendants filing non-oppositions to both the motion to change venue and the motion to consolidate but deciding at the hearing that it actually agreed with Respondents as to the transfer (r. 7170-76); and (4) the Endo Defendants wanting the case to be consolidated for pretrial proceedings in Davis County, to not be transferred, and to reserve the right to consolidate the cases for trial at a later date (r. 7176-77).

Transfer (and the ultimate consolidation) would also prejudice Davis County if it is based on the false premise that consolidation will prevent inconsistent rulings or prevent duplicative discovery. Both of those ships have already sailed. The opioid industry is facing thousands of lawsuits, including in every state in the nation, some of which were filed years ago. There are already disparate decisions on substantively similar motions, including motions to dismiss. As a result, there are already inconsistent rulings taking place throughout the country, which of course happens in courts in Utah and across the county every day. These differences are as likely to be due to the individual claims and allegations made in those complaints and motions as they are to the inconsistent application of law. Either way, the inconsistencies exist and the transfer and consolidation of this case will not change that fact. Further, "any inconsistent rulings . . . can be resolved on appeal." *In re: LVNV Funding, LLC, Time-Barred Proof of Claim Fair Debt Collection Practices Act (FDCPA) Litig.*, 96 F. Supp. 3d 1376, 1377 (U.S. Jud. Pan. Mult. Lit. 2015); *see also Exxon Mobil Corp. v. Falcon*, No. CIV.A. 12-454, 2012

WL 630048, at *4 (E.D. La. Feb. 27, 2012) (observing that the "risk of inconsistent rulings" is "inherent in the nature of our judicial system" and "why we have appellate courts as well as doctrines such as *res judicata*"). Inconsistent rulings may actually provide different perspectives to appellate courts.

In addition, both Respondents and the other Defendants in this case are already addressing various discovery issues throughout the country. As part of that discovery, Defendants are dealing with many different depositions (and other discovery) that each party in each different jurisdiction has a right to take. The Defendants in this case have already completed substantial document productions in federal MDL proceedings and in cases pending outside the MDL, and they have reproduced those documents (or agreed to produce them) in other cases precisely to avoid duplicating efforts. Further, Davis County has been willing to actively work with Respondents and Defendants to avoid duplicative discovery while protecting Davis County's right to conduct its own discovery where appropriate. Thus, Respondents and each of the other Defendants in this case are already addressing discovery issues throughout the country, and the transfer and consolidation of this case will not change that fact, nor will it necessarily help resolve those issues any more efficiently going forward within the consolidated case in Utah.

It is a farce to argue that the transfer of this case and the consolidation of all of these parties, attorneys, and positions will result in the just, speedy, and inexpensive determination of this action. The consolidation in the Third District has already slowed each of the individual cases down considerably, and joining Davis County will significantly prejudice Davis County. If Davis County is left to try its own case in its own

jurisdiction, it will be free to move its case forward expeditiously, and achieve "the just, speedy, and inexpensive determination of [this] action." Utah R. Civ. P. 1.

CONCLUSION

Therefore, Davis County respectfully requests that this Court reverse the order of the district court and remand this case to the Second Judicial District Court for all proceedings.

RESPECTFULLY SUBMITTED this 27th day of September 2019.

DURHAM JONES & PINEGAR

/s/ Douglas B. Thayer
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 15 pages, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the non-public information requirements of Utah R. App. P. 21(g).

DATED this 27th day of September 2019.

DURHAM JONES & PINEGAR

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CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of September 2019, an electronic copy of the foregoing Reply Brief of Petitioner was sent and that, within 7 days after filing by email, two paper copies of the foregoing Reply Brief of Petitioner will be sent to the following:

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Addendum D

Cummings v. ConGlobal Indus., Inc., No. 07-CV-409-TCK-SAJ, 2008 WL 656000, 2008 U.S. Dist. LEXIS 17634 (N.D. Okla. Mar. 6, 2008)

Espanol v. Avis Budget Car Rental, LLC, No. 8:10-CV-944-T-35-AEP, 2012 WL 12902912, 2012 U.S. Dist. LEXIS 195970 (M.D. Fla. Oct. 12, 2012)

Calder v. Blitz U.S.A., Inc., No. 2:07-CV-387-TC-PMW, 2010 WL 2639971, 2010 U.S. Dist. LEXIS 63934 (D. Utah June 28, 2010)

Exxon Mobil Corp. v. Falcon, No. CIV.A. 12-454, 2012 WL 630048 (E.D. La. Feb. 27, 2012)

2008 WL 656000
Only the Westlaw citation is currently available.
United States District Court,
N.D. Oklahoma.

Cecil R. CUMMINGS, Cathy Cummings, Plaintiffs,
v.
CONGLOBAL INDUSTRIES, INC., a Delaware Corporation, and Conglobal Industries Holding, Inc., a Delaware Corporation, Defendants.

No. 07-CV-409-TCK-SAJ.
|
March 6, 2008.

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OPINION AND ORDER

TERENCE KERN, District Judge.

