IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

W.C. McQUAIDE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 612-N
	)	
LELAND R. McQUAIDE, NORA GENE WALKER, WILLIAM F. McQUAIDE, STAN R. McQUAIDE, and R. TIM McQUAIDE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 19, 2005
Date Decided: May 24, 2005

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William F. McQuaide, Stan R. McQuaide, Johnstown, Pennsylvania, *Defendants Pro Se*

PARSONS, Vice Chancellor.

Before the Court is a motion to dismiss or stay this action in favor of an earlier-filed case in Pennsylvania. The parties' dispute regards the validity of a transfer of 50% of the stock of W.C. McQuaide, Inc., a Delaware corporation (the "Company"), from defendants Leland McQuaide and Nora Gene Walker to R. Tim McQuaide.[1] The Company has refused to issue stock certificates to Tim, contending that the transfer violates a stock transfer restriction adopted at a meeting of the Company's Board of Directors in 1960.

On March 11, 2004, Leland, Nora Gene and Tim (collectively the "Pennsylvania Plaintiffs") filed suit in the Court of Common Pleas of Cambria County, Pennsylvania seeking an order compelling William McQuaide and Stan McQuaide (the "Pennsylvania Defendants"), as officers of the Company, to issue stock certificates to Tim (the "Pennsylvania Action"). On July 30, 2004, the Company filed this action (the "Delaware Action") against *all* of the parties named in the Pennsylvania Action. This case seeks a declaratory judgment that the Company has no obligation to register the purported transfer of stock.

The Pennsylvania Plaintiffs have moved to dismiss or stay this action in favor of the Pennsylvania Action on the grounds that it was first-filed and to dismiss under Court of Chancery Rule 12(b)(6) on the merits. For the reasons stated below, I conclude that the Pennsylvania Action was first-filed and that this case should be stayed pending resolution of that action.

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[1] Because the plaintiff corporation and several of the individual defendants bear the name McQuaide, the Court will refer to the defendants by their first names.

I. FACTS[2]

W.C. McQuaide, Inc. was incorporated in Delaware in 1957 and is in the trucking business. Leland, Nora Gene, William and Stan are directors of the Company and each owns 25% of the Company's outstanding shares. Tim is also a director.

At a Board of Directors meeting on January 15, 1960, all four of the stockholders of the Company at that time voted to adopt the following stock transfer restriction (the "Stock Transfer Restriction"):

> RESOLVED that in the event any stockholder desires to sell his stock, he must offer the stock to the corporation for a period of thirty days. Then, if the corporation does not buy the stock, it must then be offered to the other stockholders for a period of fifteen days. If they do not purchase it, then the stock must be offered to the corporation again for thirty days. If the corporation does not purchase it then, it can be offered for public sale. Also, in the event of death of a stockholder where the stock would go to an estate, it must be offered back to the corporation for purchase.[3]

Pursuant to the Stock Transfer Restriction, the Company placed the following language on its stock certificates in boldface type and all capitals:

> The shares evidenced by this certificate are subject to and transferable only upon compliance with the terms of a shareholder resolution of this corporation restricting transfer of shares. Any transfer in violation of that resolution is invalid and said conditions are binding upon any transferee. A copy of the resolution is available for inspection at the office of the corporation.[4]

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[2] All facts are taken from the Verified Complaint ("Compl."), unless otherwise noted.

[3] Compl. Ex. A.

[4] Compl. ¶ 8.

Since adoption of the Stock Transfer Restriction, all shares to be transferred were offered to the Company for repurchase and in every case the Company ultimately repurchased the tendered shares.

Recently, Leland and Nora Gene purported to transfer their stock to Tim. They endorsed their stock certificates, delivered them to William and Stan as officers of the Company, and requested that they issue stock certificates to Tim. William and Stan refused to record the transfer, contending that the Company had been deprived of the opportunity to acquire the stock in contravention of the Stock Transfer Restriction and the well-settled practices of the Company's stockholders.

A. The Delaware and Pennsylvania Actions

On March 11, 2004, the Pennsylvania Plaintiffs filed the Pennsylvania Action. That action seeks an order compelling William and Stan to issue stock certificates to Tim. The Complaint did not name the Company as a party.

The Company filed the Delaware Action on July 30, 2004. William and Stan, as officers and directors of the Company, approved the Company's hiring of counsel and authorized the filing of that Complaint.[5] The Complaint names Leland, Nora Gene, and Tim, as well as William and Stan, as defendants. It seeks a judgment declaring that Leland and Nora Gene may not transfer their stock without abiding by the procedures set forth in the Stock Transfer Restriction and that the Company has no obligation to register the purported transfer of stock.

