IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DONALD R. WILD and
DIANA H. WILD,

Plaintiffs,

v.

SUBSCRIPTIONS PLUS, INC., Y.E.S.!, INC., a/k/a Youth Employment Services Inc., KARLEEN HILLERY, CHOAN LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANY, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

00-C-0067-C

- -

Defendant Progressive Northern Insurance Company has moved the court for an injunction barring plaintiffs Donald and Diana Wild and their lawyer, Camilo K. Salas, from "bringing, maintaining or prosecuting any lawsuit or action" against defendant Progressive arising out of the death of the Wilds' son, Joseph, "in any court or tribunal in the United

States of America."[1] Jurisdiction is present, as district courts retain ancillary jurisdiction to enter protective injunctions to enforce their judgments. Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co., 542 F.2d 45, 48 (7th Cir. 1976) (citing Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). Because defendant Progressive has failed to demonstrate that it lacks an adequate remedy at law and that the harm it would suffer in the absence of an injunction outweighs the harm plaintiffs would suffer if one issues, defendant Progressive's motion for an injunction will be denied.

BACKGROUND

The lengthy history of this case is well known to the parties and is recounted here only briefly. This case arises out of a March 25, 1999 automobile accident in which seven young magazine subscription sellers, including plaintiffs' son, were killed when the van they were riding in crashed. Defendant Progressive's nexus to this case is its issuance of a policy of commercial automobile insurance to defendant Subscriptions Plus, which is owned by defendant Karleen Hillery. Progressive provided representation for Subscriptions Plus and Hillery in this case under a reservation of rights. In an opinion and order dated March 14,

[1]Defendant Scottsdale Insurance Company initially joined with defendant Progressive in bringing the motion for an injunction now before the court. However, Scottsdale later withdrew its joinder to Progressive's motion and is no longer seeking an injunction against plaintiffs.

2001, I concluded that the van involved in the accident was not covered by the insurance policy defendant Progressive wrote. Accordingly, I ordered that Progressive was relieved of its duty to defend and indemnify defendants Subscriptions Plus and Karleen Hillery.

In its motion for an injunction, defendant Progressive alleges that despite this court's order relieving it of its duty to defend Subscriptions Plus and Hillery, plaintiffs have initiated three new civil actions in various state and federal courts seeking damages from Progressive, among others, in connection with the van accident that killed their son. One of these actions is in the Circuit Court for Dane County, Wisconsin and takes the form of a counterclaim filed by plaintiffs when defendant Progressive, seeking a declaratory judgment, intervened in an ongoing state case related to the van accident and named plaintiffs as necessary parties. The other two suits were filed by plaintiffs in Louisiana state court. Defendant Progressive removed one of these cases to United States District Court for the Eastern District of Louisiana and the other to the United States District Court for the Middle District of Louisiana. Progressive maintains that a nationwide injunction barring these suits and any others filed by plaintiffs in connection with the accident is necessary to protect the judgment they received from this court.

Since the parties briefed defendant Progressive's motion for an injunction, there have been two significant developments. First, according to defendant Progressive, the Circuit Court for Dane County, Wisconsin has dismissed plaintiffs' claims against Progressive.

Second, the cases that were removed to the Louisiana federal courts have been transferred to this court.

OPINION

According to defendant Progressive, this court can look to two sources for the authority to issue an injunction prohibiting plaintiffs from bringing or maintaining a lawsuit against Progressive arising out of the death of plaintiffs' son in any state or federal court. Progressive points first to the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. Generally, the Anti-Injunction Act prohibits a federal court from enjoining ongoing state court proceedings, but contains three exceptions, including the so-called "relitigation exception." That exception allows a federal court to issue an injunction in order to "protect or effectuate its judgments." Id. It is intended to "allow a party with a favorable federal judgment to protect that judgment by enjoining repetitive state court proceedings instead of relying on a claim or issue preclusion defense." Ramsden v. AgriBank, FCB, 214 F.3d 865, 868 (7th Cir. 2000). However, the Anti-Injunction Act does "not preclude injunctions against the *institution* of state court proceedings, but only bars stays of suits already instituted." Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965) (emphasis added); Erwin Chemerinsky, Federal Jurisdiction, § 11.2 at 693 (3d ed. 1999) (The Anti-Injunction Act "applies only if there are proceedings actually pending in the state courts; it does not prevent

federal courts from issuing injunctions in the absence of ongoing state court litigation"). Because plaintiffs' counterclaims against defendant Progressive in the Wisconsin state court case have been dismissed and because there appear to be no other ongoing state court proceedings, the Anti-Injunction Act is not applicable to this case; defendant need not concern itself with demonstrating that its request for an injunction falls within one of the act's exceptions.

Defendant Progressive also points to the All Writs Act, 28 U.S.C. § 1651, as a source of authority for the issuance of an injunction barring the relitigation in federal courts of issues already determined by this court. "Under the All Writs Statute, a federal court has the power to enjoin a party before it from attempting to relitigate the same issues or related issues precluded by the principles of res judicata and collateral estoppel in another federal court." New York Life Ins. Co. v. Deshotel, 142 F.3d 873, 879 (5th Cir. 1998); Moore's Federal Practice, § 131.53, at 131-178 (Matthew Bender 3d ed. 2000) ("If the initial judgment was in a federal court, that court clearly has authority to enjoin proceedings involving the same claim in other federal courts."). However, it is also clear that "[t]he powers conferred on a federal court under the All Writs Act must be exercised with caution and restraint." Peters v. Brants Grocery, 990 F. Supp. 1337, 1342 (M.D. Ala. 1998); Kondrat v. Byron, 587 F. Supp. 994, 998 (N.D. Ohio 1984) (refusing to enjoin under All Writs Act filing of further pro se actions by plaintiff who had filed four actions relating to same occurrences because

"extraordinary powers to grant injunctive relief should be invoked only in extraordinary circumstances").

Further, a party seeking a permanent injunction pursuant to the All Writs Act "must make the showing necessary for issuance of any injunction." Moore's Federal Practice, § 131.53, at 131-180. The standards governing permanent injunctive relief in this situation are not entirely clear and the case law in the Seventh Circuit on the topic is not entirely clear. In the Seventh Circuit, a party seeking a permanent injunction "must demonstrate (1) it has succeeded on the merits; (2) no adequate remedy at law exists; (3) the moving party will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm the nonprevailing party will suffer if the injunction is granted; and (5) the injunction will not harm the public interest." Old Republic Ins. Co. v. Employers Reinsurance Corp., 144 F.3d 1077, 1081 (7th Cir. 1998) (citations omitted). However, the Seventh Circuit has also held that a party seeking to justify entry of a permanent injunction is "not required . . . to show irreparable injury. Although it is a necessary element for a temporary restraining order or a preliminary injunction, irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy." Crane v. Indiana High School Athletic Ass'n, 975 F.2d 1315, 1326 (7th Cir. 1992) (citations and internal quotations omitted). Therefore, the third requirement listed in Old Republic should be viewed as a method for the

moving party to demonstrate that the second element (lack of an adequate legal remedy) has been satisfied, rather than as a separate requirement unto itself. This understanding comports with the notion that it is critical for a party seeking an injunction to protect the preclusive effect of a federal judgment to "satisfy the general equitable requirement that the 'legal' remedy by defensive assertion of res judicata be found inadequate." 18 Charles Alan Wright, et al., Federal Practice & Procedure § 4405, at 39-40 (1981). Although I appreciate defendant Progressive's desire to avoid relitigation of claims on which it has already prevailed in this court, I am not persuaded that its legal remedy is inadequate.