***1** On November 8, 2007, this Court issued an Order denying Defendants' Motion to Consolidate and Transfer ("Motion"). *(See* Motion, Doc. 10; Order, Doc. 21.) In said Order, the Court found that counsel for Defendants, Secrest, Hill & Butler ("Secrest Hill"), potentially violated Federal Rule of Civil Procedure 11(b)(2) [1] in connection with the Motion. Specifically, the Court provided Secrest Hill with notice that the following specific conduct "appear[ed] to violate" Rule 1 1(b)(2):

1. Secrest Hill's failure to select and clearly identify a specific procedural basis or procedural bases for the Motion;

2. Secrest Hill's failure to cite any procedural rule or case law in the Motion;

3. Secrest Hill's failure to conduct an "inquiry reasonable under the circumstances" as to whether Rule 42(a) allowed consolidation of a federal case with a case pending in state court; and

4. Secrest Hill's overall failure to show that its legal contentions were "warranted by existing law."

The Court therefore ordered Secrest Hill to show cause why it had not violated Rule 11(b)(2) and why it should not be sanctioned accordingly. Secrest Hill thereafter filed its Show of Cause Why it Did Not Violate Rule 1 1(b)(2) *(see* Doc. 22).

"[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus ... streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corp .,* 496 U.S. 384, 393 (1990). It accomplishes this purpose, in part, by imposing upon attorneys an affirmative duty to conduct some prefiling inquiry into the facts and law. *See* Fed.R.Civ.P. 11(b). In deciding whether to impose Rule 11 sanctions, the Court must apply an objective standard and determine whether a reasonable and competent attorney would believe in the merit of the argument presented. *See Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.,* 935 F.2d 1152, 1155 (10th Cir.1991).

Applying this standard, the Court finds that sanctions are appropriate in the instant case. As noted in the Court's Order, Secrest Hill's Motion failed to identify *any* legal or procedural basis supporting the contentions therein, forcing the Court and Plaintiffs to speculate as to the basis for the Motion and to conduct research that should have been completed by Secrest Hill prior to filing the Motion. Although it is true that in order to comply with Rule 11, an attorney need not provide an absolute guarantee of the correctness of the legal theory that is advanced, the attorney is required to conduct a reasonable inquiry into relevant law in order to comport with Rule 11. *See Smith v. Our Lady of the Lake Hosp., Inc.,* 960 F.2d 439, 444 (5th Cir.1992). Secrest Hill's failure to provide any legal basis for its Motion suggests that no inquiry was conducted prior to filing the Motion. *See Hartz v. Friedman,* 919 F.2d 469, 475 (7th Cir.1990) (imposing Rule 11 sanctions on attorney when it appeared that "counsel neglected to make reasonable inquiry into the law before filing"). Had a reasonable inquiry been conducted, it follows that the Motion would have included some sort of legal basis-whether that basis be in the form of existing law, the extension, modification, or reversal or existing law, or in the establishment of new law. *See* Fed.R.Civ.P. 11(b)(2).

***2** Moreover, after Plaintiffs noted in their response brief that the Motion failed to include citation to "any Federal Rule of Civil Procedure or precedent" (*see* Pls.' Resp. to Mot. 4), Secrest Hill's only legal citation in its reply brief was to

Federal Rule of Civil Procedure 42(a). Rule 42(a) authorizes consolidation "[w]hen actions involving a common question of law or fact *are pending before the court."* (emphasis added). Not only does a cursory review of the plain language of Rule 42(a) indicate that both cases must be pending before the *same* court in order for consolidation to be proper, but relevant authority discussing Rule 42(a) also makes this point clear. *See United States v. Brandt Constr.Co.,* 826 F.2d 643, 647 (7th Cir.1987) (holding that federal case could not be consolidated with improperly removed state case because state case was not "pending before the court"); *Mourik Int'l B.V. v. Reactor Serv. Int'l, Inc.,* 182 F.Supp.2d 599, 602 (S.D.Tex.2002) (same); *see also Glencore Ltd. v. Schnitzer Steel Products Co.,* 189 F.3d 264, 267 (2d Cir.1999) (holding that court erred in relying on Rule 42(a) to authorize a joint hearing on two arbitration proceedings because the arbitration proceedings were not actions "pending before the court"); *Williams v. City of New York,* No. 03 Civ. 5342, 2006 WL 399456, at *1 n. 1 (S.D.N.Y. Feb. 21, 2006) (denying motion to consolidate cases pending in different federal judicial districts because it was "not possible for the Court to consolidate the Southern District [of New York] action with any other action" that was not pending before it); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 n. 1 (2d ed.1995) (collecting cases). Accordingly, Rule 42(a) does not support the relief requested in the Motion. Had Secrest Hill undertaken a reasonable inquiry, as required under Rule 11(b)(2), it would have come across such authority and discovered that Rule 42(a) was not a possible basis for the Motion. *See Murphy v. Cuomo,* 913 F.Supp. 671, 683 (N.D.N.Y.1996) (finding sanctions appropriate when "a mere cursory review of the applicable caselaw by plaintiff's counsel would have revealed" the fact that plaintiff's claim had no legal viability); *Watson v. City of Salem,* 934 F.Supp. 643, 664-66 (D.N.J.1995) (imposing sanctions for failure to conduct reasonable inquiry into the law after noting that a simple review of a relevant case would have revealed that plaintiff's position was legally untenable). [2]

Having found that sanctions are appropriate under Rule 11(b)(2), the Court must next determine what sanction is appropriate under Rule 11(c)(3). *See* Fed.R.Civ.P. 11(c)(3) (stating "[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation") In the instant case, the Court finds that Secrest Hill's failure to make a reasonable inquiry into the legal basis for its Motion resulted in an unnecessary expenditure of resources by both this Court and Plaintiffs. The Court therefore finds it appropriate to award sanctions to Plaintiffs for the reasonable costs and attorney's fees incurred in conjunction with preparing their response brief to the Motion.

