IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BIO-SYSTEMS CORPORATION LTD,
BELOIT PLASTICS, LLC, MALCOLM PEACOCK,
MARILYN PEACOCK and RICHARD PEACOCK,

Plaintiffs,

v.

BIO-SYSTEMS OF OHIO, LLC a/k/a BIO-SYSTEMS INTERNATIONAL,

Defendant.

OPINION AND ORDER

12-cv-367-wmc

This case is the product of a falling-out between defendant Bio-Systems of Ohio, LLC, and plaintiffs, a coalition of its former employees and business partners. Plaintiffs assert claims for breach of employment, lease and distributor contracts, as well as a claim for unpaid back wages under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Now before the court is defendant's motion to stay this action pending disposition of a related and earlier-filed action in the United States District Court for the Northern District of Ohio. For the reasons set forth below, defendant's motion to stay will be granted and the case will be administratively closed.

BACKGROUND[1]

On September 29, 2010, defendant Bio-Systems of Ohio, LLC, ("Bio-Ohio"), through its parent company, Betco Corporation, Ltd., purchased production equipment

[1] For the purposes of this motion, the court considers the parties' pleadings, as well as affidavits and exhibits submitted by defendant's counsel in support of the motion.

and related assets from plaintiffs Malcolm and Marilyn Peacock and from two companies in which the Peacocks were principal shareholders, Enviro-Zyme International LLC and Bio-Systems Corporation, an Illinois corporation ("Bio-Illinois"). The terms of transaction are memorialized in an asset purchase agreement between the parties, as well as in several additional legal agreements. Among the various commitments in these related agreements were the following: (1) Malcolm and Richard Peacock agreed to be employed by Bio-Ohio for two years; (2) Bio-Systems Corporation Ltd. ("Bio-UK"), of which Malcolm Peacock is a director, agreed to distribute certain products for Bio-Ohio; and (3) Malcolm and Marilyn Peacock agreed to lease office, manufacturing and warehouse buildings to Bio-Ohio.

With litigation now pending in two federal courts, the parties' transaction obviously proved ill-fated. On April 27, 2012, Betco Corporation brought suit against Malcolm Peacock and Marilyn Peacock in the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:12cv01045 ("the Ohio case") seeking rescission of the transaction based on the Peacocks' fraudulent inducement. On May 18, 2012, plaintiffs -- the Peacocks and several companies owned or controlled by them -- initiated this lawsuit, claiming that Bio-Ohio had violated the terms of the employment, distribution and lease agreements entered into at the time of the asset purchase as described above.

OPINION

Defendant moves this court to stay proceedings pending disposition of the first-filed action in the Northern District of Ohio, arguing that it is "prudent and in the interests of judicial economy[] to know the result of the Ohio case." While the plaintiffs here might argue the same of the litigation pending before this court, the court agrees that the Ohio case is the broader of the two and more likely to subsume much, if not all, of the other. This court will, therefore, grant a stay.

> [T]he general test for imposing a stay requires the court to "balance interests favoring a stay against interests frustrated by the action" in light of the court's strict duty to exercise jurisdiction in a timely manner. Courts often consider the following factors when deciding whether to stay an action: (1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court.

Grice Eng'g, Inc. v. JG Innovations, Inc., 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (internal citations omitted).

Plaintiffs contend that the issues bound up in the Ohio rescission action have little or no bearing on this action. On the contrary, there appears considerable overlap between the two cases. Defendant's rescission case will focus in significant part on the circumstances surrounding contract formation in late September of 2010, as well as the Peacocks' subsequent behavior as plant supervisors. All of this factual background seems to be directly relevant to the formation and alleged breach of the three ancillary contracts

that make up plaintiff's claims here. Indeed, not only do the claims all arise out of the same transaction, the contracts upon which they are based were attached to the asset purchase agreement the defendant seeks to have rescinded. Accordingly, it is likely that final disposition of the Ohio case would effectively dispose of several claims, if not the entirety of this action. Far better to know the outcome of this more sweeping lawsuit, rather than expend time and energy in satellite litigation that may be preempted or rendered wholly inconsistent with that suit.

Plaintiffs argue that the contracts at issue here "stand alone . . . [and are] entered into for their own consideration." That is, at best, unclear given that they were executed with and attached to the asset purchase agreement. Even assuming that the lease, distribution and employment contracts were supported by separate consideration -- and thus would not be rendered void or voidable by rescission of the underlying purchase agreement -- rescission *or* the denial of rescission will likely lend overwhelming weight to certain claims and defenses asserted in this case. For example, defendant could seek to avoid the contracts on grounds that rescission of the purchase agreement frustrates the essential purpose of the other agreements. *See* Restatement (Second) of Contracts § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."). Defendant will also have a much stronger chance of proving that the three ancillary contracts at issue in this case were *also* the product of fraud -- if not directly, then

indirectly, because they would never had been proposed were it not for the related and allegedly fraudulent sale of assets -- and thus subject to rescission or other equitable relief. See *First Nat'l Bank & Trust Co. of Racine v. Notte*, 97 Wis.2d 207, 225, 293 N.W.2d 530 (1980) (a party fraudulently induced to enter into a contract "has the election of either rescission or affirming the contract and seeking damages"). Similarly, at least one of the defendant's principal defenses here would be precluded should its parent company lose its claim for rescission.

These are only some of the issue preclusive effects on the parties here that may flow from the Ohio litigation, all or most of whom are either in privity with or directly involved in that case. Thus, the third and fourth factors in the *Cherokee Nation* test militate strongly in favor of a stay. The first factor does as well, since this case is yet in its infancy.

This leaves only the second factor. Plaintiffs claim that a stay would work prejudice because they continue to be deprived of their rightful sales, profits, salary and bonus proceeds with every additional day of litigation. This prejudice is largely mitigated by post-judgment interest and by the usual contract remedies, which cover both compensatory and foreseeable consequential damages. *E.g.*, *Magestro v. N. Star Envtl. Const.*, 2002 WI App 182, ¶ 10, 256 Wis.2d 744, 649 N.W.2d 722. The court also notes that if speed is a truly compelling consideration for plaintiffs, they may seek to add their Wisconsin claims as counterclaims in the Ohio case, thus assuring a complete resolution of the parties' entire controversy in one lawsuit, something the lawsuit in this district cannot offer. The fact that they appear not to have done so speaks volumes for

their desire for a just, speedy and inexpensive determination of *all* claims between the parties.[2]

With this in mind, the court finds that the interests of efficiency substantially outweigh any possible prejudice to plaintiffs, and will stay the action.

ORDER

IT IS ORDERED that:

(1) defendant's motion to stay this action pending disposition of Case No. 3:12cv01045 in the Federal District Court for the Northern District of Ohio, Western Division, is GRANTED;

(2) the clerk of court is directed to administratively close this case pending further notice; and

(3) this court will convene a status conference when it has received notice that the Northern District of Ohio has entered a final judgment on the merits.

Entered this 26th day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge

[2] Defendant Bio-Systems plays a bit fast and loose by initially representing that the trial date in the Ohio case is set three weeks before the trial here, while soft peddling the parties' joint motion to continue the Ohio trial and presuming this court would do the same. Plaintiff seizes on this, pointing out that unlike the Ohio case, the parties are only seeking to move the summary judgment deadline here and not this court's trial date. Typically, this would be a concern since it is *not* the court's practice to move trial dates once set. But the overlap between suits make this case atypical. Having said that, should the plaintiff Betco Corporation refuse to stipulate to amendments adding the parties and claims at issue here to the Ohio case, plaintiffs here have leave to seek reconsideration of this court's grant of a stay.