Progressive argues that it is without an adequate remedy at law "through mere assertion of the preclusion doctrines" because it "will be obligated to spend substantial time and money preparing motions that assert the preclusion defense in three different courts." Dft.'s Br. in Supp. of Mot. for Inj., dkt. #282, at 13. That is no longer the case. In a July 3, 2001 status conference, defendant Progressive informed the court that plaintiffs' claims against Progressive in the Wisconsin state court proceeding have been dismissed. Opin. and Order dated July 12, 2001, dkt. #292, at 2. Further, the case removed to the United States District Court for the Middle District of Louisiana was transferred to the Eastern District of Louisiana and both cases pending there have been transferred to this court. In an opinion and order issued today in those cases, 01-C-0461-C and 01-C-0463-C, I have denied plaintiffs' motion to retransfer them to the Eastern District of Louisiana. Therefore, at the

moment, all cases against defendant Progressive stemming from the death of plaintiffs' son are before this court. It is true that an injunction to enforce the preclusive effect of a judgment may be especially appropriate where "the particularly tangled nature of the controversy ma[kes] it difficult for the second court to provide the benefits of preclusion without unnecessarily protracted proceedings to become familiar with the underlying dispute." 18 Wright et al., Federal Practice and Procedure, § 4405, at 41. However, at present there is no second court involved in this case. Plaintiffs' new cases are pending before this court, which is well aware of the potential preclusive effects of its prior judgments. The tendency "to approach antisuit injunctions as if they were a routine means of enforcing preclusion . . . should be avoided." Id.

In addition, I cannot agree with defendant Progressive that plaintiffs' conduct since judgment in this case was entered can be fairly characterized as "vexatious" or "abusive." Plaintiffs have consistently maintained that this court is without jurisdiction to hear this case because it was transferred here improperly from the United States District Court for the Eastern District of Louisiana at the outset of the litigation. Accordingly, they challenge the validity of all the orders and judgments entered by this court, including this court's order that defendant Progressive has no duty to defend and indemnify defendants Subscription Plus and Karleen Hillery. Plaintiffs have made this argument in their pending appeal to the Court of Appeals for the Seventh Circuit. Plaintiffs maintain that the lawsuits and counterclaims

about which defendant Progressive complains were filed in order to preserve their rights should their appeal before the Seventh Circuit succeed. According to plaintiffs, the counterclaims they filed against defendant Progressive in the Wisconsin state court action were compulsory and would have been lost even if their appeal in this case is successful. Similarly, plaintiffs contend that the cases they filed in Louisiana were necessary to prevent the applicable statute of limitations from expiring. In response, defendant Progressive suggests that plaintiffs' concerns can legitimately relate only to the possibility that the statute of limitations might run as to claims against defendant Karleen Hillery, who was dismissed from this case for lack of personal jurisdiction. Final judgment has been entered as to all other defendants, Progressive argues, and if plaintiffs are displeased, their proper remedy is to appeal, not to file a new round of litigation asserting the same claims and issues in various state and federal courts. Progressive finds plaintiffs' continued claims against any party other than Karleen Hillery inexplicable.

Defendant Progressive does not characterize plaintiffs' argument accurately. As noted above, plaintiffs maintain that this court's judgment relieving Progressive of any duty to defend and indemnify defendants Hillery and Subscriptions Plus is invalid and that the additional actions they have filed are procedurally required to preserve their rights in the event that the court of appeals agrees with them on that score. Defendant Progressive has not addressed this argument or suggested that the requested injunction would jeopardize

plaintiffs' ability to prosecute their claims, should plaintiffs succeed on appeal. The party seeking an injunction must demonstrate that "the threatened injury to the [moving party] outweighs the threatened harm the injunction may inflict on the [non-moving party]." Plummer v. American Inst. of Certified Public Accountants, 97 F.3d 220, 229 (7th Cir. 1996). I am not convinced defendant Progressive has made this showing. Although I doubt plaintiffs' appeal will succeed, I am not prepared to issue a nationwide injunction that could potentially jeopardize plaintiffs' ability to preserve their right to litigate their claims if they prevail on their appeal to the court of appeals.

Because defendant Progressive has not demonstrated that its legal remedy by assertion of a preclusion defense is inadequate and that the balance of harms weighs in its favor, its motion for an injunction will be denied.

ORDER

IT IS ORDERED that the motion of defendant Progressive Northern Insurance Company for an injunction barring plaintiffs Donald and Diana Wild and their lawyer, Camilo K. Salas, from bringing, maintaining or prosecuting any lawsuit or action against Progressive Northern Insurance Company arising out of the death of the Wilds' son, Joseph,

in any state or federal court is DENIED.

Entered this 23rd day of November, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge