IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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J. BROOKE JOHNSTON, JR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17607
	)	
CAREMARK RX, INC.,	)	
	)	
Defendant.	)	

Submitted: March 22, 2000
Decided: March 28, 2000

MEMORANDUM OPINION

Hem-y N. Herndon, Jr. and Michael A. Weidinger of Morris, James, Hitchens & Williams, Wilmington, Delaware. Attorneys for Plaintiff.

Gregory P. Williams and Megan Semple Greenberg of Richards, Layton & Finger, Wilmington, Delaware. OF COUNSEL: Michael P. Kenny and Philip R. Stein of Alston & Bird LLP, Atlanta, Georgia. Attorneys for Defendant.

STEELE, V.C.

Plaintiff files in Alabama for arbitration of his employment agreement with defendant, his former employer, and the former employer tiles an action in the Alabama courts seeking a declaratory judgment that plaintiff is not entitled to arbitration. The Alabama court stays the arbitration pending a decision on the declaratory judgment action. Plaintiff then seeks leave of the Alabama court to file for arbitration of a related indemnification agreement. The Alabama court denies leave to submit the indemnification agreement to arbitration. The former employer then files an amended complaint in the declaratory judgment action alleging, *inter alia*, that plaintiff breached his fiduciary duties while employed under the terms of the agreements. Plaintiff responds to the amended complaint by asserting a right to advancement of litigation expenses under one or both of the agreements. Five weeks later, plaintiff tiles this complaint in Delaware's Court of Chancery seeking a summary proceeding to determine his right to advancement of expenses or indemnification under 8 ***Del.C.*** § 145(k). His former employer moves to dismiss or stay the Delaware action on the grounds that plaintiff initiated the controversy in Alabama, and that therefore the action was first filed in that forum. Comity and the practical considerations customarily addressed by *forum non conveniens,* the former employer argues, require that this Delaware action be dismissed or stayed.

For the following reasons, I conclude that the first-filed rule does apply to these admittedly anomalous facts and that principles of comity and *forum non conveniens* require that this Delaware action be stayed but not dismissed.

I. Procedural Background

A. The Delaware Battlefield

On November 24, 1999, Plaintiff J. Brooke Johnston, Jr. filed a complaint in this Court against his former employer, Caremark, Inc., a Delaware corporation, in which he seeks the advancement of litigation expenses for a case between the same parties presently pending in the Circuit Court of Jefferson County, Alabama. That action is styled ***MedPartners, Inc.*** v. ***Wagar,*** et ***al.***, CV-9804984. In September 1999, ***MedPartners, Inc.*** changed its name to Caremark Rx, Inc., causing the apparent inconsistency between the Alabama action's caption and this action's caption.

Caremark has filed a motion to dismiss or stay these Delaware proceedings. Notably, Caremark states that Johnston has already raised the advancement issue in Alabama. Caremark therefore argues that the considerations of comity, judicial economy and a *forum non coveniens* analysis favor either dismissal, or a stay, of this action.

B. The War in the South

Johnston formerly served as Senior Vice President and General Counsel of MedPartners. Without getting mired in details that are best left for the Alabama court, it is sufficient to say that Johnston and the company's new management team did not have a good working relationship. These problems led to Johnston's departure in June 1998 and, eventually, to litigation.

Johnston demanded arbitration in Alabama of the disagreement over issues in his employment agreement in the summer of 1998. Caremark' then filed the Alabama action seeking a judgment declaring that Johnston had no right to arbitration. The Alabama court stayed the arbitration proceeding until a final ruling on Caremark's declaratory judgment action. In response to Caremark's Alabama complaint, Johnston asserted seven counterclaims, all of which relate to his alleged employment agreement. Johnston also demanded arbitration in Alabama according to the terms of an indemnification agreement purporting to obligate Caremark to advance and ultimately indemnify his expenses in any action against him arising out of his employment brought for or by Caremark. On September 2, 1999, the Alabama court denied his request for arbitration, finding in

[1] At the time, still called MedPartners.

essence, that the issues raised as of that time all related to the employment agreement and not to the indemnification agreement.

The Alabama battle then escalated. Caremark amended its complaint in Alabama, adding claims against Johnston for breach of fiduciary duties, reckless misrepresentations, suppression, conspiracy to defraud, and waste of corporate assets.

Johnston takes the position that the amended complaint opened the door for a successful claim for advancement and indemnification of his litigation expenses. Specifically, Johnston argues that he is entitled to indemnification under an agreement with MedPartners/Caremark in the event he is a party to any action brought "by reason of any act or omission by him" in his capacity as an "officer, employee or agent of the Company." Further, he asserts that same agreement, by its reference to Delaware's liberally interpreted statute' mandates advancement and indemnification of litigation expenses to an indemnitee who gives proper notice and makes the appropriate undertaking.[3] Therefore, on October 18, 1999, Johnston responded to Caremark's amended complaint, in relevant part, as follows:

> 21. Johnston states that as a result of the new allegations of Plaintiffs First Amended Complaint, he is now undisputedly entitled to the advancement of attorneys' fees and expenses and indemnification pursuant to the Indemnification Agreement of May 13,

[2] ***8 Del. C.*** §145.
[3] See Compl., Ex. G §§ 10, 11.

1997, the applicable corporate governing documents of MedPartners, and the statutory and common law of the State of Delaware.

II. Analysis

Johnston filed this Delaware action on *November 24,* 1999. When Caremark learned of the Delaware action, it petitioned the Alabama court to enjoin Johnston from proceeding with the action on the theory that the advancement issue had been drawn in Alabama, the Alabama court was perfectly capable of interpreting Delaware law, could promptly hear and decide the issue, and that the Delaware action unnecessarily created piecemeal litigation that would be costly to the parties. Johnston argued to the Alabama court that Delaware had "exclusive" jurisdiction over claims for advancement of litigation expenses, that Johnston could and had elected Delaware as his forum for this discrete issue, and that Delaware could more promptly decide the issue and had an overriding governmental interest in indemnification of the litigation expenses of its corporate citizens' officers and directors. Indeed, except for the patently wrong argument of exclusive jurisdiction and the inclusion of an argument that the parties would be spared a jury trial here,[4] the same arguments have been made to me. The Alabama

[4] The record does not clearly show that a jury would be involved in Alabama's consideration of advancement.

court refused to enjoin Johnston from proceeding, implicitly deferring to Delaware on the issue of which court should exercise jurisdiction. The Alabama Circuit Court's courtesy is appreciated and duly noted.

Although the facts in this case do not fit the usual set of circumstances where a defendant tries to defeat a plaintiffs choice of forum in a pending suit elsewhere by initiating a Delaware action involving the same issues as in another jurisdiction of plaintiffs choosing, this is, nonetheless, a first-filed case as that term should be construed. Johnston put advancement of litigation expenses in issue in the Alabama circuit court five weeks before he brought this Action. Because I conclude that the first-filed rule applies, considerations of comity as well as practical considerations will still be addressed, but there is no need to perform a ritualisticforum *non conveniens* analysis here.[5] The first-filed rule applies when a party seeks to stay or dismiss a Delaware action in favor of a first-filed action pending in federal or another state jurisdiction.[6] In contrast, the doctrine of *forum non conveniens* applies when there is no other action with similar parties involving similar issues pending in another jurisdiction, or when the action tiled elsewhere is contemporaneous with or later than the Delaware filing.[7] Our courts, however,

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[5] ***Azurix Corp. v. Synagro Tech., Inc.,*** Del. Ch., C.A. No. 17509, mem. op. at 8, Steele, V.C. (Feb. 3, 2000).

[6] ***McWane Cast* Iron *Pipe Corp. v. McDowell-Wellman Eng'g Co.,*** Del. Supr., 263 A.2d 281, ***284*** (1970).

[7] *Id.*

have often discussed the *forum non conveniens* "practicality" factors when assessing motions to stay Delaware litigation under the first-filed rule.* For that reason, it is proper for this Court to seek to resolve jurisdiction after consideration of practical factors which address where the case could be tried most expeditiously, efficiently and at the least expense to the parties and the public while giving appropriate deference to the plaintiffs choice of forum. The anomaly here, of course, is that Caremark tiled in the Alabama court action in reaction to Johnston's initiation of an alternative dispute resolution mechanism in Alabama and now seeks to stay Johnston's Delaware action in order to proceed in the forum of the state the Delaware plaintiff chose in the first place. Caremark wants to stay the Delaware action in favor of both the state where Johnston began the dispute and where Caremark wishes to resolve it. I suspect we shall not soon see the like of this scenario again.

Should Delaware exercise jurisdiction and decide this dispute? Delaware clearly does not have *exclusive* jurisdiction over it. This Court does, however, exclusive of any other *Delaware* court, have jurisdiction over these disputes when it is appropriate to hear them in Delaware.[9]

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[8] ***See e.g., Adirondack GP, Inc. v. American Power Corp.,*** Del. Ch., C.A. No. 15060, mem. op. at 15, Steele, V.C. (Nov. 13, 1996); ***Hurst v. General Dynamics Corp.,*** Del. Ch., 583 A.2d 1334, 1337-38 (1990).

[9] See 8 ***Del.C.*** § 145(k).

Johnston argues that this Court should follow ***Fujisawa Pharmaceutical Co., Ltd., v. Kapoor***.[10] But, the facts of that case are inapposite. In ***Fujisawa,*** the Supreme Court examined a request for advancement from a *Delaware plaintiff who had been sued* in a pending federal action *in Illinois.* The Supreme Court upheld the trial court's decision to order advancement after construing the meaning of the relevant indemnification agreement. In ***Fujisawa,*** however, the party seeking advancement never raised that issue in Illinois or anywhere else. He put it in issue here first and the Delaware courts honored his forum choice. Here, Johnston himself undeniably drew the parties into this controversy by electing arbitration in Alabama of all issues relating to his employment agreement and then put the discrete issue of advancement in issue in the Alabama Circuit Court in October 1999. I am not persuaded by Johnston that simply because the indemnification agreement suggests that Delaware is an appropriate forum for litigating advancement of litigation expenses that his plea to segregate and then litigate here the issue already drawn in Alabama should, for practical reasons, be heard here. Johnston argued initially, here at any rate, that because Alabama had set the trial for April 10, 2000, only Delaware, with its reputation for swift judicial action, could be capable of providing prompt and complete relief before that date. Notwithstanding this Court's appreciation of that appealing consideration I need

[10] Del. Supr., 655 A.2d 307, 1995 WL 24906 (1995) (Unpublished disposition).

not address that argument because the Alabama trial has been postponed to a future, not yet determined, date. Accordingly, it seems Johnston would neither be denied timely resolution of his advancement contention nor prejudiced by delay in resolving it before the crushing expense of trial if he pursues the matter in the Alabama Circuit Court.

I recognize that Delaware law is applicable. I note that none of the documents or persons who would either produce discovery or testify are in Delaware and that discovery is ongoing, if not already completed, in Alabama. While Delaware certainly has a compelling interest in its General Corporate Law, other states are capable of applying Delaware law." The application of Delaware law to disputed facts arising out of transactions over which other states have jurisdiction carries far less compelling interest for Delaware courts than cases where novel and substantial issues of our corporate law are implicated. The parties dispute whether Alabama can act as quickly as Delaware's Court of Chancery especially when our statute requires that we decide the matter "summarily." Now that trial in Alabama no longer looms on the immediate horizon, the record does not suggest that Alabama would or could not decide the advancement issue in sixty days or, at least, before trial.

[11] ***See In re Chambers Development Co., Inc. Shareholders Litig.,*** Del. Ch., C.A. No. 12508, 1993 WL 179335 at *3, Chandler, C. (May 20, 1993) (stating that, except in cases involving application of novel and substantial issues of Delaware corporate law, other "courts are more than capable of interpreting Delaware corporate law").

Before deeply engaging in a two front war contrary to our Supreme Court's admonition against encouraging "piecemeal litigation,"[12] Alabama should have the opportunity to address the issue. Johnston filed for arbitration in Alabama in order to resolve disputes about his rights under his employment agreement. A review of that arbitration, if necessary, would be in the Alabama courts. An Alabama court has already stayed the arbitration and construed, at least in part, the indemnification agreement which is the basis for Johnston's claim for advancement. The delay of the trial date in Alabama gives Johnston time to request that the court to which he first asserted his right to advancement take up his entitlement to advancement of litigation expenses as well as the time for the Alabama court to decide it. It makes little sense for Delaware to begin to construe the limited issue of the rights and obligations of the parties under the indemnification agreement simply because Delaware law applies and the plaintiff now wants this single discrete issue raised in another forum other than the one in which he opened the controversy.

This case presents, I admit, a rather unusual variation on the first filed rule's policy to defer to the plaintiffs choice of forum. Given the ever-increasing reliance on alternative dispute resolution in all states and the general understanding that court review of that process will take place in the state where the ADR occurs,

[12] ***See Prezant v. De Angelis, 636*** A.2d 915,923 (1994).

absent a written understanding to the contrary, this plaintiff must logically be deemed to have filed first in Alabama. Considerations of comity and practicality suggest that after injecting the issue of advancement into the declaratory judgment action, plaintiff can not claim first filed deference for this Delaware filing. Staying this Delaware filing will enable the Alabama court to elect to examine the advancement issue in a context with a better opportunity to understand the need and reasons for litigation costs and expenses and the relative contractual rights of the parties. Only if Alabama is unable or unwilling to resolve the issue, should this Court undertake to resolve a matter that Johnston first put in issue in Alabama. Johnston and this Court will be able to move swiftly here to lift the stay and proceed should the Alabama court conclude it can not or should not act upon his request for advancement of litigation expenses.

The motion to expedite is denied.

The motion to dismiss is denied.

The motion to stay is granted.

IT IS SO ORDERED.

Vice Chancellor