***3** The issue regarding the amount of costs and fees to be awarded to Plaintiffs is REFERRED to Magistrate Joyner for resolution.

ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 656000

Footnotes

1 Rule 11(b)(2) states that in presenting a written motion to the court, an attorney certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that] the claims, defenses, or other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

2 In its response to the Court's Order, Secrest Hill argues that its Motion was "warranted by existing law" because *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) states that federal courts have a "virtually unflagging obligation" to exercise jurisdiction. *Id.* at 819. According to Secrest, the use of the word "virtually" saves their motion from being legally frivolous because it "turns ConGlobal's Motion from sanctionable to merely unlikely to succeed." (Defs.' Show of Cause Why it Did Not Violate Rule 11(b)(2) 4.) However, for the purposes of determining whether sanctions are appropriate for failure to make a reasonable inquiry into the applicable law, Secrest Hill's argument is of little assistance because Secrest Hill did not make any argument with regard to the *Colorado River* doctrine in its Motion or in its reply brief. Rather, this doctrine was raised by Plaintiffs. As stated above, the notable absence of *any*

legal authority in the Motion, coupled with the sole citation to Rule 42(a) in Defendant's reply brief, demonstrates that Secrest Hill did not make a reasonable inquiry into applicable law.

Secrest Hill also advances *United States v. Stringfellow,* 911 F.2d 225, 226 (9th Cir.1990), for the proposition that its failure to cite relevant authority does not justify the imposition of sanctions. While *Stringfellow* does indeed make such a statement, the situation presented in *Stringfellow* differs from the instant case in that there was at least *some* citation to controlling legal authority in the challenged filing in *Stringfellow,* and the court was faced with deciding whether failure to cite to potentially contrary authority rendered sanctions appropriate. *See* 911 F.2d at 226.

End of Document

2012 WL 12902912
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Bernar ESPANOL, on behalf of himself and others who are similarly situated and consent to their inclusion, [1] Plaintiff,
v.
AVIS BUDGET CAR RENTAL, LLC and Budget Rent a Car Systems, Inc., Defendants.

Case No.: 8:10–cv–944–T–35–AEP
|
Signed 10/12/2012

Attorneys and Law Firms

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ORDER

MARY S. SCRIVEN, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** comes before the Court for consideration of Plaintiffs' Motion to Transfer and Otherwise Consolidate Related Cases Before this Court (the "Motion") (Dkt. 227) and Defendants' Response in Opposition. (Dkt. 228) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court hereby **DENIES** Plaintiffs' Motion (Dkt. 227), as described herein.

Pursuant to 28 U.S.C. § 1404(a) and Fed. R. Civ. P. 42(a), Plaintiff moves this Court to transfer and consolidate McWilliams v. Avis Budget Car Rental, LLC, No. 1:12–cv–21481–JAL (S.D. Fla.) and Tetreault v. Avis Budget Car Rental, LLC, No. 2:12–cv–13692–NGE (E.D. Mich.) with this action. Plaintiffs contend consolidation is appropriate because common issues of law and fact exist, the parties are represented by the same counsel and it would avoid unnecessary costs and delays. Further, Plaintiffs contend consolidation is proper because venue in the Middle District of Florida is proper for the cases sought to be transferred.

Defendants argue that 28 U.S.C. § 1404(a) and Fed. R. Civ. P. 42 do not provide this Court with authority to transfer a case from another district to this Court. Defendants assert that 28 U.S.C. § 1404(a) only gives a district court the power to transfer an action to another court and does not grant the district court authority to "force another district court to relinquish a case." (Dkt. 228 at 3) Moreover, Defendants argue that Rule 42(a) of the Federal Rules of Civil Procedure grants a district court the authority to manage its own docket and "does not give one trial court the authority to control another trial court's docket, and by its plain language, it does not pertain to any action that is not presently 'before the Court.' " (Id. at 4) Defendants assert that Plaintiff's motion should be denied with prejudice and Plaintiffs' counsel should bear the fees and costs "occasioned by this motion." (Id.)

28 U.S.C. § 1404(a) provides

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

28 U.S.C. § 1404(a) (2011). Following the plain language of 28 U.S.C. § 1404(a), district courts have found that "[o]nly a district court where an action is pending ... can order a change of venue." Machulas v. U.S. Air Force, No. CV406–268, 2007 WL 781730, at * 1 (S.D. Ga. March 12, 2007); see, e.g. National Equip. Rental, Ltd. v. Fowler, 287 F.2d 43, 46–47 (2nd Cir. 1961) ("It seems clear that this language [in 28 U.S.C. § 1404(a)] presupposes that the action to be transferred is pending in the transferor court. The administration of justice would be chaotic indeed if one district court could order another to divest itself of jurisdiction and to transfer a case properly before it."); Republic Precious Metals, Inc. v. Republic Precious Metals Corp., 575 F. Supp. 1256, 1258 (D. Minn. 1984) (28 U.S.C. § 1404(a) "does not give a

district court power to transfer a case commenced in another jurisdiction."). Plaintiffs cite no case law to the contrary.

***2** Here, the McWilliams and Tetreault cases are not pending in the Middle District of Florida or before this Court. Therefore, this Court finds that it lacks the authority to transfer these cases to this district.

