IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KERRY INC.,

Plaintiff,

v.

MINCING TRADING CORPORATION,
d/b/a MINCING OVERSEAS SPICE COMPANY and
THE CAMDEN FIRE INSURANCE ASSOCIATION,

Defendants.

OPINION and ORDER

10-cv-726-bbc

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In this civil action for monetary relief, plaintiff Kerry, Inc. contends that defendant Mincing Trading Corporation violated state law by selling several batches of black pepper to plaintiff that were later recalled because they might had been contaminated by salmonella bacteria. Plaintiff contends that defendant The Camden Fire Insurance Association is directly liable for its losses under Wis. Stat. § 632.24 and § 803.04(2) because Camden issued an insurance policy to Mincing that covers the claims alleged in this suit. Jurisdiction is present under 28 U.S.C. § 1332 because the parties are citizens of diverse states and the amount in controversy is alleged to exceed $75,000.

The case is before the court on defendant Camden's motion to bifurcate the insurance

coverage dispute from plaintiff's claims against Mincing, dkt. #11, and its motion to be dismissed from the case under the principles set forth in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), dkt. #13, on the ground that it is litigating the insurance coverage dispute against Mincing in New Jersey state court. Plaintiff opposes both motions; defendant Mincing has not filed a response to either one.

I conclude that the proceedings in this court should not be dismissed or stayed because the federal and state proceedings are not parallel. Moreover, defendant Camden has failed to demonstrate that "exceptional circumstances" justify deferral to the pending state court proceedings. Additionally, I conclude that bifurcation is unnecessary. Therefore, I will deny both motions.

BACKGROUND

Plaintiff Kerry, Inc. commenced this case on November 18, 2010, naming The Camden Fire Insurance Association and Mincing Trading Corp. as defendants. Plaintiff alleges that Mincing negligently produced, sold and distributed salmonella-contaminated black pepper to plaintiff, a food manufacturer and distributor, causing plaintiff to suffer significant monetary losses. It alleges that "Camden issued liability insurance to Defendant Mincing that covers Mincing for all claims, damages and allegations herein, and is therefore directly liable to Plaintiff for them." Plf.'s Cpt., dkt. #1, ¶ 3. Neither Camden nor Mincing

have filed cross-claims raising the issue of Camden's duty to defend Mincing in the lawsuit.

On May 28, 2010, before plaintiff filed this lawsuit, defendant Camden filed a case that is pending in the Superior Court of New Jersey Law Division, The Camden Fire Insurance Association v. Mincing Trading Corporation, case no. MID-L-3955-10. In that case, Camden is seeking a declaration that it owes no insurance coverage obligations to Mincing in connection with any claims or potential claims by several companies, including plaintiff Kerry Inc., that might arise out of the transmission of salmonella by Mincing. Dkt. #13, Ex. A. Mincing filed counterclaims in the New Jersey action, contending that there is coverage for the claims arising out of the alleged salmonella contaminated black pepper. Dkt. #13, Ex. B. The state court denied the parties' cross motions for summary judgment, finding genuine disputes of material fact with respect to the coverage provided under the insurance contract. The state court case is scheduled for trial in November 2011.

OPINION

A. Motion to Dismiss

Under Colorado River, a federal district court may abstain from exercising jurisdiction over a case that is "parallel" with a pending state court action. Colorado River, 424 U.S. at 817-21. In ruling on a request to abstain, a federal court must be mindful of its "virtually unflagging obligation" to exercise the jurisdiction given it. Tyrer v. City of South Beloit,

Illinois, 456 F.3d 744, 750-51 (7th Cir. 2006) (internal quotation omitted). Because of this obligation, a court should abstain only when presented with the "clearest of justifications." AAR International, Inc. v. Nimelias Enterprises S.A., 250 F.3d 510, 518 (7th Cir. 2001) (citation omitted). In most cases, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." Colorado River, 424 U.S. at 817 (internal quotations omitted). Nevertheless, a federal court may stay an action in favor of concurrent state proceedings in "exceptional" circumstances when doing so would promote "wise judicial administration." Id.; AXA Corporate Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272, 278 (7th Cir. 2003).

"To determine whether [abstention] is appropriate under the Colorado River doctrine the district court must undertake a two-part inquiry. First, the court must determine whether the concurrent state and federal actions are actually parallel." Tyrer, 456 F.3d at 751 (citations omitted). Two suits are parallel if "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." AXA Corporate Solutions, 347 F.3d at 278 (citations omitted). "The question is not whether the suits are formally symmetrical, but whether there is a substantial likelihood that the state court litigation will dispose of *all* claims presented in the federal case." TruServ Corp. v. Flegles, Inc., 419 F.3d 584, 592 (7th Cir. 2005) (emphasis added). Once it is established that the suits are parallel, the court must consider a number of non-exclusive factors that

might demonstrate the existence of 'exceptional circumstances.'" Tyrer, 456 F.3d at 751 (citations omitted). "In applying these requirements, there is a general presumption against abstention." Id.