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[5] William and Stan's Answer at ¶¶ 2–3.

On August 16, 2004, William and Stan filed preliminary objections to the Complaint in the Pennsylvania Action. Their objections asserted, among other things, that the Company was a necessary party to that action. On September 17, 2004, the Pennsylvania Plaintiffs filed an Amended Complaint adding the Company as a defendant.

On October 8, 2004, William, Stan and the Company filed preliminary objections to the Amended Complaint, this time contending that the Pennsylvania Action should be dismissed or stayed pending resolution of this action under Pennsylvania's *lis pendens* doctrine. The Pennsylvania court denied that motion. In a December 3, 2004 opinion, the Pennsylvania judge rejected the defendants' *lis pendens* argument, holding that he could resolve the parties' dispute and apply Delaware law, if necessary. The Court further stated:

> Despite defendant's argument that the plaintiff's amended complaint is a "mirror image" of the Delaware suit, and although the parties are substantially similar, the prayers for relief in the plaintiff's complaint, amended complaint and defendant's Delaware complaint are far from identical.[6]

On January 7, 2005, the Pennsylvania Plaintiffs filed a Motion to Dismiss Complaint, or in the Alternative Motion to Stay the Proceedings ("Motion to Stay") in this case. That is the motion currently before the Court.

On January 26, 2005, the Pennsylvania Plaintiffs moved for leave to file a Second Amended Complaint in the Pennsylvania Action. The new pleading would add additional claims, including claims for a declaration regarding the size of the Company's

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[6] Opinion dated Dec. 3, 2004 at 2, attached as Ex. B to Plaintiff's Answering Brief ("PAB").

board and the invalidity of certain board actions, breach of fiduciary duty, and an accounting. At last report, that motion was still pending.

B. The Parties' Contentions

The Pennsylvania Plaintiffs urge this Court to dismiss or stay this action pending resolution of the earlier-filed Pennsylvania Action under the *McWane* doctrine.[7] They argue that the parties in the two actions are identical because the Amended Complaint in the Pennsylvania Action includes all of the parties in the Delaware Action and relates back to the original complaint. In addition, the Pennsylvania Plaintiffs argue that the parties are functionally identical because the two officers who would be compelled to issue stock certificates on behalf of the Company are named parties in both actions. They also contend that both actions involve the same issue: whether Leland and Nora Gene have the right to transfer their stock to Tim without first offering it to the Company and other stockholders. Thus, the Pennsylvania Plaintiffs contend the requirements of *McWane* are satisfied and the Court should dismiss or stay this action pending a resolution of the Pennsylvania Action.

The Pennsylvania Plaintiffs alternatively seek a dismissal of this case on the merits under Court of Chancery Rule 12(b)(6). They contend the Stock Transfer Restriction is invalid under 8 *Del. C.* § 202 because it is not set forth in the certificate of incorporation, the by-laws or any shareholder agreement. The Pennsylvania Plaintiffs further argue that,

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[7] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

even assuming the Stock Transfer Restriction is valid, its plain language does not apply to the allegedly gratuitous transfer initiated by Leland and Nora Gene.

The Company opposes a dismissal or stay under *McWane* because they contend that this action, and not the Pennsylvania Action, was the first-filed. In support of its position, the Company emphasizes that this action was the first-filed action in which it was a party. The Company does not contend that the issues in the two cases as originally filed differ substantially. Instead, the Company argues that the Pennsylvania Plaintiffs are judicially estopped from arguing that the actions are substantially the same because they previously persuaded the Pennsylvania court to conclude otherwise. The Company also argues that the proposed Second Amended Complaint would cause the actions to involve very different issues. With respect to the Stock Transfer Restriction itself, the Company contends that the restriction is valid under 8 *Del. C.* § 202 as "an agreement among any number of security holders," and that it restricts gratuitous transfers, as well as sales.

II. ANALYSIS

A. Legal Framework

The granting of a stay is not a matter of right, but rests within the sound discretion of the trial court.[8] The threshold issue when determining whether to stay a Delaware action in favor of a related case is which action should be considered first-filed. If the foreign action is first-filed, principles such as fairness, comity, judicial economy and the

[8] *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996).

possibility of inconsistent results generally favor the granting of a stay,[9] and "our courts will uphold a plaintiff's choice of forum except in the rare case where that choice imposes overwhelming hardship on the defendant."[10] *McWane* provides the appropriate analysis, holding that the discretion to grant a stay should be exercised freely where (1) there is a prior pending action (2) that involves the same parties and issues and (3) the other court is capable of doing prompt and complete justice.[11]

As a general rule, litigation should proceed in the forum in which it is first-filed, and a party should not be permitted to defeat an adversary's choice of forum by commencing litigation involving the same cause of action in another jurisdiction of its own choosing.[12] Parties have argued that changes to the first-filed case — effected by amendments to the complaint or partial or complete dismissal — have stripped the action of its first-filed status. In those instances Delaware courts have compared the substance of the original case to that of the case as later composed. Where the modified case bears little resemblance to the original case, the courts have treated the modified case as a new action and denied it the benefit of the original filing date.[13] Where the substance of the

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9 *Id.*

10 *United Phosphorus, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 764 (Del. 2001).

11 *McWane*, 263 A.2d at 283.

12 *Id.*

13 *See Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1995 WL 632030, at *3 (Del. Ch. Oct. 19, 1995) (finding Delaware action to be first-filed because earlier filed Pennsylvania action did not include the Delaware claims until amendment after filing of the Delaware action); *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at *3–4 (Del. Ch. July 17, 2000) (staying original plaintiff's cross-

original case remains unchanged, however, the courts have viewed the filing of intervening suits in other jurisdictions as forum shopping and have maintained the case's first-filed status.[14]

Under *McWane*, a key consideration is whether the first-filed action involves "the same parties and the same issues" as the competing action.[15] Identical parties and issues are not necessary. Instead, the courts examine whether the ultimate legal issues to be litigated will be determined in the first-filed action, and thus, repeatedly have held that *McWane* requires only a showing of "[s]ubstantial or functional identity."[16] The primary analysis is whether the issues arise out of a "common nucleus of operative facts."[17] Similarly, the courts have found parties to be substantially the same under *McWane* where related entities are involved but not named in both actions, referring to the

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claim in deference to a foreign filed action after holding that the cross-claim did not relate back to the original case).

14 *See United Phosphorus*, 808 A.2d at 765 (finding a later filed Delaware state action to be the "continuation of the viable claims" of a dismissed Delaware federal action and thus to relate back for first-filing analysis); *see also Corwin v. Silverman*, 1999 WL 499456, at *4–5 & n.13 (Del. Ch. June 30, 1999) (holding that neither amended pleadings that did not assert broader claims, nor later joinder of parties, would alter a case's first-filed status).

15 *McWane*, 263 A.2d at 283.

16 *See AT&T Corp. v. Prime Security Distrib., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996). *See also E.I. du Pont de Nemours and Co. v. Cigna Prop. & Cas. Co.*, 1992 WL 171427, at *5 (Del. Ch. July 20, 1992); *FWM Corp. v. VKK Corp.*, 1992 WL 87327, at *1 (Del. Ch. Apr. 27, 1992).

17 *See Dura Pharm.*, 713 A.2d at 930; *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).

exclusion as "more a matter of form than substance."[18] Our courts have also held the parties in competing actions to be "substantially identical" where differences between the parties can be remedied by joinder.[19]

B. Application of the *McWane* Analysis

1. Same parties

The first step of the *McWane* analysis is to determine whether the foreign action is first-filed. The Pennsylvania Action was filed on March 11, 2004, over four months before the filing of the Delaware Action on July 30, 2004. In the Company's view, however, the Delaware Action is the first-filed action because it was the first to name the Company as a party. The Pennsylvania Plaintiffs argue that the filing of their Amended Complaint adding the Company as a defendant relates back to the original complaint, causing both actions to have identical parties. They further contend that, even if the Court were to consider only the original Complaint in the Pennsylvania Action, the parties are functionally identical.

I find the parties in the two actions to be substantially the same. The Amended Complaint in the Pennsylvania Action is sufficiently related to the original Complaint to justify giving it the benefit of the earlier filing date for purposes of the *McWane*

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[18] *FWM*, 1992 WL 87327, at *1 (granting a motion to stay after noting the excluded party's de facto involvement in the first-filed action); *see also AT&T*, 1996 WL 633300, at *3 ("The *McWane* test applies where the two actions involve the same parties *or persons in privity with them.*") (emphasis original).

[19] *See Corwin*, 1999 WL 499456, at *4 & n.13; *Macklowe*, 1994 WL 586835, at *3.

analysis.[20] Although their alignment is different, the parties under the Amended Complaint in the Pennsylvania Action are identical to the parties in this case. Moreover, even considering only the original Complaint, the parties in the two actions are functionally the same because the Company was represented by its officers, directors and stockholders in the Pennsylvania Action.[21] The original parties to the Pennsylvania Action — Leland, Nora Gene, Tim, William and Stan — collectively own 100% of the Company's stock and are all directors of the Company. In addition, the original Complaint sought an order compelling William and Stan, as officers of the Company, to issue the stock certificates. Furthermore, any difference between the parties could be (and in fact was) remedied by joinder.[22]

The Company relies on *Berdel, Inc. v. Berman Real Estate Management, Inc.* for the proposition that the Amended Complaint is not entitled to the original filing date. *Berdel*, however, is inapposite. In *Berdel*, the Berman parties asserted claims in Pennsylvania against the Berdel parties relating to two Florida partnerships. The Berdel parties then filed suit in Delaware based on claims related to the Fox Run apartment

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[20] Whether the allegations of the Amended Complain would relate back to the original Complaint for pleading purposes under Court of Chancery Rule 15 is a different issue that need not be decided for purposes of the pending motion.

[21] *See FWM*, 1992 WL 87327, at *1 (finding the omitted party's involvement in the first-filed action through the presence of a 100% stockholder and a related entity to satisfy the "same parties" analysis); *see also Adirondack*, 1996 WL 684376, at *6 ("In essence, AFR is controlled by two groups of closely related entities, each of which is represented in the two actions.").

[22] *Macklowe*, 1994 WL 586835, at *3.

complex in Delaware. Thereafter, the Berman parties amended their complaint in Pennsylvania to join the entities named in the Delaware case and assert claims related to Fox Run. The Berman parties then moved to dismiss the Delaware case on the grounds that the Pennsylvania case was first-filed. In denying the motion, the court focused on the lack of identity of issues and the fact that the Fox Run claims were wholly missing from the Pennsylvania action until after the filing of the Delaware case.

Here, in contrast, the Amended Complaint in the Pennsylvania Action does not change the substance of the original Complaint. Instead, the Amended Complaint merely added the Company as a nominal party. Therefore, this case is more analogous to cases where amendments to pleadings have been held not to disturb a case's first filed status than to *Berdel*.[23] For example, in *United Phosphorus*, an entirely new state court action was held to be a "continuation of the viable claims" of an earlier-filed but *dismissed* federal court action and accorded first-filed status.[24] Thus, as in *United Phosphorus*, the Pennsylvania Action constitutes a direct continuation of the original case and deserves first-filed status.

2. Same issues

Next the Court must determine whether the issues in this action and the Pennsylvania Action are substantially or functionally identical. The Company argues that the proposed Second Amended Complaint in the Pennsylvania Action, which would add

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[23] *See United Phosphorus*, 808 A.2d at 765; *see also Corwin*, 1999 WL 499456, at *4–5.

[24] 808 A.2d at 764–65.

claims for a declaratory judgment on the size of the Board and the invalidity of various actions, breach of fiduciary duty and an accounting, would make that action "totally unlike this one."[25] Although the Second Amended Complaint would make the Pennsylvania Action broader, both actions still would include claims calling into question the validity of the purported stock transfers to Tim. If those claims are substantially similar, the presence of additional claims in the Pennsylvania Action would not weigh against, and indeed might favor, a stay.[26]

The parties do not seriously dispute that both actions involve the issue of whether the transfer of stock to Tim is valid in light of the Stock Purchase Restriction. They also do not seriously dispute that the issue is substantially the same in both actions. The Company contends, however, that the Pennsylvania Plaintiffs are judicially estopped from arguing that the actions are substantially similar because they succeeded in convincing the Pennsylvania court that they are dissimilar under Pennsylvania's *lis pendens* doctrine.

The doctrine of judicial estoppel precludes a party from advancing an argument that contradicts a position it previously persuaded a court to adopt as the basis for a

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[25] PAB at 15. The Company concedes that the two actions were substantially the same before submission of the Second Amended Complaint: "the [Company] argued then (and continues to believe) that these actions were substantially similar . . . ." *Id.* at 13.