Moreover, the Court does not have the authority to consolidate the cases with this action. Rule 42(a) of the Federal Rules of Civil Procedure provides

> If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a) (emphasis added). Because the McWilliams and Tetreault cases are not pending before this Court, this Court cannot consolidate those cases with this action. See 9A Wright & Miller, Federal Practice and Procedure § 2382 (3d Ed. 2012)("Actions pending in different districts may not be consolidated under Rule 42(a)."); Swindell–Dressler Corp v. Dumbauld, 308 F.2d 267, 273 (3rd Cir. 1962)("And finally, we are of the view that a cause of action pending in one jurisdiction cannot be consolidated with a cause of action pending in another jurisdiction.").

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiffs' Motion to Transfer and Otherwise Consolidate Related Cases Before this Court (Dkt. 227) is **DENIED.**

2. Plaintiffs are directed to file within **fourteen (14) days** from the date of this Order a response to Defendants' request for attorneys' fees and costs associated with this Motion and show cause why Defendants' request for sanctions should not be imposed for filing a facially meritless motion. Plaintiffs' response shall be no more than five (5) pages. If fees are ordered, the Court will set a separate schedule for proving the amount of fees that are warranted.

DONE and **ORDERED** in Tampa, Florida, on this 12th day of October 2012.

All Citations

Not Reported in Fed. Supp., 2012 WL 12902912

Footnotes

1 Over 100 people have filed their consent to join this action since the commencement of this case. The Court will therefore refer to Bernar Espanol and the other people collectively as "Plaintiffs" in this Order.

2010 WL 2639971
Only the Westlaw citation is currently available.
United States District Court, D. Utah, Central Division.

David CALDER, individually, and as father and guardian of HMP, a deceased minor, Plaintiff,
v.
BLITZ U.S.A., INC., Defendant.

No. 2:07–cv–387–TC–PMW.
|
June 28, 2010.

Attorneys and Law Firms

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MEMORANDUM DECISION AND ORDER

PAUL M. WARNER, United States Magistrate Judge.

***1** Chief District Judge Tena Campbell referred this case to Magistrate Judge Paul M. Warner pursuant to 28 U.S.C. § 636(b)(1)(A) . [1] Before the court are (1) David Calder's ("Plaintiff") motion to compel; [2] (2) Plaintiff's motion for terminating sanctions against Blitz U.S.A., Inc. ("Blitz"); [3] (3) Blitz's motion for leave to file a sur-reply on Plaintiff's motion for terminating sanctions; [4] and (4) Blitz's motion for leave to file certain notices under seal. [5] Pursuant to civil rule 7–1(f) of the Rules of Practice for the United States District Court for the District of Utah, the court has concluded that oral argument is not necessary and will determine the motions on the basis of the written memoranda. *See* DUCivR 7–1(f). The court will address the motions in turn.

I. Plaintiff's Motion to Compel

In his original motion, Plaintiff sought an order compelling Blitz to respond to Interrogatory Nos. 3, 20, and 21 from Plaintiff's First Set of Interrogatories. Subsequently, Plaintiff filed a motion to withdraw his motion with respect to Interrogatory No. 20, [6] which the court granted. [7] Consequently, Plaintiff's motion now seeks compelled responses to only Interrogatory Nos. 3 and 21.

Interrogatory No. 3 asked Blitz to

> [i]dentify each and every engineer and/or engineering firm or consultant, supplier or other entity, who has met with your company or any of its employees or representatives and discussed flammability of gas vapors or flame arresters or other detonation suppression methods for portable plastic gasoline containers or metal gasoline containers from 1981 to the present. [8]

Blitz originally responded by providing multiple general objections along with a substantive response. [9] Blitz supplemented its response by referring to its response to Plaintiff's Request for Production No. 4, which sought documents related to the same general subject matter covered by Interrogatory No. 3. Blitz's response to Request for Production No. 4 identified multiple documents by Bates numbers.

Interrogatory No. 21 asked Blitz to

> [i]dentify each and every non-Blitz engineer, engineering company, research facility, manufacturing company, consultant or third party entity that has met with or corresponded with your company representative(s) regarding flame arresters. [10]

Blitz responded by providing the same general objections it provided in response to Interrogatory No. 3, along with an additional objection about the use of the phrase "flame arresters." [11] After providing those objections, Blitz provided a substantive response. [12] While Blitz did identify several specific entities it had contacted, it also indicated that it had contact with unspecified "others." [13] In addition, and presumably based on its objection to the use of the phrase "flame arresters," Blitz's substantive response indicated that its response was limited to those entities it had contact with concerning "the manufacture of gasoline containers." [14]

***2** In support of his motion to compel, Plaintiff argues that Blitz's response to Interrogatory No. 3 is inadequate because it fails to include individuals or entities that one of its corporate representatives identified during a deposition and fails to meet the requirements of rule 33(d) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 33(d). Plaintiff also argues that Blitz's response to Interrogatory No. 21 is inadequate because it fails to identify the "others" referenced in the response and unilaterally changes the subject matter of the interrogatory from "flame arresters" to "gasoline containers." Finally, Plaintiff argues that Blitz's general objections are without merit and asks the court to conclude that Blitz has waived certain privileges. The court will address those arguments in turn.

Interrogatory No. 3

Plaintiff makes a one-sentence argument that Blitz's response is inadequate because it fails to include individuals or entities that one of its corporate representatives identified during a deposition. In support of that argument, Plaintiff references Exhibit L of his supporting memorandum, which consists of two pages of deposition testimony. After reviewing those two pages, the court is unable to find any individuals or entities identified in the testimony that should have been included in response to Interrogatory No. 3.

