2019 IL App (1st) 190233-U

FIFTH DIVISION
December 20, 2019

No. 1-19-0233

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEWIS McCLENNEY, derivatively on behalf of POWER SOLUTIONS INTERNATIONAL, INC., Plaintiff-Appellant, v. GARY S. WINEMASTER, KENNETH WINEMASTER, ERIC A. COHEN, DANIEL P. GOREY, JAY HANSEN, ELLEN R. HOFFING, KENNETH LANDINI, MICHAEL P. LEWIS, MARY VOGT, and POWER SOLUTIONS INTERNATIONAL, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 17 CH 6481 Honorable Anna H. Demacopoulos, Judge, presiding.
GARY McFADDEN, derivatively on behalf of POWER SOLUTIONS INTERNATIONAL, INC., Plaintiff-Appellant, v. GARY S. WINEMASTER, KENNETH WINEMASTER, ERIC A. COHEN, DANIEL P. GOREY, JAY HANSEN, ELLEN R. HOFFING, KENNETH LANDINI, MICHAEL	)	Appeal from the Circuit Court of Cook County. No. 17 CH 6517 Consolidated

P. LEWIS, MARY VOGT, RSM US LLP, and POWER SOLUTIONS INTERNATIONAL, INC.,	)	
	)	Honorable Anna H.
	)	Demacopoulos,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court did not abuse its discretion in dismissing a shareholder derivative lawsuit pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2016), on the basis that there was a separate action involving the same parties pending in federal court.

¶ 2 The plaintiffs in these consolidated cases are shareholders in a publicly traded corporation. They sued various individuals and entities, alleging that defendants committed various acts of corporate mismanagement and fraud. The circuit court dismissed the cases pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2016) (Code)) because there was already a separate shareholder derivative action pending in federal court. We affirm.

¶ 3 BACKGROUND

¶ 4 Four separate lawsuits are relevant to this appeal: the two consolidated cases before us and two cases in federal court. The first case was filed by Travis Dorvit in the United States District Court for the Northern District of Illinois on February 10, 2017.[1] He named as defendants corporate officers of Power Solutions International, Inc.: Gary S. Winemaster, Kenneth Winemaster, Eric A. Cohen, Daniel P. Gorey, Jay Hansen, Ellen R. Hoffing, Kenneth Landini, Michael P. Lewis, and Mary Vogt. In 2018, a second federal lawsuit was brought by Michael Martin, raising claims similar to those in Dorvit's lawsuit.[2] Although the two cases were not

[1]Case no. 17-cv-1097 (U.S.D.C., N.D. Ill.).
[2]Case no. 18-cv-2386 (U.S.D.C., N.D. Ill.).

formally consolidated, a single amended complaint was filed with both Dorvit and Martin as named plaintiffs and merging the allegations of the two cases (the amended federal complaint). Because of this merger, we will refer to the federal cases in the singular.

¶ 5 The amended federal complaint added four individuals who became Power Solutions officers in 2017 or later as defendants: Shoajun Sun, Jiang Kui, Leslie Coolidge, and Frank P. Simpkins. Power Solutions, a publicly traded corporation, was named as a "nominal defendant".

¶ 6 The federal lawsuit is a shareholder derivative action alleging that Power Solutions officers, including defendants, breached their fiduciary duties by willfully ignoring deficiencies in the company's accounting and financial reporting systems and failing to make a good-faith effort to correct those deficiencies. In particular, the amended federal complaint alleged that the company overstated revenues and had weak internal controls over financial reporting. Upon discovering these facts, the company was required to restate its financial disclosures for 2015 and 2016. Along the way, the company's auditor, RSM US LLP (RSM), resigned, stating it could not rely on management's representations. The result of this activity, according to the federal complaint, is that the corporation sustained damages for the costs of restating its financial disclosures, defending against a Securities and Exchange Commission investigation, and responding to NASDAQ delisting proceedings. The complaint alleges that during 2015 and 2016, corporate officers falsely assured stockholders that the company's internal controls and procedures were adequate and effective. One side effect of the misstated finances was that corporate officers received inflated incentive compensation.

¶ 7 Count I of the amended federal complaint alleged a violation of the company's bylaws. Count II was a claim for breach of fiduciary duties. Count III sounded in unjust enrichment. Count

IV alleged a waste of corporate assets. The plaintiffs requested damages, disgorgement of improper compensation, unspecified equitable relief, costs, and attorney fees.

