Third District Court of Appeal

State of Florida

Opinion filed September 11, 2019.

Nos. 3D19-840 and 3D19-841
Lower Tribunal Nos. 18-32843 and 18-37190

OPKO Health, Inc., et al.,
Petitioners,

vs.

Frank Lipsius, etc., and Louis T. Alexander, etc.,
Respondents.

Writs of Certiorari to the Circuit Court for Miami-Dade County.

Akerman LLP, and Gerald B. Cope, Jr.; King & Spalding LLP, and Rebeca M. Ojeda (Atlanta, GA), for petitioners.

Hernandez Lee Martinez, LLC, and Eric A. Hernandez and Jermaine A. Lee; The Weiser Law Firm, P.C., and James M. Ficaro and Brett D. Stecker (Berwyn, PA); RM Law PC, and Richard A. Maniskas (Berwyn, PA), for respondents.

Before SALTER, MILLER, and GORDO, JJ.

ON MOTION FOR REHEARING

GORDO, J.

Upon considering Respondents' Motion for Rehearing, this Court withdraws its previous opinion filed June 19, 2019, and substitutes the following opinion in its place:

FACTUAL & PROCEDURAL BACKGROUND

OPKO Health, Inc. ("OPKO"), petitions this Court for certiorari review of the trial court's order denying their motion to stay proceedings in Lipsius v. Frost, and Alexander v. Frost.[1] The undisputed facts are set out as follows by the lower court in its Order on Defendants' Motion to Dismiss, and/or Stay the Case:[2]

> On September 7, 2018, the U.S. Securities and Exchange Commission ("SEC") filed a complaint against OPKO, the Company's Chief Executive Officer ("CEO") and Chairman of the Board of Directors (the "Board"), defendant Frost, and a myriad of others, alleging that these defendants participated in an elaborate "pump and dump" insider stock selling scheme, netting Frost and his co-conspirators millions of dollars (the "SEC Action"). The SEC Action alleged that Frost and his associates executed a scheme whereby they used Frost's reputation as a successful healthcare investor in order to artificially inflate the stock prices of companies in which they had invested, and then liquidated their own positions in those stocks. After the filing of the SEC Action, OPKO's stock price tumbled by nearly 30% and trading in OPKO stock was temporarily halted.
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> On December 27, 2018, the Company announced the settlement of the SEC Action. In connection with the settlement, the Company announced that it had "agreed to an injunction from certain violations

[1] The two cases have not been consolidated below; however, the trial court issued a single order pertaining to the two cases. Thus, this Court has ordered a consolidation for all appellate purposes.

[2] Lipsius v. Frost, et al., No. 2018-032843 CC 44 (Fla. 11th Cir. Ct. 2019); Alexander v. Frost, et al., No. 2018-037190 CC 44 (Fla. 11th Cir. Ct. 2019).

> of the Securities Exchange Act of 1934 (the "Exchange Act"); a $100,000 penalty; and will perform certain undertakings related to the Exchange Act." Defendant Frost, meanwhile, agreed "to injunctions from certain violations of the Securities Act of 1933 and the Exchange Act; approximately $5.5 million in penalty, disgorgement, and prejudgment interest; and a prohibition, with certain exceptions, from trading in penny stocks."

Following the SEC Action, multiple federal securities class actions and derivative actions were filed in federal and state courts. The first action initiated in Florida, Steinberg v. OPKO Health, Inc. ("Federal Securities Action"), was filed on September 14, 2018, in the Southern District of Florida.[3] This class action suit was brought on behalf of a class of OPKO investors alleging that OPKO, Frost and other officers made false or misleading statements and failed to disclose alleged market manipulation at issue in the SEC Action.

On September 27, 2018, the first of the Florida derivative suits was filed in the Circuit Court for the Eleventh Judicial Circuit of Florida by Frank Lipsius, on behalf of OPKO, seeking damages caused by a breach of fiduciary duties by OPKO's directors. Service was not perfected until November 9, 2018. Meanwhile, on November 2, 2018, Louis Alexander filed an almost identical derivative complaint in the Florida circuit court. The Florida derivative suits allege the OPKO directors breached their fiduciary duties by allegedly allowing there to be misstatements and

[3] A consolidated class action complaint was later filed in this action in the Southern District.

misrepresentations made in OPKO's SEC filings and failing to disclose their involvement in the "pump and dump" scheme.