Plaintiff also argues that Blitz's reference to its response to Request for Production No. 4 is inadequate because it fails to meet the specificity requirement of rule 33(d). *See id.* (allowing a party to specify business records as a response to an interrogatory provided that "the burden of deriving or ascertaining the answer will be substantially the same for either party" and that the party "specif[ies] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could"). Plaintiff's argument is without merit. As indicated earlier, Blitz's response to Request for Production No. 4, Blitz identified multiple documents by Bates number. Plaintiff has failed to persuade the court that such identification fails to meet the specificity requirement of rule 33(d).

Plaintiff has failed to persuade the court that Blitz's response to Interrogatory No. 3 is inadequate. Accordingly, this portion of Plaintiff's motion is denied.

Interrogatory No. 21

Plaintiff argues that Blitz's response to Interrogatory No. 21 is inadequate because it fails to identify the "others" referenced in the response. The court agrees. To the extent that the unspecified "others" exist, Blitz should be required to specifically identify them. *See* Fed.R.Civ.P. 33(b)(3) ("Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.").

Plaintiff also argues that Blitz's response to this interrogatory is inadequate because it unilaterally changes the subject matter of the interrogatory from "flame arresters" to "gasoline containers." Again, the court agrees. While the court recognizes that Blitz did lodge an objection to the use of the phrase "flame arrester" with respect to Interrogatory No. 21, the same phrase was used in Interrogatory No. 3, and Blitz did not object to its use there.

***3** For these reasons, the court has determined that Blitz's response to Interrogatory No. 21 is inadequate. Therefore, this portion of Plaintiff's motion is granted. Within thirty (30) days of the date of this order, Blitz shall provide a full response to Interrogatory No. 21. To the extent that unspecified "others" do exist, Blitz shall identify them in its updated response. If no such "others" exist, Blitz shall provide Plaintiff with a sworn declaration to that effect. In addition, Blitz's updated response shall respond to the subject matter identified in Interrogatory No. 21 (i.e., "flame arresters").

General Objections and Waiver of Privileges

Even though Blitz provided substantive responses to both Interrogatory Nos. 3 and 21, Plaintiff also presents arguments with respect to the general objections Blitz included in its

responses to those interrogatories. The court has determined that it is unnecessary to address the merits of those arguments and objections. In the court's experience, it is commonplace for parties responding to discovery requests to include general objections along with their substantive responses as a way of avoiding possible waiver of those objections. That appears to be the case here.

Based on several of Blitz's general objections, Plaintiff also argues that this court should conclude that Blitz has waived the attorney-client privilege, as well as the protections afforded to the "facts known or opinions held by" certain of Blitz's non-testifying experts. [15] Fed.R.Civ.P. 26(b)(4)(B). Plaintiff relies on the deposition testimony of certain Blitz representatives to support his waiver argument. The court again concludes that it is unnecessary to address the merits of those arguments. The subject matter of Plaintiff's motion to compel, Interrogatory Nos. 3 and 21, merely ask Blitz to identify certain parties. Because the interrogatories do not seek any sort of communications between Blitz and its counsel, they do not implicate the attorney-client privilege. *See, e.g., In re Grand Jury Supboena Duces Tecum,* 697 F.2d 277, 278 (10th Cir.1983) (stating that the attorney-client privilege "protects confidential *communications* by a client to an attorney made in order to obtain legal assistance from the attorney in his capacity as a legal advisor" (emphasis added) (quotations and citation omitted)). In addition, because the interrogatories do not seek "facts known or opinions held by" Blitz's non-testifying experts, they do not implicate rule 26(b)(4)(B). Fed.R.Civ.P. 26(b)(4)(B).

Request for Reasonable Expenses

Plaintiff has requested an award of reasonable expenses incurred in connection with his motion to compel. Although the court has granted a portion of Plaintiff's motion, the court has determined that such an award is not appropriate or warranted under the circumstances. *See* Fed.R.Civ.P. 37(a)(5)(C). Accordingly, Plaintiff's request is denied.

II. Plaintiff's Motion for Terminating Sanctions

***4** Before reaching the merits of this motion, the court will first address a procedural issue raised in the motion. Plaintiff seeks to have this motion consolidated with a similar motion in a case pending against Blitz in the United States District Court for the Eastern District of Texas. Plaintiff argues that rule 42 of the Federal Rules of Civil Procedure provides this court with the authority to order that the motions be consolidated. That argument is without merit. Rule 42 allows for varying degrees of consolidation of "actions before the court," Fed.R.Civ.P. 42(a), which means that both actions must be pending before the same court. *See, e.g., Cummings v. Conglobal Indus., Inc.,* No. 07–CV–409–TCK–SAJ, 2008 U.S. Dist. LEXIS 17634, at *4–6 (N.D.Okla. March 6, 2008) (stating that "a cursory review of the plain language of Rule 42(a) indicate[s] that both cases must be pending before the same court in order for consolidation to be proper" and citing to multiple sources of "relevant authority discussing Rule 42(a) [that] make[ ] this point clear"). Because this court does not have the authority to consolidate Plaintiff's motion with the motion pending in the case in the Eastern District of Texas, this portion of Plaintiff's motion is denied.

The court turns next to the merits of Plaintiff's motion for terminating sanctions. Plaintiff seeks entry of judgment against Blitz as a sanction for alleged spoliation of evidence and discovery abuse. Plaintiff also asserts that entry of judgment is the only appropriate sanction because lesser sanctions would not provide an adequate remedy.

> A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules. Such sanctions may include dismissing the party's case with prejudice or entering judgment against the party. But dismissal or other final disposition of a party's claim is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice.

Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1195 (10th Cir.2002) (quotations and citations omitted); *see also, e.g., Davis v.. Miller,* 571 F.3d 1058, 1061 (10th Cir.2009) (addressing dismissal as a sanction and stating that the Tenth Circuit has "long held that dismissal of an action with prejudice is a drastic sanction that should be employed only as a last resort"). If a court determines that entry of judgment is an appropriate sanction, it must address certain factors on

the record. *See, e.g., Gripe v.. City of Enid,* 312 F.3d 1184, 1188 (10th Cir.2002).

The court has determined that it is unnecessary to address those factors in this case because Plaintiff has failed to make a sufficient factual showing that the sanction of entry of judgment against Blitz is either appropriate or warranted. The great majority of Plaintiff's memorandum in support of his motion for terminating sanctions is devoted to reciting his version of the facts to support his claims for spoliation and discovery abuse. Blitz's response to that memorandum disputes nearly every one of Plaintiff's factual allegations. Not only are Plaintiff's claims based on disputed factual issues, it is far from clear whether the evidence Plaintiff relies upon is admissible. The court has determined that those disputed factual issues and evidentiary questions will be more appropriately resolved during the trial phase of this case, not as part of a discovery-related motion for sanctions. For these reasons, Plaintiff's motion for terminating sanctions against Blitz is denied.

III. Blitz's Motion for Leave to File Sur–Reply

***5** After Plaintiff's motion for terminating sanctions was fully briefed, Blitz filed a motion for leave to file a sur-reply on that motion. Because it was unnecessary for the court to consider Blitz's sur-reply in reaching a ruling on Plaintiff's motion for terminating sanctions, Blitz's motion for leave to file a sur-reply has been rendered moot.

IV. Blitz's Motion for Leave to File Notices Under Seal

In this motion, Blitz seeks an order from the court allowing it to file certain notices under seal. Blitz asserts that the notices contain "highly sensitive and confidential information regarding Blitz, as well as detailed information regarding invocation of the Fifth Amendment privilege against self-incrimination." [16]

In his response, Plaintiff does not focus on whether Blitz should be allowed to file the notices under seal. Instead, Plaintiff focuses on whether the notices should be allowed or will be admissible in this case. Plaintiff's arguments are misplaced. As Blitz has noted in its reply, the only issue raised by its motion is whether the notices can be filed under seal. Because nothing in Blitz's motion seeks a judicial determination about the propriety or admissibility of the notices, that issue is not before the court.

For the reasons set forth the motion, and based upon good cause appearing, Blitz's motion to file notices under seal is granted.

In summary, **IT IS HEREBY ORDERED:**

1. Plaintiff's motion to compel [17] is **GRANTED IN PART AND DENIED IN PART,** as detailed above. Plaintiff's request for an award of reasonable expenses incurred in connection with his motion to compel is **DENIED.**

2. Plaintiff's motion for terminating sanctions against Blitz [18] is **DENIED.**

3. Blitz's motion for leave to file a sur-reply on Plaintiff's motion for terminating sanctions [19] is **MOOT.**

4. Blitz's motion for leave to file notices under seal [20] is **GRANTED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2639971

Footnotes

1 *See* docket no. 17.
2 *See* docket no. 125.
3 *See* docket no. 134.
4 *See* docket no. 167.
5 *See* docket no. 170.
6 *See* docket no. 141.
7 *See* docket no. 142.

8 Docket no. 126 at 13.
9 *See id.*
10 *Id.* at 17.
11 *See id.* at 18.
12 *See id.*
13 *Id.*
14 *Id.*
15 Although Plaintiff also makes some references to the work-product doctrine in the memorandum in support of his motion, he does not present any argument that Blitz waived the protections of that doctrine. Moreover, Plaintiff makes no reference to the work-product doctrine in his reply memorandum. Accordingly, the court will not address that issue here.
16 Docket no. 170 at 1.
17 *See* docket no. 125.
18 *See* docket no. 134.
19 *See* docket no. 167.
20 *See* docket no. 170.

2012 WL 630048
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

EXXON MOBIL CORPORATION
v.
Timothy J. FALCON, et al.

Civil Action No. 12–454.
|
Feb. 27, 2012.

Attorneys and Law Firms

James Alcee Brown, Liskow & Lewis, New Orleans, LA, for Exxon Mobil Corporation.

ORDER

ELDON E. FALLON, District Judge.

***1** The Court has pending before it Defendants' Motion to Dismiss, Alternatively to Stay and Motion for Sanctions (Rec.Doc.13). Plaintiff has filed a response. The Court has reviewed the briefs and the applicable law and now issues this Order and Reasons.

I. BACKGROUND

This unusual case arises from a state-court evidentiary and procedural dispute surrounding an allegedly privileged document. Plaintiff Exxon Mobil Corporation is a defendant in Naturally Occurring Radioactive Material ("NORM") cases pending in Louisiana state court. Defendants are three attorneys and their law firms who represent plaintiffs in state-court NORM litigation against Exxon.

The allegedly privileged Document was inadvertently produced by Exxon to Defendants Falcon and Sprague on August 28, 2008, in response to discovery in the state-court NORM litigation, and Exxon wants it back. The Document, which has been filed into the record under seal, is described by Exxon as a memorandum written by in-house legal counsel that "contains ... confidential legal advice ... regarding the use and disposition of tables reflecting results of air sample tests performed by an ExxonMobil industrial hygienist in 1987 on an experimental pipe cleaning unit developed by Intracoastal Pipe Repair and Supply Company ("ITCO")." (Cmpl. at ¶ 6). Defendants apparently contend that the Document is relevant in NORM cases with respect to Exxon's knowledge and to punitive damages.

