Trujillo v. Apple Computer, Inc. et al Doc. 1081

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

ATLANTIC MUTUAL INSURANCE COMPANY,	)	Case No.: 05C 4886
Plaintiff,	)	Judge Blanche Manning
v.	)	Magistrate Judge Nolan
MYRON CORPORATION,	)	
Defendant.	)	

ATLANTIC MUTUAL INSURANCE COMPANY'S RESPONSE TO DEFENDANT'S MOTION FOR ABSTENTION

Plaintiff, Atlantic Mutual Insurance Company ("Atlantic"), submits its Memorandum in Response to the Motion for Abstention filed by Defendant, Myron Corporation ("Myron").

INTRODUCTION

While district courts certainly have discretion to abstain from issuing declaratory judgments, this discretion is not unfettered and it clearly should not be exercised in this case. There are no parallel proceedings pending in New Jersey or any other court between the parties and, in fact, because Myron's state court case was specifically dismissed in favor of this case, there is no chance this Court's ruling will result in piecemeal litigation or inconsistent results. A New Jersey court already determined that Atlantic was not forum shopping when it filed its case here, and it agreed that interests of comity and judicial efficiency were served by proceeding in a federal forum. To now allow Myron to circumvent the New Jersey ruling, and to further delay and avoid a ruling on the merits, results in actual prejudice to Atlantic, since it continues to be responsible for Myron's ongoing defense costs in the underlying cases. By going forward now, with the benefit of extensive briefing on the background of this matter, this Court is in the best position to clarify whether Atlantic owes an obligation to defend or indemnity Myron for a host

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of underlying TCPA cases filed throughout the country, not just in New Jersey. This Court should deny Myron's motion for abstention.

LAW AND ARGUMENT

A. In the Absence of a Parallel State Case, This Case Lies At the "Outer Boundaries" of the Court's Discretion; The Court Should Not Abstain

District courts clearly have discretion as to whether and when to grant declaratory relief, but this discretion is not unfettered. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995); *see also Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491, 494, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942); *Public Affairs Association v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 581-82 (1962). A district court cannot decline to entertain a declaratory judgment action "as a matter of whim or personal disinclination." *Public Affairs Association v. Rickover*, 369 U.S. at 112, 82 S.Ct. at 581-82. Further, there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically. *Government Employees Ins. Co. v. Dizcol,* 133 F.3d 1220, 1225 (9th Cir. 1998).

Cases such as this one, where there are no parallel state court proceedings, lie at the "outer boundaries" of the district court's discretion under the Declaratory Judgment Act. *Ark Telecommunications, Inc. v. State Farm Fire & Cas. Co.*, 116 F.3d 1485 (9th Cir. 1997); *Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1289 (9th Cir. 1996), *citing, Wilton* 515 U.S. at 289-290, 115 S.Ct at 2144. As was recognized by the court in *Maryland Cas. Co. v. Knight,* the "primary instance" in which a district court should exercise its discretion to dismiss a case is presented when a parallel proceeding exists in state court. *Id.* at 1289.

Indeed, the non-exhaustive list of factors identified by the Seventh Circuit to consider in guiding a district court's discretion are specifically described in reference to circumstances where a related state action is already pending. *Nationwide v. Zavalis,* 52 F.3d 689, 692 (7th Cir.

1995) (considering factors such as identity of issues, parties and relief sought in parallel cases). In contrast, there is very little reason to dismiss declaratory relief claims when there is no pending or impending state court suit. *Maryland Cas. Co. v. Knight*, 96 F.3d at 1289.

The Seventh Circuit does not appear to apply a *per se* rule either requiring a district court to hear a declaratory judgment action where there is no pending state litigation, or requiring abstention where there is a pending action. *But see, ARW Exploration Corp. v. Aguirre*, 947 F.2d 450, 454 (10th Cir. 1991)(finding a district court abused its discretion when it dismissed a declaratory judgment action after a related state court proceeding had been dismissed); *Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1247 (11th Cir. 2000)(finding it an abuse of discretion to dismiss a declaratory judgment action in favor of a state court proceeding that does not exist.). Nonetheless, even in jurisdictions without a *per se* rule, the absence of a pending parallel state proceeding is clearly an important factor weighing against abstention. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 394 (5th Cir. 2003); *see also State Auto Ins. Cos. v. Summy*, 234 F.3d 131 (3rd Cir. 2000). When this court abstained in *General Motors Corp. v. M&G Management,* 2003 WL 21501782 (N.D. Ill. 2003)(cited by Myron), its concern that a decision could result in piecemeal litigation or conflicting results, was due to the fact that a parallel state action was pending. *See also, Sherwin-Williams*, 343 F.3d at 391 (recognizing a federal district court should avoid duplicative or piecemeal litigation where possible). However, this is not an issue here.