Additionally, multiple derivative suits were filed in Delaware court. Tunick v. Frost ("Delaware Derivative Action"), the first Delaware derivative suit,[4] was filed on October 15, 2018, in the Delaware Supreme Court. Service was perfected on October 23, 2018.

Petitioners filed a motion in the Florida circuit court to dismiss, or, in the alternative, to stay Lipsius and Alexander pending the resolution of the Federal Securities Action and the Delaware Derivative Action. Petitioners asserted that comity principles dictate that the derivative suits should follow, rather than precede, the direct suits involving substantially similar parties and claims. Petitioners argued a stay is warranted because the derivative actions seek relief that is contingent on the outcome of the related litigation. Petitioners further contended it would be prejudicial and impractical for OPKO to simultaneously defend against the federal securities class actions while also contesting derivative claims based on the same core allegations. Petitioners also asserted that allowing the Florida derivative suits to proceed at the same time as the Federal Securities Action would force OPKO to litigate inconsistent positions at the same time. Upon resolution of the Federal

[4] Additional derivative actions were filed in the Delaware Court after Tunick. These cases have all been consolidated.

Securities Action, Petitioners sought a stay pending resolution of the Delaware Derivative Action arguing Delaware has a stronger interest in adjudicating cases involving Delaware companies and Delaware law.

Respondents argued that the Federal Securities Action involves distinct causes of action, names only some of the same individuals as defendants and therefore does not preclude recovery in the derivative suits. Respondents contended a stay would cause the derivative suits to remain unresolved for years and would still have to be litigated after resolution of the Federal Securities Action. Respondents conceded there was a slight overlap of issues and that both the Federal Securities Action and the Florida derivative suits stemmed from the SEC action and involved most of the same facts. Yet, Respondents proposed coordinating discovery for overlapping issues and maintained a stay should be denied.

During the hearing on the motion to stay, the trial court heard extensive legal argument regarding which case should be allowed to proceed first. The court recognized these actions created a "hodgepodge of legal conflict because of how many jurisdictions all these cases have fallen into." Nonetheless, the lower court denied the motion finding that the principle of priority in Florida dictated that a stay in favor of the Delaware Derivative Action be denied. Notably, the lower court did not apply this principle to determine whether a stay was warranted pending resolution of the Federal Securities Action. Rather, the trial court reasoned there

was insufficient evidence that the resolution of the Federal Securities Action would resolve many of the issues in the derivative suits. These petitions followed.

STANDARD OF REVIEW

Certiorari review is warranted when the petitioning parties demonstrate the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on postjudgment appeal." Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So. 3d 450, 454 (Fla. 2012) (quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)).

LEGAL ANALYSIS

"Although a trial court has broad discretion to order or refuse a stay of an action pending before it, it is nonetheless an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues. This rule is based on principles of comity." Fla. Crushed Stone Co. v. Travelers Indem. Co., 632 So. 2d 217, 220 (Fla. 5th DCA 1994) (citations omitted). Comity principles dictate that "[w]here a state and federal court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains jurisdiction." Shooster v. BT Orlando Ltd. P'ship, 766 So. 2d 1114, 1115 (Fla. 5th DCA 2000) (citing Wade v. Clower, 114 So. 548, 551 (Fla.

1927)). "It is well-settled that when a previously filed federal action is pending between substantially the same parties on substantially the same issues, a subsequently filed state action should be stayed pending the disposition of the federal action." Beckford v. Gen. Motors Corp., 919 So. 2d 612, 613 (Fla. 3d DCA 2006) (citing Wade, 114 So. 548; Oviedo v. Ventura Music Grp., 797 So. 2d 634 (Fla. 3d DCA 2001)).

