Third District Court of Appeal

State of Florida

Opinion filed June 19, 2019.
Not final until disposition of timely filed motion for rehearing.

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.

GORDO, J.

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 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."

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[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).

Following the SEC Action, multiple federal securities class actions and derivative actions were filed in federal and state courts. On September 14, 2018, Steinberg v. OPKO Health, Inc. ("Federal Securities Action"), was initiated on behalf of a class of OPKO investors in the Southern District of Florida. The Federal Securities Action claimed defendants made misleading statements of material fact by failing to disclose the alleged market manipulation at issue in the SEC Action. On September 27, 2018, Frank Lipsius, on behalf of OPKO, filed a derivative action in the Circuit Court for the Eleventh Judicial Circuit of Florida seeking damages caused by a breach of fiduciary duties. On October 15, 2018, Tunick v. Frost ("Delaware Derivative Action"),[3] was filed in the Delaware Supreme Court. On November 2, 2018, Louis Alexander filed a derivative complaint in the Florida circuit court which was virtually identical to Lipsius.

OPKO filed a motion to stay the two Florida derivative suits pending the resolution of the Federal Securities Action and the Delaware Derivative Action involving substantially similar parties and issues. The lower court denied the motion. These petitions followed.

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

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)).

ANALYSIS

Principle of Priority

"[A] trial court has broad discretion to order or refuse a stay of an action." Fla. Crushed Stone Co. v. Travelers Indem. Co., 632 So. 2d 217, 220 (Fla. 5th DCA 1994). However, based on "principles of comity," it is "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." Id. The same principles apply to a previously filed "[state] action." Pilevsky v. Morgans Hotel Grp. Mgmt., LLC, 961 So. 2d 1032, 1035 (Fla. 3d DCA 2007). "Comity principles dictate that an action should be stayed, and a trial court departs from the essential requirements of law by failing to grant such a stay, when the first-filed lawsuit involves substantially similar parties and substantially similar claims." Id. (citing Cuneo v. Conseco Servs., LLC, 899 So. 2d

1139, 1141 (Fla. 3d DCA 2005)). A Florida 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).

The principle of priority defers to previously filed cases as those typically in which jurisdiction first attaches. However, the principle hinges on the exercise of jurisdiction in an action rather than the actual filing of the complaint. "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." Id. at 1177-78 (citing Royal Globe Ins. v. Gehl, 358 So. 2d 228 (Fla. 3d DCA 1978)). Similarly, "[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)).

In Florida, "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); Shooster, 766 So. 2d at 1116. "Whether one or multiple defendants are involved in a lawsuit, . . . jurisdiction lies in the court where service first is perfected against all defendants. 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, it is undisputed that the Federal Securities Action was the first action initiated in Florida. Thereafter, Lipsius was filed on September 27, 2018, and service was perfected on November 9, 2018. Tunick, the Delaware Derivative Action, was filed on October 15, 2018, and service was perfected on October 23, 2018. Alexander was later filed on November 2, 2018, and while there is no record evidence of the date of service, it necessarily post-dates that of the Delaware Derivative Action. The "principle of priority" dictates once a court has exercised jurisdiction over a case with substantially similar parties and similar issues, the subsequently filed cases should be stayed.

In this case, the trial court found Lipsius and Alexander should continue to proceed and a stay should not be granted because Lipsius was filed first. However, Florida law clearly establishes that jurisdiction attaches when service is perfected. There is no dispute that the Delaware Derivative Action perfected service on all defendants as of October 23, 2018, and Lipsius did not effectuate service until November 9, 2018. Because the Delaware Derivative Action was filed and served before the Florida derivative suits, jurisdiction first attached in Delaware. Under the principle of priority, the lower court departed from the essential requirements of

Florida law by not finding that jurisdiction lies in the first circuit where service was perfected.

Substantially Similar Parties and Issues

Where jurisdiction first attaches in a pending federal or state action "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); see Pilevsky, 961 So. 2d at 1035. "Florida law is clear that, 'the causes of action do not have to be identical' to require a stay of the second-filed action." Pilevsky, 961 So. 2d at 1035 (quoting Fla. Crushed Stone Co., 632 So. 2d at 220). "It 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." Id. (quoting Fla. Crushed Stone Co., 632 So. 2d at 220). In Pilevsky, this Court determined that both New York and Florida actions involved substantially similar parties and substantially similar issues, highlighting the fact that the resolution of the New York action would resolve some of the issues in the Florida action. Lipsius and Alexander concede the SEC Action and the derivative actions stem from the same nucleus of facts. Moreover, the Florida actions involve many of the same parties as the Federal Securities Action and the Delaware

Derivative Action, including: OPKO Health, Inc., Phillip Frost, Adam Logal, and Juan F. Rodriguez.

A stay is warranted where the verdict and judgment in the Federal Securities Action or Delaware Derivative Action may "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). Petitioners assert the outcome of the Federal Securities Action directly affects the viability of the derivative actions regarding the breach of fiduciary duties at issue. Respondents, however, argue there is no material injury to proceeding with the Florida actions. Although the trial court found that OPKO has not demonstrated any harm, 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."). The instant derivative actions should be stayed pending resolution of the Federal Securities Action as the outcome of that action could materially affect the issue of damages as well as the underlying facts and form of the claims brought in the derivative suits.[4]

CONCLUSION

We find that the trial court's failure to apply the principle of priority and stay the Florida actions in favor of the Delaware Derivative Action departed from the essential requirements of the law. The record establishes that a denial of the stay will cause Petitioners material injury that cannot be corrected on appeal by requiring them to simultaneously litigate actions involving substantially similar parties and issues in concurrent jurisdictions. 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).

[4] Notably, the federal judge presiding over Lee v. Frost, a derivative suit pending in the Southern District of Florida, issued an order staying the case. Lee v. Frost, et al., Case No. 1:18-cv-24765-UU (S.D. Fla. 2018).