According to the Complaint, in December, 2009, Exxon discovered that the Document had been inadvertently produced. On December 8, 2009, Exxon sent a letter notifying Defendant Falcon of the inadvertent production and demanding its return pursuant to Louisiana Code of Civil Procedure article 1424(D).[1] Exxon also submitted a privilege log identifying the Document as subject to attorney-client privilege and sent revised CDs which clawed back the Document. On December 15, 2009, Defendant Falcon returned the original CDs but retained a copy of the Document.

Subsequently, according to Exxon Defendants Falcon and Sprague provided copies of the Document to other attorneys. The Document was offered as evidence (by an attorney not named as a Defendant in this case) in a NORM trial against Exxon in the 24th JDC for the Parish of Jefferson. According to the Complaint, in that trial the Document was held to be privileged and inadmissible. Defendants Falcon and Sprague also allegedly provided a copy of the Document to Defendant Buck, who then offered the Document in a NORM trial against Exxon on September 20, 2011 in Civil District Court for the Parish of Orleans. The Document was not admitted at that trial, although the parties dispute why it was excluded and whether the Document was held to be privileged.

On January 27, 2012, Defendant Sprague notified Exxon that he intends to use the Document in another upcoming trial against Exxon in the 24th JDC scheduled to begin on March 5, 2012. The Defendants indicate that prior to receiving Exxon's complaint in this case, they had prepared and intended to file a motion *in limine* in the state court proceeding seeking permission from the state court to use the document.

***2** On Friday, February 17, 2012, Plaintiff Exxon filed this case against Defendants Falcon, Sprague, Buck, and their respective law firms. In the complaint, Exxon seeks a declaratory judgment that the Document is protected by the attorney-client privilege and that the privilege has not been waived. Exxon also seeks injunctive relief requiring Defendants to return the Document and to refrain from disseminating it or attempting to use it at trial. On the same day, Exxon filed a motion for a temporary restraining order or preliminary injunction, arguing that there is an immediate

risk of irreparable harm if Defendants further disseminate the Document. The Court denied the request for a temporary restraining order and set a preliminary injunction hearing for Wednesday, February 29, 2012.

II. PRESENT MOTION

Defendants now move for relief from Exxon's complaint and motion for a preliminary injunction. They essentially argue that this United States District Court is not an appropriate forum for resolving an evidentiary matter that can and should be resolved in already-pending cases in state court. Therefore, Defendants contend that either dismissal, abstention, or a stay of this proceeding is warranted.

Exxon responds that neither abstention, dismissal, or a stay are appropriate. It contends that the Anti–Injunction Act and the *Colorado River* abstention doctrine do not apply to these facts, and that the Court should issue injunctive relief to prevent potential irreparable harm.

III. LAW AND ANALYSIS

An appropriate resolution of Defendants' motion follows from a clear understanding of the procedural posture of this case. The Court will explain that posture and the outcome it suggests. Then, the Court will address its deep concerns with the question of subject matter jurisdiction over this matter.

There are a number of NORM cases pending in various Louisiana trial courts, including one set for trial on March 5, 2012, in the 24th JDC for the Parish of Jefferson. As mentioned, Defendant Buck intends to introduce the Document at that trial and intends to file a motion *in limine* with that court addressing the admissibility of the Document. The state trial court is fully capable of resolving the issue. If the Document is found to be privileged, the Court can identify no reason why Exxon cannot seek an order from that Court compelling Defendants to return it, and to seek sanctions if Defendants fail to comply. If the Document is held not to be privileged, Exxon may pursue any appeals available to it in the Louisiana state court system. Either way, the Louisiana state courts which host the NORM litigation are fully capable of vetting the issue and according Exxon whatever relief is appropriate.

Instead, Exxon has attempted to short-circuit the normal functioning of the Louisiana state courts by seeking a declaratory judgment and injunctive relief from this federal court. Exxon wants to preempt every Louisiana state court and resolve the privilege issue "in one forum rather than 30 different jurisdictions." (Rec. Doc. 16 at 3). It argues that "[o]nly by obtaining injunctive relief requested herein will Exxon be assured a consistent ruling on this important issue." (Rec. Doc. 16 at 7).

> The 24th JDC is fully empowered and competent to rule on the procedural and evidentiary matters arising out of the inadvertent production and retention of the Document. Indeed, the 24th JDC is likely better equipped to resolve those issues, given its greater familiarity with the factual background of the case and the procedural and evidentiary rules of Louisiana. Moreover, the state court has jurisdiction over the underlying dispute and supervisory authority over the counsel involved. Exxon has not explained why it cannot obtain all of the relief it seeks in state court. Accordingly, the Court finds it prudential and appropriate to stay this case and the preliminary injunction hearing pending treatment of the issues in the first instance by the 24th JDC in the case scheduled to begin on March 5, 2012.