¶ 8 The parties in the federal case reached a tentative settlement. Gary McFadden, who is a plaintiff in one of the consolidated cases now before us, moved to intervene to object to the settlement. The federal court allowed him to intervene, but nonetheless approved the settlement. On August 23, 2019, while briefing was ongoing in this appeal, the federal court entered a final order and judgment finding that the settlement was fair, reasonable, and adequate for all Power Solutions shareholders. The order released the Power Solutions defendants from further liability, but specifically stated: "for the avoidance of doubt", the "Released Persons" did not include RSM, Power Solutions' auditor. McFadden filed an appeal of the order rejecting his objection. That appeal is presently pending before the United States Court of Appeals for the Seventh Circuit.[3]

¶ 9 The third lawsuit was filed in the circuit court of Cook County.[4] The plaintiff in that case is Lewis McClenney,[5] who also sued derivatively as a shareholder of Power Solutions. The defendants were the same nine corporate officers originally sued in the federal case, with Power Solutions again named as a nominal defendant. While the allegations of this complaint are not precisely identical to those of the amended federal complaint, they are substantively the same in that they allege a failure of corporate officers to accurately disclose financial details for a period of time approximately encompassing 2015-2016, an eventual disclosure of the false and misleading statements despite attempts to conceal them, excessive incentive compensation of corporate officers, and the resignation of RSM as auditor.

[3]Case no. 19-2755 (7th Cir.)

[4]Case no. 17 CH 6481 (Cir. Ct. Cook County, Ill.).

[5]Lewis McClenney's name is spelled "McCleney" in certain documents in the record. We adopt the spelling he used when he signed his verified complaint.

¶ 10 The McClenney complaint has five counts: count I, breach of fiduciary duties; count II, unjust enrichment; count III, abuse of control; count IV, gross mismanagement; and count V, waste of corporate assets. The complaint requests a judgment for damages, a declaration that the defendants breached various corporate duties, an order requiring the company to institute proper financial controls, costs, and attorney fees.

¶ 11 The fourth lawsuit was filed in the circuit court of Cook County only five hours after McClenney filed his complaint.[6] The original plaintiff was Sara Rebscher, but Gary McFadden later substituted for her. The defendants were the same nine corporate officers originally sued in other cases, with Power Solutions again named as a nominal defendant. Two additional defendants were named in this lawsuit. The first is H. Samuel Greenawalt, another Power Solutions officer whom the company tells us died in 2015, and therefore was never served with process. The other is RSM, Power Solutions' auditor. Like the other plaintiffs, Rebscher and McFadden sued derivatively as shareholders of Power Solutions.

¶ 12 The McFadden lawsuit alleges that Power Solutions officers misstated corporate revenues during the 2015-2016 period, that the company lacked proper internal controls resulting in false and misleading financial statements, that the company was eventually forced to restate its disclosures, that inflated revenues resulted in increased incentive payments to corporate officers, and that RSM resigned as corporate auditor. The lawsuit also contains excerpts from the relevant audits prepared by RSM's predecessor entity, allegations regarding the duties of certain defendants in their roles as members of the company's audit committee, and allegations that Wells Fargo Bank lent the company funds at an inflated rate due to its past financial misdeeds.

[6]Case no. 17 CH 6517 (Cir. Ct. Cook County, Ill.).

¶ 13 The McFadden lawsuit contains three counts. Count I (breach of fiduciary duties) and count II (unjust enrichment) are pleaded against the Power Solutions defendants. Count III is a claim for negligence and malpractice against RSM. The complaint concludes with a single prayer for relief applicable to all counts. The prayer seeks damages, disgorgement, costs, and attorney fees against the Power Solutions defendants, and unspecified equitable relief to remedy the Power Solutions officers' breaches of fiduciary duties. The complaint does not appear to seek any specific relief, even damages, against RSM.

¶ 14 The circuit court consolidated the McClenney and McFadden actions, and designated McFadden's complaint as the "operative complaint". (Again, we will refer to the cases in the singular.) The court also designated McFadden's counsel as lead counsel. Over Power Solutions' objection, the court then lifted a stay of the case that had been in place.

¶ 15 Power Solutions moved to dismiss the consolidated action pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2016), arguing that the consolidated cases should be dismissed in favor of the pending federal complaint. After briefing and extensive argument, the circuit court granted the motion. The court explained that the state and federal cases had the "same parties" and "same cause" under section 2-619(a)(3) despite the inclusion of RSM as a defendant in the case before it. It found that "the prevention of multiplicity, vexation, and harassment favor the dismissal of this action" and that any prejudice to plaintiff was outweighed by the "Illinois public policy of avoiding duplicative litigation." McClenney moved to reconsider, but the court denied that motion. This appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, McClenney contends that the circuit court erred in determining that the federal complaint involved the "same parties" as required by section 2-619(a)(3) and that it abused its

discretion in dismissing the case. In the alternative, McClenney argues that the circuit court should have stayed, rather than dismissed, the case.