"Florida law is clear that, 'the causes of action do not have to be identical . . . [i]t is sufficient that the two actions involve a single set of facts and that resolution of the one case will resolve many of the issues involved in the subsequently filed case.'" Pilevsky v. Morgans Hotel Grp. Mgmt., LLC, 961 So. 2d 1032, 1035 (Fla. 3d DCA 2007) (quoting Fla. Crushed Stone Co., 632 So. 2d at 220). Here, Respondents concede the derivative actions stem from the same nucleus of facts as the pending Federal Securities Action. Moreover, the Florida actions involve many of the same parties as the Federal Securities Action, including: OPKO Health, Inc., Phillip Frost, Adam Logal, and Juan F. Rodriguez. Respondents even acknowledge the actions have overlapping issues and that it would preserve judicial resources to coordinate discovery.

A stay is warranted where the verdict and judgment in the Federal Securities Action is likely to "materially affect the viability of some of the [Petitioners'] claims in the Florida lawsuit," or lead to inconsistent outcomes. Benihana of Tokyo, Inc.

v. Benihana, Inc., 129 So. 3d 1153, 1155 (Fla. 3d DCA 2014). This Court has previously granted certiorari for a lower court's failure to stay proceedings where jurisdiction attached in a concurrent jurisdiction involving substantially similar parties and issues, subjecting Petitioner to "duplication of efforts and costs, as well as the possibility of inconsistent judgments." J.M. Smucker Co. v. Rudge, 877 So. 2d 820, 822 (Fla. 3d DCA 2004); see Pilevsky, 961 So. 2d at 1035 ("Resolution in the New York action of whether Morgans breached the management contract . . . [and] whether Morgans acted to the Shore Club's detriment in dealing with its vendors will resolve most, if not all, [of the related] issues in the Florida action . . . ."); State v. Harbour Island, Inc., 601 So. 2d 1334, 1335 (Fla. 2d DCA 1992) ("While the two cases are not identical, the disposition of the federal case will resolve many of the issues raised in the state action."). Because the outcome of the Federal Securities Action is likely to resolve some questions of fact or materially affect the viability of some claims for breach of fiduciary duty by the directors involved, the trial court abused its discretion by failing to stay the subsequently-filed derivative actions pending resolution of the Federal Securities Action.[5]

[5] The federal judge presiding over Lee v. Frost, a derivative suit pending in the Southern District of Florida, issued an order staying the case in favor of the Federal Securities Action. The federal district court concluded that the "shareholder derivative action should be stayed pending resolution of the . . . direct federal securities actions as the outcome of those actions will not only materially affect Plaintiff's damages, but will also materially affect the underlying facts and the form

Next, we examine the denial of a stay pending resolution of the Delaware Derivative Action. In its order, the trial court applied the principle of priority to find that the Florida derivative suits should first proceed because Lipsius was filed first.

"If courts of different states have concurrent jurisdiction over the same parties and subject matter, the 'principle of priority' may be applied as a matter of comity." Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ainsworth, 630 So. 2d 1145, 1147 (Fla. 2d DCA 1993) (citing Siegel v. Siegel, 575 So. 2d 1267 (Fla. 1991)). Pursuant to this principle, "the court which *first exercises its jurisdiction* acquires exclusive jurisdiction to proceed with that case." Siegel, 575 So. 2d at 1272 (emphasis added) (quoting Bedingfield v. Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982)). "It is the well established law of Florida that where two courts have concurrent jurisdiction of a cause of action, the first court to exercise jurisdiction has the exclusive right to hear all issues or questions arising in the case." Royal Globe Ins. Co. v. Gehl, 358 So. 2d 228, 229 (Fla. 3d DCA 1978). "[A] trial court abuses its discretion when it fails to respect the principle of priority." Hirsch v. DiGaetano, 732 So. 2d 1177, 1178 (Fla. 5th DCA 1999).

Florida courts do not apply a bright-line "first-filed" test to resolve questions of competing jurisdiction in concurrent jurisdictions. The principle of priority

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of the claims Plaintiff may bring in this shareholder derivative suit." Lee v. Frost, et al., Case No. 1:18-cv-24765-UU (S.D. Fla. 2018).

hinges on the court's exercise of jurisdiction in an action. However, "[i]t is true that no Florida court appears to have addressed the question of exactly what the supreme court meant by the term 'the court which first exercised its jurisdiction' in Siegel." In re Guardianship of Morrison, 972 So. 2d 905, 909 (Fla. 2d DCA 2007).

When applying the principle of priority, Florida courts have often referred to the "first-filed" case. Significantly, in such cases, the exercise of jurisdiction was not at issue. For example, in this Court's decision in Polaris Pub. Income Funds v. Einhorn, 625 So. 2d 128 (Fla. 3d DCA 1993), we considered "[t]he pivotal question [of] whether the Florida action [was] so similar in parties and issues as to be unnecessarily duplicative of the prior-filed New York State proceedings." Id. at 129. As it was undisputed that the New York court had previously exercised jurisdiction over the matter (which was also filed prior to the Florida action), we determined the trial court abused its discretion in denying a stay of the Florida proceedings. Similarly, in Pilevsky, the issue before us was whether the action pending in the prior-filed case in New York involved both substantially similar parties and substantially similar issues such that a stay of the subsequently-filed Florida case was warranted. 961 So. 2d at 1034. Again, the question of which court was the first to exercise jurisdiction was not before us when we determined the trial court abused its discretion by refusing to stay the Florida action.

In cases where the exercise of jurisdiction was at issue, Florida courts have appropriately applied the principle of priority in favor of the first court to exercise jurisdiction. To determine priority, Florida courts have compared the actions taken in a foreign jurisdiction with the actions taken in a pending Florida action. See Perleman v. Estate of Perelman, 124 So. 3d 983 (Fla 4th DCA 2013) (remanding for the trial court to issue a stay pending the resolution of the Pennsylvania probate proceeding because Pennsylvania was the first state to exercise jurisdiction by issuing a notice, which got "the ball [] rolling" in Pennsylvania before a petition was filed in Florida); In re Guardianship of Morrison, 972 So. 2d 907 (remanding for a stay pending the resolution of the New Jersey proceedings because the New Jersey court first exercised jurisdiction by issuing an order to show cause, which occurred prior to the filing of the petitions in Florida); Shooster, 766 So. 2d 1114 (concluding that under Florida procedural law the federal court exercised jurisdiction over the cause with the earlier service of process where the federal action was filed and served in the United States District Court for the Southern District of Florida before the Florida circuit court); Merrill Lynch, 630 So. 2d 1145 (concluding that as a matter of comity the Florida court should have stayed the action in view of the New York court's prior exercise of concurrent jurisdiction by issuing an order to show case).

In Florida, the Supreme Court has established that "[w]hen two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected." Mabie v. Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v. Martinez, 15 So. 2d 842 (Fla. 1943)). Importantly, "Mabie unequivocally rejects the concept that the suit first filed prevails." Fasco Indus., Inc. v. Goble, 678 So. 2d 916, 917 (Fla. 5th DCA 1996).

Here, the trial court abused its discretion by refusing to stay Lipsius and Alexander based on its reasoning that Lipsius was the first derivative action filed. The "principle of priority" dictates that the first court to exercise jurisdiction retains the exclusive right to hear the questions and issues arising from the case. Because we have established that the Federal Securities Action has priority and a stay of the Florida actions is warranted pending its resolution, we need not address the question of priority between the Florida and Delaware courts.

Nonetheless, we observe that the Delaware court exercised its jurisdiction over the cause before the Florida court. The Delaware Derivative Action was filed on October 15, 2018, and service was perfected on October 23, 2018, more than two weeks before service was perfected in the Lipsius action. On the record before us, it is clear "the ball [was] rolling" in Delaware before Florida. Thus, the lower court

abused its discretion by denying the stay of the Florida action pending the resolution of the Delaware Derivative Action.

CONCLUSION

We conclude that the trial court's failure to stay the Florida actions in favor of the Federal Securities Action, or in the alternative, the Delaware Derivative Action departed from the essential requirements of the law resulting in material injury irremediable on plenary appeal. Accordingly, we grant the petition, quash the circuit court order denying Petitioners' motion to stay and deny as moot Petitioners' pending motions in this Court for a stay of the circuit court cases (in anticipation that the trial court will grant a stay of the Lipsius and Alexander actions).