The parties and issues involved in the aspect of the federal case concerning defendant Camden's obligations under the insurance policy issued to Mincing are substantially the same as in the indemnification issue in the state court action, with one major exception. Plaintiff is not a party in the state case and the state case will not dispose of plaintiff's claims with respect to liability and damages against Mincing. Thus, the actions are not parallel.

Even if the suits were parallel, the federal proceedings would go forward because this case lacks the "exceptional circumstances" that must be present before a stay is authorized under Colorado River. (Although defendant Camden seeks *dismissal* under Colorado River, the Court of Appeals for the Seventh Circuit has held that "a stay, not a dismissal, is the appropriate procedural mechanism for a district court to employ in deferring to a parallel state court proceeding under the Colorado River doctrine." Selmon v. Portsmouth Drive Condominium Assoc., 89 F.3d 406, 409 (7th Cir. 1996) (citations omitted)). To determine whether a stay is warranted, a court must balance the factors set out in Colorado River and its progeny, "with the balance heavily weighted in favor of the exercise of jurisdiction.'" Schneider National Carriers, Inc. v. Carr, 903 F.2d 1154, 1156 (7th Cir. 1990) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983)).

The Court of Appeals for the Seventh Circuit has identified ten factors to be addressed in determining whether exceptional circumstances exist:

> 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 701 (7th Cir. 1992) (quoting LaDuke v. Burlington N.R.R., 879 F.2d 1556, 1559 (7th Cir. 1989)).

The first factor is not applicable in this case because neither court has taken jurisdiction over property. Weighing in favor of a stay are the facts that both defendants Mincing and Camden are New Jersey corporations; the insurance policy was negotiated and issued in New Jersey; the New Jersey case was filed first and is scheduled for trial before the federal action; and the possibility of inconsistent outcomes regarding coverage if both cases proceed. However, none of these factors are determinative and the remaining factors do not weigh in favor of a stay.

First, the majority of plaintiff's claims will not be resolved by the state court action and the parties will have to appear in federal court regardless which court resolves the issue of coverage under the insurance policy. Plaintiff is not a party to the state court action; there

is no reason to believe plaintiff would be allowed to intervene in that action; and even if it could intervene, plaintiff would have no option of removing the state case to federal court. Next, there is no reason to believe this federal lawsuit is "vexatious or contrived." Additionally, a stay of plaintiff's claims against Camden would delay plaintiff its right to obtain a direct judgment against Camden as provided in Wisconsin's direct action statutes. Finally, it is not clear that any efficiencies or other benefits would be achieved by staying plaintiff's claims against defendant Camden at this stage of the case. Although Wisconsin law allows plaintiff to bring a direct action against Camden as the insurer of Mincing, Camden cannot be held liable unless and until Mincing's own liability is determined. If the New Jersey state court reaches a decision on the coverage issue before this court reaches a decision on Mincing's liability, the parties may argue at that time whether the state decision is entitled to preclusive effect. Because no party with standing has raised the issue of Camden's duty to defend in the federal suit, there is nothing for this court to stay with respect to that issue. In sum, there is no reason to delay the federal case.

The cases cited by defendant Camden do not support a different conclusion. In fact, most of the cases involve a federal court's decision to stay an insurance company's declaratory judgment action during the pendency of parallel state court proceedings. E.g., Employers Insurance of Wausau v. Missouri Electric Works, Inc., 23 F.3d 1372 (8th Cir. 1994); Lubermans Mutual Casualty Co. v. Connecticut Bank & Trust Co., 806 F.2d 411 (2d

Cir. 1986); Liberty Mutual Insurance Co. v. Foremost-McKesson, Inc., 751 F.2d 475, 477 (1st Cir. 1985). Such cases are governed by the discretionary standard set forth in Brillhart v. Excess Insurance Co., 316 U.S. 491 (1942), and not the Colorado River "exceptional circumstances" test. Camden has cited no case that has facts and a procedural posture similar to the present case. On balance, I conclude that the proceedings in this court should not be stayed under Colorado River, 424 U.S. 800. Accordingly, I will deny Camden's motion to dismiss plaintiff's claims against it.

B. Motion to Bifurcate

Defendant Camden has moved to bifurcate issues related to insurance coverage from plaintiff's liability action against defendant Mincing. (It has moved only to bifurcate the issues and has not moved to stay the remainder of the case or to seek advance determination of any issue.). This court does not generally bifurcate insurance coverage disputes from underlying liability disputes; as a rule, it is more efficient to handle insurance issues in conjunction with related issues leading toward dispositive motions and trial. Although Camden argues vaguely that bifurcation will promote convenience, judicial economy and avoid prejudice, it points to no specific concerns and has provided no evidence or argument tending to show that the parties would be inconvenienced or prejudiced if all issues are litigated in one proceeding. Therefore, I will deny Camden's motion to bifurcate.

ORDER

IT IS ORDERED that defendant The Camden Fire Insurance Association's motion to bifurcate, dkt. #11, and motion to dismiss, dkt. #13, are DENIED.

Entered this 9th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge