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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRU-CON CONSTRUCTION CORPORATION, a Missouri corporation,

NO. CIV. S-05-583 LKK/GGH

Plaintiff,

v.

O R D E R

SACRAMENTO MUNICIPAL UTILITY DISTRICT, a municipal utility district; UTILITY ENGINEERING CORPORATION, a Texas corporation,

Defendants.

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Plaintiff Fru-Con Construction Corp. ("Fru-Con") has brought suit against the Sacramento Municipal Utilities District ("SMUD") for breach of a construction contract; co-plaintiff Traveler's Casualty and Surety Co. has also sued SMUD, seeking a declaratory judgment as to Traveler's non-liability on related bonds. SMUD has filed counterclaims against both plaintiffs on the same contracts. SMUD also filed an earlier suit against Fru-Con in state court.

1 SMUD previously moved to stay this action pursuant to Colorado
2 River Water Conservation Dist v. United States, 424 U.S. 800
3 (1976). On August 11, 2005, the court denied SMUD's motion,
4 although with the caveat "in light of the concern regarding
5 piecemeal litigation, this order is without prejudice
6 to renewal should the scope of the state court action change
7 significantly." Doc. No. 95, at 8. While the court has not issued
8 a formal stay since that time, a de facto stay has been in place
9 for roughly eighteen months. In that interim, the state proceeding
10 went to trial, and on June 8, 2009, the jury returned a verdict in
11 favor of SMUD. The court now formally stays the matter pursuant
12 to Colorado River.

13 I. STANDARD

14 Abstention from the exercise of federal jurisdiction is a
15 narrow exception to the general rule that federal courts must
16 exercise the jurisdiction given them. Colorado River, 424 U.S. at
17 813. In cases where state and federal courts contemporaneously
18 exercise jurisdiction, considerations of wise judicial
19 administration including conservation of judicial resources and
20 comprehensive disposition of litigation may lead a court to stay
21 a federal action. Id. This so-called "Colorado River abstention"
22 is not an actual form of "abstention," but rather a form of
23 deference to state court jurisdiction. Coopers & Lybrand v.
24 Sun-Diamond Growers of Calif., 912 F.2d 1135, 1137 (9th Cir. 1990).
25 If Colorado River deference is found to be appropriate, a district
26 court must stay rather than dismiss an action so that the federal

1 forum remains open if the state forum proves inadequate. Coopers
2 & Lybrand v. Sun-Diamond Growers of Calif., 912 F.2d 1135, 1137
3 (9th Cir. 1990); Attwood v. Mendocino Coast District Hospital, 886
4 F.2d 241 (9th Cir. 1988).

5 The court must examine six factors to determine whether a
6 stay is appropriate under Colorado River: (1) whether either
7 court has assumed jurisdiction over a res; (2) the convenience of
8 the forum; (3) the desirability of avoiding piecemeal litigation;
9 (4) the chronological order in which the state and federal courts
10 obtained jurisdiction; (5) whether state or Federal law controls;
11 and (6) whether the state proceedings are adequate to protect the
12 parties' rights. Moses H. Cone Memorial Hospital v. Mercury
13 Construction Corp., 460 U.S. 1, 25-26 (1983); Colorado River, 424
14 U.S. at 818. The Ninth Circuit has identified an additional
15 factor: whether the suit in federal court is an attempt to forum
16 shop or to avoid an adverse ruling in the state court. Nakash v.
17 Marciano, 882 F.2d 1411, 1417 (9th Cir. 1989). These factors "are
18 not to be applied in a checklist fashion[,] [r]ather they are to
19 be applied pragmatically and flexibly as part of a balancing
20 process." American Int'l Underwriters (Phillipines), Inc. v.
21 Continental Ins. Co., 843 F.2d 1253, 1257 (9th Cir. 1988). To
22 determine whether a stay is warranted, the court must balance the
23 Colorado River factors "with the balance heavily weighted in favor
24 of the exercise of jurisdiction." Travelers Indem. Co. v. Madonna,
25 914 F.2d 1364, 1372 (9th Cir. 1990) (quoting Cone, 460 U.S. at 16).

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1 **II. ANALYSIS**

2 Although the factors are not a checklist, the court must
3 determine the effect of each. In the prior order denying a
4 Colorado River stay, the court concluded that "jurisdiction over
5 a res, convenience of the forum, and the adequacy of the state
6 proceedings, are either irrelevant or neutral in this case." Order
7 of August 11, 2005, at 7-8.

8 The analysis of two other factors is also unchanged. The
9 court previously determined that although this case purely involves
10 state law, the state law questions are merely "'routine issues .
11 . . which the District court is fully capable of deciding,'" such
12 that this factor did not weigh in favor of a stay. Id. at 6
13 (quoting Travelers, 914 F.2d at 1370). On the other hand, the
14 court held that Fru-Con's actions raised a possibility of forum
15 shopping that "len[t] some weight to staying this action." Id. at
16 7 (citing Travelers, 914 F.2d at 1371). Intervening developments
17 in this case do not warrant re-examination of these conclusions.
18 Therefore, the court turns to concerns over piecemeal litigation
19 and the order in which the suits were filed.

20 **A. Piecemeal Litigation**

21 "'Piecemeal litigation occurs when different tribunals
22 consider the same issue, thereby duplicating efforts and possibly
23 reaching different results.'" Travelers Indem. Co., 914 F.2d at
24 1369 (quoting American International Underwriters, Inc. v.
25 Continental Ins. Co., 843 F.2d 1253, 1258 (9th Cir. 1988)). To
26 some extent, this possibility exists whenever there are parallel

1 state and federal proceedings, and this ordinary circumstance does
2 not warrant a stay. Colorado River, 424 U.S. at 817.

3 In the prior order, the court held that there was a
4 possibility that numerous subcontractors would be joined in the
5 state action, which would create a “vastly more comprehensive
6 state action that can adjudicate the rights of many parties or the
7 disposition of much property,” a fact which would support issuance
8 of a stay. Id. at 4 (quoting Travelers, 914 F.2d at 1369). It
9 does not appear that such a vastly more comprehensive action has
10 been created. Instead, Travelers Casualty and Surety Co. has been
11 joined as a party in the federal action but not the state action.
12 Accordingly, while the prior order found that this factor provided
13 some support for issuing a stay, this is no longer the case.

14 **B. Order in which Suits Were Filed**

15 Although the state suit was filed first, this fact does not
16 itself indicate that the federal suit should be stayed. Instead,
17 for purposes of the Colorado River doctrine, the issue is “how much
18 progress has been made in the two actions.” Cone, 460 U.S. at 21.
19 When the court last considered this issue, little progress had been
20 made in the state suit, although the court attributed the lack of
21 progress to Fru-Con’s improvident removal of the state suit. Order
22 of August 11, 2005 at 5.

23 At this point, the state suit has proceeded through discovery,
24 summary judgment, and a fourteen week trial. After these fourteen
25 weeks, the jury deliberated for a further seven weeks. The state
26 court has not yet entered final judgment, because it is considering

1 motion a motion for prejudgment interest. While progress has also
2 been made in this suit, including adjudication of several motions
3 for summary judgment, the state court's completion of the
4 extraordinarily long trial demonstrates that significantly more
5 progress has been made in the state suit. This factor supports
6 issuance of a stay.

7 **C. Balancing of The Factors**

8 The court concludes that the balance of the above factors
9 warrants issuance of a stay. In this inquiry, the issue is not
10 whether the factors indicate that the federal forum is preferable
11 to the state forum; instead, in light of the presumption against
12 a stay, the question is whether the factors demonstrate that this
13 case presents the exceptional circumstances that warrant deference
14 to state courts and consequent issuance of a stay. Travelers, 914
15 F.2d at 1367 (citing Colorado River, 424 U.S. at 818). As noted
16 above, in evaluating whether a case manifests these circumstances,
17 the various factors "are not to be applied in a checklist
18 fashion[,] [r]ather they are to be applied pragmatically and
19 flexibly as part of a balancing
20 process." American Int'l Underwriters, 843 F.2d at 1257.

21 As explained above, this case does not present an abnormal
22 risk of piecemeal litigation, which indicates against a stay.
23 Several other factors have been found to be neutral as to this
24 analysis. The only factors indicating that a stay should issue are
25 the possibility of forum shopping, which provides only weak
26 support, and the disparity in the progress that has been made in

1 the two suits. However, this final factor provides compelling
2 support for issuance of a stay. Given the complexity of this suit,
3 a parallel trial would present both the type of "substantial waste
4 of judicial resources" and "burden on the defendant" that warrant
5 a stay. Travelers, 914 F.2d at 1370 (quoting Herrington v. County
6 of Sonoma, 706 F.2d 938, 940 (9th Cir. 1983)); see also American
7 Int'l Underwriters, 843 F.2d at 1259. The court concludes that the
8 burdens on both the court and the defendant in this suit would be
9 especially extreme, given the complexity of this matter as
10 demonstrated by the proceedings that have already been completed
11 in the state suit. On the facts of this case, this factor, even
12 in isolation, overcomes the presumption against issuance of a stay.

13 **III. CONCLUSION**

14 For the reasons stated above, the court STAYS this matter
15 pursuant to Colorado River, 424 U.S. 800. The parties are directed
16 to notify the court upon completion of the state court litigation.

17 IT IS SO ORDERED.

18 DATED: September 17, 2009.

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22 LAWRENCE K. KARLTON
23 SENIOR JUDGE
24 UNITED STATES DISTRICT COURT
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