[26] *See AT&T*, 1996 WL 633300, at *3.

ruling.[27] Therefore, the Court must examine the issue that was before the Pennsylvania Court when the argument in question was made. Under the Pennsylvania doctrine of *lis pendens*, a court will stay or dismiss a case in favor of an earlier filed action upon a showing that the later case "is the same, the parties are the same, and the rights asserted and relief prayed for [are] the same."[28] This "identity test" is "applied strictly."[29] In the Pennsylvania Action, the Pennsylvania Plaintiffs admitted that the two actions are similar, but argued that the doctrine of *lis pendens* was not applicable because the Pennsylvania Action "was clearly the first filed" and the actions were not identical.

> While [the Pennsylvania] action and the Delaware action are similar, the Delaware action, brought by the corporation, seeks a declaration as to the meaning of a resolution while [the Pennsylvania] action seeks to compel Stan R. McQuaide and William F. McQuaide to issue stock certificates to plaintiff R. Tim McQuaide.[30]

The Pennsylvania court agreed, holding that the *lis pendens* test was not met because "the plaintiff's complaint, amended complaint and [the Company's] Delaware complaint are far from identical."[31]

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27 *Siegman v. Palomar Med. Techs.*, 1998 WL 409352, at *3 (Del. Ch. July 13, 1998).

28 *Crutchfield v. Eaton Corp.*, 806 A.2d 1259, 1262 (Pa. Super. 2002).

29 *Id.*

30 Pennsylvania Plaintiffs' Response to Defendants' Preliminary Objections at ¶ 8, attached as Ex. A to PAB.

31 Opinion dated Dec. 3, 2004 at 2.

In Pennsylvania, the Pennsylvania Plaintiffs argued that the two actions are not identical; before this Court, they argue that the actions are substantially the same. I consider the argument previously advanced by the Pennsylvania Plaintiffs rather hypertechnical and of dubious merit. Nevertheless, I do not find that the argument contradicts the position they advanced in this action. I reach that conclusion because courts in Pennsylvania and Delaware apply different tests when examining a motion to dismiss or stay in favor of a prior pending action. Therefore, judicial estoppel does not bar the Pennsylvania Plaintiffs from arguing here that the two actions are substantially the same.

Turning to whether the actions are, in fact, substantially the same, I find this action and the Pennsylvania Action do involve functionally the same issues. Both actions seek a decision as to whether the Stock Transfer Restriction bars the proposed transfer of stock. Both cases arise from the same nucleus of operative facts. The fact that one action seeks an order compelling issuance of stock certificates and the other seeks a declaratory judgment that the Company need not issue the certificates, is a matter of form, not substance, and is a distinction without a difference under Delaware law.[32]

3. Other considerations

The Company has not presented grounds suggesting that the Pennsylvania Court is incapable of providing prompt and complete justice. Under *McWane*, however, the

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[32] *See Schnell*, 1994 WL 148276, at *4 ("while the claims in the two courts may be stated in different ways, they are actually the same claims and arise out of the same transactional facts").

granting of a stay is not a matter of right, but rests in the sound discretion of the Court. In light of the Pennsylvania Court's decision to proceed with the stock transfer issue, principles of comity and the possibility of inconsistent results weigh heavily in favor of a stay. In addition, the Company has not presented any evidence that proceeding with the case in Pennsylvania would cause it "overwhelming hardship." Factors weighing in favor of resolving the validity of the stock transfer in this Court include the fact that the issue pertains to the internal affairs of a Delaware corporation and may require construction of a section of the Delaware General Corporation Law. In addition, I am mindful that the Second Amended Complaint filed by the Pennsylvania Plaintiffs adds several additional and potentially far reaching claims that could significantly delay resolution of the stock transfer issue. On the other hand, this Court could address that issue promptly and summarily. The Pennsylvania Court, however, presumably has the procedural flexibility to do likewise. Thus, on balance, I conclude that this action should be stayed in favor of the first-filed Pennsylvania Action, absent a determination by the Pennsylvania Court to the contrary. For those reasons, I will stay this case until the conclusion of the Pennsylvania Action.[33]

III. CONCLUSION

In sum, this case presents just the situation the *McWane* doctrine seeks to avoid. "[A] defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in another

[33] Because I conclude this action should be stayed under *McWane*, I do not address the Pennsylvania Plaintiffs' substantive motion to dismiss under Rule 12(b)(6).

jurisdiction of its own choosing."[34] The parties and issues are substantially and functionally the same and there is no dispute that the Pennsylvania Court is capable of providing prompt and complete justice. For those reasons, I hereby stay this action pending the resolution of the Pennsylvania Action or further order of this Court.

IT IS SO ORDERED.

[34] *McWane*, 263 A.2d at 283.