As Myron concedes, there was no pending or even impending state court action when this case was filed, and there are clearly no state court actions pending at this time. While Myron spends a great deal of time discussing the *Nationwide* factors, it does so in reference to a state case which no longer exists. This court cannot conclusively determine whether there are an

identity of parties, issues or requests for relief so as to justify abstention, since a state court case involving these parties, these issues or a request for declaratory relief is, at this point, only a theoretical concept. Unlike the cases cited by Myron, a state court judge has already weighed in on considerations of comity and judicial efficiency and specifically dismissed Myron's attempt at a competing state court case, finding it appropriate for these parties to proceed before this Court. *See,* Affidavit of Kevin Wolff, attached as Ex. A; Order attached to Myron's Brief as Ex. E.

Since there is no state action pending in New Jersey, the form and contents of a theoretical future complaint by Myron against Atlantic remain unknown.[1] What is certain, is that the court in New Jersey has already deferred to this Court, thus removing any threat of piecemeal results or inconsistent findings. Under these circumstances, the absence of any parallel action weighs heavily against abstention.

B. <u>This Court Should Not Reward Myron's Reactionary State Court Case; Its Allegations of Forum Shopping by Atlantic Are Unwarranted</u>

As Myron notes, federal courts, including the Seventh Circuit, apply a non-exhaustive list of factors to consider when assessing whether to exercise discretion in a declaratory proceeding. *See, Sherwin-Williams*, 343 F.3d at 390 n.2 (discussing factors considered in several jurisdictions). In *Maryland Cas. Co. v. Knight*, 96 F.3d at 1289, one of the factors considered by the court was the relative timing of the competing cases and whether the federal case was filed as a reactionary tactic, or in anticipation of an impending state court suit. *See also, Sherwin Williams*, 343 F.3d at 391; *Government Employees,* 133 F.3d at 1225. However, this factor weighs against abstention under the circumstances of this case.

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[1] For example, if Myron were to re-file an action against Atlantic in state court, it could conceivably join other parties, allege other causes of action, or seek other forms of relief not set forth in its initial New Jersey complaint, which was dismissed without prejudice.

As noted by Myron, upon receipt of requests for a defense and indemnification in underlying TCPA claims, Atlantic issued a detailed reservation of all rights, including the right to withdraw from Myron's defense at any time and/or to deny any obligation for a judgment or settlement. (Myron's Brief, Ex. C). If Myron was concerned about obtaining a judicial declaration of the parties' rights and obligations in its home state, it had *over one year* to file such an action. It chose not to.

When *American States Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), was decided, it resolved a conflict which had previously existed at the district court level and it became, at the time, the highest court decision of its kind. Having been rendered in the precise jurisdiction where Myron's largest, most expensive TCPA case was pending,[2] it was certainly a factor to be considered. Nonetheless, rather than withdrawing from Myron's defense at that time and rushing to the courthouse, as Myron implies, Atlantic continued its reservation of rights position for several months *after* the *American States* decision. (Myron's Brief at 3). During that time, Myron had every opportunity to file a declaratory judgment action in its home state, or elsewhere, but it did not do so. Myron certainly never advised Atlantic of any plans to file an action in New Jersey and it does not present any such evidence to this Court.

Instead, after several *months*, Atlantic indeed filed its initial action in this court, but not without appropriate justification for doing so. Myron's largest, most expensive TCPA case was (and remains) pending in Illinois, a state where both of the parties conduct business, and the state where Myron allegedly sent thousands of the faxes to Illinois residents giving rise to potential TCPA liability here. Since Atlantic was (and still is) defending Myron in its Illinois case, under reservation of rights, it was (and still is) entirely proper for Atlantic to pursue a declaration of its

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[2] A majority of the defense costs in the underlying TCPA lawsuits have been incurred in Illinois as a result of the underlying *Stonecrafters Inc. v. Myron Corporation* case, which is still pending in Illinois.

rights here. *See, Government Employees,* 133 F.3d at 1225 (noting an absence of any authority barring an insurer from invoking diversity jurisdiction to bring a declaratory action against an insured on an issue of coverage).

When this court initially dismissed Atlantic's action for a perceived lack of a sufficient amount in controversy, Atlantic immediately re-filed, not because it anticipated a state court case by Myron, but because additional defense cost invoices had been received in the interim which exceeded the amount in controversy requirement. *See,* Certifications of Kris Kennedy and Jane Freud, filed in support of Atlantic's motion to dismiss the New Jersey action, attached as Exs. B & C. If anything, Myron's filing of a competing New Jersey case within days of Atlantic's re-filed action was clearly "reactive" and done solely in an attempt to wrestle the case away from Atlantic chosen forum.

During briefing on Atlantic's motion to dismiss the New Jersey case, and throughout the briefing before this court, Myron repeatedly accuses Atlantic of forum shopping, citing the fact that the policies at issue were negotiated and/or executed in New Jersey. *See, e.g.,* Ex. A(2). While Myron's allegations regarding the policy negotiation may be true, the terms of the Atlantic policies themselves are not in dispute in any event. Myron has submitted TCPA claims and suits to Atlantic seeking a defense and/or indemnification throughout the country, not just in New Jersey. Further, the largest, most expensive case, the case involving the greatest number of allegedly unsolicited faxes, and the case with the greatest potential uninsured exposure to Myron, is pending in Illinois.

As was recognized in *Sherwin Williams,* 343 F.3d at 391, the filing of every lawsuit involves forum selection. Declaratory judgment actions in particular often anticipate related litigation. *Id.* Yet the filing of a declaratory judgment action in a federal court with jurisdiction

to hear it, even in anticipation of state court litigation, is not in itself improper or otherwise abusive "forum shopping." *Id.* Myron's forum shopping allegations are clearly unjustified and, in fact, have already been specifically rejected by Judge Harries in New Jersey. *See,* Affidavit of Kevin Wolff, attached hereto as Exhibit A; Order attached to Myron's Brief at Ex. E. This Court should come to the same conclusion. Certainly, Myron's name calling tactics should not be used as a basis for abstention.

C. <u>"Federalism," "Fairness" and "Efficiency" Are Served by This Court Proceeding to the Merits</u>

In *Sherwin-Williams Co. v. Holmes County,* 343 F.3d at 390, the Fifth Circuit noted the similarity among all federal circuits, including the Seventh Circuit, in applying various non-exhaustive factors to guide a court's exercise of discretion in accepting or declining jurisdiction in a declaratory suit. The court summarized all of the tests as including three general concepts: federalism; fairness; and judicial efficiency. All of these factors weigh in favor of the Court accepting jurisdiction and proceeding in this forum.

As was already noted, there is no parallel state proceeding pending and, since the New Jersey court deferred to this Court, there is no risk that this Court's ruling will run afoul of a state court's decision. Further, contrary to Myron's assertions, this case does have an impact on a "federal interest" in the sense that all of the underlying cases allege violations of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*, ("TCPA"). In determining the parties' rights and obligations, the Court will necessarily need to determine whether the nature of this federal statute and the alleged violations at issue fall within the purview of a commercial general liability policy. *See generally, Nationwide Mut. Ins. Co. v. Svitesic*, 2005 WL 3070941 (W.D. Pa. 2005)(a district court does not have absolute discretion to decline jurisdiction over a declaratory judgment action when the issues include federal statutory interpretation).

Considerations of fairness also dictate in favor of this Court retaining jurisdiction and proceeding on the merits, rather than further delaying the process. *See Three Rivers Cablevision, Inc. v. Pittsburgh*, 502 F. Supp. 1118, 1126 (W.D. Pa. 1980)(refusing to abstain where no state proceeding had yet been commenced and where abstention would delay the ultimate disposition for more than an immaterial period). Atlantic has been defending Myron in the underlying TCPA lawsuits for years, under a reservation of rights. As the Court is keenly aware, Myron has and continues to incur defense costs in these cases and, unless or until Atlantic obtains a judicial declaration of its rights, Atlantic will remain responsible for those costs. For this reason, Atlantic has spent over one year trying to get to the merits and obtain a substantive ruling, only to be met by jurisdictional challenges by Myron designed expressly to delay. Atlantic ultimately succeeded in proving the jurisdictional basis for its suit and it is prepared to move forward to the merits. While Myron does not articulate how the parties will proceed,[3] if this Court were to abstain, Atlantic could be at the whim of Myron; forced to wait for Myron to re-file a state action at its leisure and then begin this process from scratch. All the while, Atlantic remains responsible for Myron's defense costs. Going forward now will "serve a useful purpose in clarifying the legal obligations and relationships among the parties," so the Court should proceed. *Nationwide,* 52 F.3d at 692. Further, in conjunction with the other factors discussed herein, prejudicial delay makes abstention in this case "wholly inappropriate." *Id.*

Judicial efficiency is also served by this Court retaining jurisdiction. The parties already spent a significant amount of time and resources debating principals of comity, judicial efficiency and forum selection in New Jersey, and the court agreed to defer to this Court.

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[3] For example, would Myron be required to immediately re-file the New Jersey state court action? Will it be permitted to wait weeks or months? Will Myron be required to re-file an identical state court action in New Jersey? Can it include other claims for relief which, if they had been pled previously, would have weighed against abstention?

Having already reviewed significant briefing by both parties, this Court is also much more familiar with the issues and case background than any other court. To simply allow Myron to now contravene the New Jersey decision and start from scratch in its belatedly chosen venue would be a waste of judicial resources, particularly since the outcome in New Jersey is no more certain than it is in this Court.

D. New Jersey Is Not In Any Better Position to Resolve The Coverage Dispute

Myron makes much of the fact that Atlantic's policies were negotiated in New Jersey and, as such, argues that New Jersey is in a "much better position to resolve this dispute." Myron's Brief at 9-11. However, the terms of the policies themselves are not at issue. Facts surrounding the issuance and negotiation of the policies are irrelevant. Instead, this case centers around whether alleged violations of the federal TCPA statute fall within the policy terms.

Myron inappropriately argues for the application of New Jersey law to this dispute -- an issue which is not before the Court at this time. Myron further claims that the only reason Atlantic filed in this venue is because the *American States* decision may apply here. The selection of a federal forum does not necessarily dictate or change the substantive law which may apply to the policies. Moreover, without commenting on the law which may apply, it is clear that there are no controlling cases from the highest courts of either Illinois or New Jersey on the issue of TCPA coverage. Indeed, as this Court is likely aware, federal and state courts across the country have been inconsistent on this issue, such that a New Jersey court, or any other state court, would be required to rely upon the various federal and out-of-state decisions which have addressed this issue for a ruling, in the same manner as this Court may do so.[4] As

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[4] A Massachusetts court applying New Jersey law recently held that a commercial general liability policy *did not* provide coverage for TCPA claims and lawsuits. *See Terra Nova Insurance Company v. Metropolitan Antiques, LLC et al.*, 20 Mass. L. Rep. 430 (Mass. Super. Ct. Jan. 24, 2006).

such, the fact that New Jersey law may indeed apply does not cut in favor of abstention, particularly in conjunction with the other factors discussed above.

E. <u>Atlantic's Choice of A Federal Forum Should Not Be Disturbed</u>

Myron should not be allowed to arbitrarily trump Atlantic's rightful choice of forum in this case. The express purpose of the federal diversity jurisdiction statute is to allow diverse parties the choice of a federal forum. *See* 28 U.S.C. sec. 1332; *see also Burt v. Isthmus Development Corp.*, 218 F.2d 353 (5th Cir. 1955); *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225 (S.D.N.Y. 1994) (it is generally an accepted view that diversity jurisdiction was established because of desire to insure a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states). Indeed, with Myron and Atlantic being citizens of different states, a federal court would be the most competent and impartial tribunal for this action. To allow Myron to effectively negate Atlantic's choice of forum would undermine the purpose of federal diversity jurisdiction, which Atlantic has established exists in this case. The possibility of prejudice to out-of-state litigants suggests that courts should be wary of using judicially crafted abstention doctrines to deny out-of-state litigants a federal forum that they prefer. *Stevo v. CSX Transp., Inc.*, 940 F. Supp. 1222, 1226 (N.D. Ill. 1996) (*citing Minot v. Eckardt-Minot*, 13 F.3d 590, 593 (2d Cir. 1994). *See also Government Employee*, 133 F.3d at 1225.

Moreover, this Court must "'give some weight to the plaintiff's choice of forum.'" *Posnet Services, LLC v. William R. Cunningham and Cunningham Electronics Corp.*, No. 05 C 5577, 2006 U.S. Dist. Lexis 1230 at *11 (N.D Ill. January 11, 2006)(*quoting Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364, 368 (7th Cir. Ill. 1979))(A copy is attached as Ex. D); *see also Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286,

1294 (7th Cir. 1989) (stating that "some weight must be given to [a plaintiff's] choice of forum"). The choice of a forum by a plaintiff should not be "'lightly . . . disturbed.'" *Id.* (*quoting Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1259 (7th Cir. 1977)). In fact, where a plaintiff appropriately brings a declaratory judgment action to resolve issues concerning a duty to defend and a duty to indemnify, the plaintiff's choice of forum is entitled to deference. *See e.g., American Cas. Co., et al. v. Filco, et al.*, No. 04 C 3782, 2005 U.S. Dist. Lexis 3064 at *8-9 (N.D. Ill. January 19, 2005)(A copy is attached as Ex. E). By abstaining, this Court would simply force the parties to litigate this suit in the forum of defendant's choice.[5]

CONCLUSION

For the reasons discussed above , Myron's motion for abstention should be denied and the parties should proceed before this Court.

Respectfully submitted,

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[5] If this Court is inclined to abstain, we note that the preferable course would be a stay of this action. *Wilton,* 515 U.S. at 288 n.2, 115 S. Ct. at 2143 n.2.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on July 12, 2006, a true and correct copy of the foregoing **ATLANTIC MUTUAL INSURANCE COMPANY'S RESPONSE TO DEFENDANT'S MOTION FOR ABSTENTION** was electronically filed with the Clerk of the Court using the CM/EF system which will send notification of such filing to the parties designated to receive notice.

s/Jane S. Freud