¶ 18 As noted, after the circuit court dismissed the case in January, 2019, the corresponding federal lawsuit was settled and is now on appeal. None of the parties before us suggest that these developments should affect our analysis. Without addressing any potential *res judicata* effects of the federal settlement, we will proceed to review the circuit court's order on the merits.

¶ 19 Section 2-619(a)(3) of the Code allows a court to dismiss a case when "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2016). Section 2-619 appeals generally present issues of law which we review *de novo*. *Skaperdas v. Country Cas. Ins. Co*., 2015 IL 117021, ¶ 14, citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). However, our supreme court has explained that section 2-619(a)(3) dismissals involve the weighing of factors rather than a strictly legal analysis. *Kellerman v. MCI Telecommunications Corp*., 112 Ill. 2d 428, 447 (1986). Therefore, we review a circuit court's dismissal of a case pursuant to section 2-619(a)(3) for abuse of discretion. *Id*., 112 Ill. 2d. at 448. See also *Zurich Insurance Co. v. Baxter International, Inc*., 173 Ill. 2d 235, 237 (1996). This court has further held that the movant "must demonstrate through clear and convincing evidence that the two actions involve both the same parties and the same cause." *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1091 (2000).

¶ 20 Our supreme court has explained section 2-619(a)(3) in the following terms:

> "Although the purpose of the law is to avoid duplicative litigation, a circuit court is not automatically required to dismiss or stay a proceeding under section 2–619(a)(3) even when the 'same cause' and 'same parties' requirements are met. Multiple actions in different jurisdictions arising out of the same operative facts may be maintained where

> the circuit court, in a sound exercise of its discretion, determines that both actions should proceed. Factors a court should consider in deciding whether a stay is warranted under section 2–619(a)(3) include comity; the prevention of multiplicity, vexation and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment in the local forum." *Zurich Insurance*, 173 Ill. 2d at 243-244, citing *Kellerman*, 112 Ill. 2d at 447-48.

¶ 21 The "same parties" requirement of section 2-619(a)(3) is met where the litigants' interests are sufficiently similar, even though the litigants are not identical. *People ex rel. Phillips Petroleum Co. v. Gitchoff*, 65 Ill. 2d 249, 255 (1976), citing *Skolnick v. Martin*, 32 Ill. 2d 55, 57 (1964) and *Baker v. Salomon*, 31 Ill. App. 3d 278, 280-82 (1975). To qualify as "another action pending between the same parties for the same cause" under section 2-619(a)(3), neither the parties nor the causes need be identical; a substantial similarity is enough. *Id.*

¶ 22 In a derivative action, a shareholder sues on behalf of a corporation to seek relief for injuries done to that corporation, because the corporation either cannot or will not assert its own rights. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (2008), citing *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006). Accordingly, the shareholders in various derivative lawsuits are fungible—the shareholder plaintiff in one derivative lawsuit is the functional equivalent of a different shareholder who sues over the same corporate misdeeds, whether in the same forum or a different one. We therefore find that the two actions at issue here involve the same plaintiffs for the purpose of the "same parties" requirement.

¶ 23 The federal case and the case before us involve identical defendants, with the exceptions of the post-2017 appointed Power Solutions officers named in the amended federal complaint, and RSM, the auditor named in the McFadden complaint. As noted, to justify a section 2-619(a)(3)

dismissal, the parties need not be identical. No party before us argues that the addition of the post-2017 corporate officers is relevant, and we do not find that they are. The operative claims relate to corporate actions taken before they assumed office.

¶ 24 McClenney's arguments on appeal center on RSM, the corporate auditor named as a defendant in the case before us, but not in the federal case. We begin our analysis regarding RSM by noting that a litigant may not circumvent the general rule merely by adding new defendants to or subtracting old ones from a prior action when instituting a second suit. *Tambone v. Simpson,* 91 Ill. App. 3d 865, 869 (1980), citing *Chapple v. National Hardwood Co.*, 234 Mich. 296 (1926).