***3** In addition to being a common-sense resolution, a stay is also appropriate because the Court has grave doubts whether it has subject matter jurisdiction. Although the parties argue in terms of the Anti–Injunction Act, 28 U.S.C. § 2283, or the *Colorado River* abstention doctrine,[2] those analytical frameworks miss the point. Applying the Anti–Injunction Act or an abstention doctrine presupposes subject matter jurisdiction over a case. *See Health Net, Inc. v. Wooley,* 534 F.3d 487, 493 (5th Cir.2008) ("It must be remembered that the anti-injunction act limits federal remedies without ousting federal subject-matter jurisdiction.") (quotation omitted); *Wallace v. La. Citizens Prop. Ins. Corp.,* 444 F.3d 697, 701 (5th Cir.2006) ("Abstention implies that there is subject matter jurisdiction but for some other policy reason, a court refrains from exercising that power to hear the merits of a case."). The Court must always be assured that it has subject matter jurisdiction. *See, e.g., Free v. Abbott Labs., Inc.,* 164 F.3d 270, 272 (5th Cir.1999). As a corollary, the Court is "obliged also to consider threshold questions of justiciability." *See Donelon v. La. Div. of Admin. Law ex rel. Wise,* 522 F.3d 564, 566 (5th Cir.2008); *see also Orix Credit Alliance, Inc. v. Wolfe,* 212 F.3d 891, 895 (5th Cir.2000) ("When considering a declaratory judgment action .... the court must determine whether the declaratory action is justiciable.").

As explained above, Exxon wants to divert a discrete evidentiary issue from a pending state case, have this Court prohibit Defendants from attempting to introduce a piece of evidence in state court, and have that decision bind all Louisiana state courts. Although Exxon attempts to cast this case as arising from Defendants' personal failure as attorneys to comply with professional and ethical duties, it is fundamentally an evidentiary and procedural dispute related to the admissibility of a document in a case not pending before this Court. Needless to say, there are severe practical and conceptual difficulties with bringing this kind of dispute to federal court.

Strictly as a practical matter, entertaining cases like this would dramatically expand the Court's docket. The district courts would be swamped if state-court litigants could resort to federal court to resolve the myriad legal and evidentiary questions that arise in the regular course of litigation. Every state court case would become subject to exponential parallel litigation if the parties could jump to the federal courts whenever they found it convenient or favorable to have some sliver of the case considered by a different forum. This is neither desirable nor efficient.

But conceptually, Exxon's proposal is even more difficult to reconcile with fundamental principles of our federal legal system. First, it is troubling to think that the Court could issue an evidentiary ruling with binding effect on a state-court case not otherwise subject to federal-court jurisdiction, simply because a litigant is non-diverse from the opposing party's counsel. Second, it is likewise confusing to imagine that every single dispute over the law that can arise in the course of a case somehow constitutes an independent case or controversy sufficient to give rise to federal court jurisdiction. Third, and most importantly, the relief sought could seriously impinge on the proper balance of comity and federalism between the concurrent state and federal judicial systems. This Court does not sit as some kind of quasi-appellate forum dictating state evidentiary and procedural law to the state trial courts.

***4** Exxon simply has not explained why this Court should assume jurisdiction over the dispute and why Exxon lacks a reasonable legal remedy through the Louisiana courts. Certainly there is a risk of inconsistent rulings between trial courts with concurrently pending cases that raise repetitive issues. That is inherent in the nature of our judicial system and it is why we have appellate courts as well as doctrines such as *res judicata.* While one may conceive of a legal system in which the first court to resolve an issue binds all other courts and all other parties for all time, that is not the system in which we operate.

In short, the relief sought here is possibly unprecedented. Certainly, Exxon has not cited a single case remotely suggesting that this Court can interfere with thirty or more cases pending in state court and decree how those courts should resolve a matter of state evidentiary and procedural law. At a later date, and upon a full opportunity to brief these issues, dismissal of Exxon's complaint as non-justiciable may be warranted. At the moment, it is enough to stay all proceedings and to permit the state courts to act without interference from this Court.

IV. CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendant's motion (Rec.Doc.13) is GRANTED IN PART. This case is stayed until further Order of the Court. Defendants' Motion to Expedite (Rec.Doc.14) is MOOT. The preliminary injunction hearing scheduled for Wednesday, February 29, 2012 at 3:30 p.m. is CANCELLED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 630048

Footnotes

1 Article 1424(D) states that under certain circumstances inadvertent disclosure in litigation of a privileged document does not waive the privilege. The article explains the procedure by which the discloser may request its return; the recipient of the document must return or safeguard the privileged document but may assert a waiver. La.Code Civ. P. art. 1424(D).

2 The Fifth Circuit "applies one of two tests when reviewing a district court's exercise of its discretion to stay because of an ongoing parallel state proceeding." *New England Ins. Co. v. Barnett,* 561 F.3d 392, 394 (5th Cir.2009). A purely declaratory action "affords a district court broad discretion" to defer to a parallel state proceeding. *See id.* "However, when an action involves coercive relief, the district court must apply the abstention standard set forth in *Colorado River Water Conservation District v. United States,*" under which "the district court's discretion to dismiss is 'narrowly circumscribed' and is governed by a broader 'exceptional circumstances' standard." *Id.* at 394–95 (citation and quotations omitted).

The complaint seeks injunctive relief as well as a declaratory judgment, and therefore the Court cannot apply the more discretionary approach. *See Sw. Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 951 (5th Cir.1994) ("Inclusion of these coercive remedies [for the breach of contract in the form of damages, attorney's fees, and injunctive relief] indisputably removes this suit from the ambit of a declaratory judgment action."). *Colorado River* governs abstention in this case. Defendants cite *PPG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir.1973), which predates *Colorado River*. The analysis in *PPG Industries* of "a manifest policy against dual litigation which ... has given rise to a discretionary power in the federal courts to stay proceedings in equity suits in deference to a parallel state action" may be outdated. *See id.* at 679–80.