¶ 25 McClenney argues that no relief can be obtained against RSM in the federal case, because it is not a defendant in that court. He also notes that the errors and omissions which RSM allegedly committed are of a different character than those of the Power Solutions officers, which would naturally result in additional relief in favor of the shareholders at the expense of RSM. He further claims that RSM's interests are adverse to its co-defendant Power Solutions' interests, and that RSM cannot be made a defendant in the federal case because doing so would destroy diversity of citizenship of the parties and disqualify the case from being heard in a federal court. Finally, he contends that of the various plaintiffs, only he has undisputed standing because only he claims to have owned Power Solutions stock at all pertinent times, going back to the very first instances of fraudulent activities at the company. None of these contentions are availing.

¶ 26 Applying the doctrine that the parties need not be identical for a case to be validly dismissed under section 2-619(a)(3), we first note that RSM is not a necessary party to the litigation. The claim against it, set forth in count III of the operative complaint, is a stand-alone malpractice claim which is grounded in many of the same operative facts as the two shareholder derivative counts of the state court complaint. But, as noted by the circuit court, the complaint does not appear to seek

any relief against RSM. This factor alone significantly weakens McClenney's argument that RSM is such an important or necessary party that its inclusion makes his case superior to the others.

¶ 27 We also take little stock in McClenney's argument that RSM "cannot" be made a defendant in the federal case because doing so would destroy diversity of citizenship. First, our section 2-619(a)(3) jurisprudence teaches that we should not try to speculate or predict how a federal court will resolve its own jurisdictional authority. *International Games Inc. v. Sims*, 111 Ill. App. 3d 922, 925 (1982); *Palatine National Bank v. Guardian Tampa Limited Partnership*, 131 Ill. App. 3d 441, 445 (1985). More importantly, though, if the federal court's diversity jurisdiction was thwarted because RSM was joined as a defendant, the federal court's dismissal would not be on the merits and the case would then presumably be refiled in state court. See 735 ILCS 5/13-217 (West 2018); *International Games, Inc. v. Sims*, 111 Ill. App. 3d 922, 927 (1982) (observing, under similar facts, that dismissal in favor of another pending case was not on the merits and that a corresponding federal complaint could be refiled in state court if it was also dismissed for lack of jurisdiction).

¶ 28 McClenney was free at any time to intervene in the federal case to request lead plaintiff and counsel status, but he did not do so. Doing so would have at least tested his belief that adding RSM would destroy diversity of parties and federal court jurisdiction. Months after the federal case had been filed, he filed his own case in state court rather than simply join the federal case. In fact, McClenney did intervene at the very end of the federal case's lifespan to object to the settlement. And the federal court did not determine that Dorvit lacked standing to pursue claims related to the 2015-2016 corporate misconduct.

¶ 29 Multiple actions involve the "same cause" within the meaning of section 2-619(a)(3) when relief is requested on substantially the same set of facts. *Skolnick v. Martin*, 32 Ill. 2d 55, 57 (1964)

(interpreting predecessor statute to section 2-619(a)(3)). The central question is "whether the two actions arise out of the same transaction or occurrence [citation], not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions." *Tambone*, 91 Ill. App. 3d at 867. Applying those tests, it is clear that all of the cases against Power Solutions arise from the same set of operative facts centering around the financial misstatements of Power Solutions during the period between 2015-2016. All plaintiffs are seeking to enforce the same corporate right and to recover from the same defendants for the same breaches of duty on the same facts. See *Schnitzer v. O'Connor*, 274 Ill. App. 3d 314, 318–319 (1995).

¶ 30 We also find that the circuit court properly applied the *Kellerman* standards in deciding to dismiss the case. See *Kellerman*, 112 Ill. 2d at 447-448. Comity required that the state court stay its hand in favor of a federal case which had been filed first, involved the same parties and facts, and was making substantial progress toward a conclusion. Dismissing this case also prevented a multiplicity of litigation which could have created a vexatious atmosphere of duplicative litigation in different forums. While the federal case, as filed, would not have provided McClenney relief as to RSM, his claim against RSM was imprecisely pleaded as it did not seek any specific relief against that company.

¶ 31 McClenney alternatively suggests that the circuit court should have stayed this case considering the uncertainty of the ultimate outcome of the federal lawsuit. Power Solutions counters that McClenney did not raise this point below until, at the earliest, his motion to reconsider. Waiver aside, in light of the many pending actions involving what are essentially the same claims, we cannot find that the circuit court abused its discretion by not staying the case. Likewise, nothing before us demonstrates that the Seventh Circuit is likely to alter the settlement

of the federal derivative lawsuit. Therefore, we decline McClenney's invitation to stay his case ourselves.

¶ 32 For these reasons, we affirm the judgments of the circuit court dismissing the case and denying reconsideration of the dismissal order.

¶ 33 Affirmed.