



Dave's Killer Bread, Inc. v. Mont. Merch., Inc.

United States District Court for the District of Oregon, Portland Division

June 23, 2017, Decided; June 23, 2017, Filed

Case No. 3:17-cv-00237-YY

Reporter

2017 U.S. Dist. LEXIS 108748 *

DAVE'S KILLER BREAD, INC., an Oregon corporation; and FLOWERS FOODS, INC., a Georgia corporation, Plaintiffs, v. **MONTANA** MERCHANDISING, INC., d/b/a **MONTANA MILLING**, INC., a **Montana** corporation, Defendant.

Subsequent History: Adopted by, Dismissed by, Motion denied by, As moot *Dave's Killer Bread, Inc. v. Mont. Merch., Inc.*, 2017 U.S. Dist. LEXIS 107523 (D. Or., July 12, 2017)

Core Terms

Foods, second-filed, district court, first-to-file, first-filed, wheat, parties, organic, convenience, contracts, venue

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For **Montana** Merchandising, Inc., a **Montana** corporation, doing business as **Montana Milling**, Inc., Defendant: Russell D. Garrett, LEAD ATTORNEY, Jordan Ramis, P.C., Lake Oswego, OR; Kristin L. Olson, Olson Brooksby PC, Portland, OR.

Judges: Youlee Yim You, United States Magistrate Judge.

Opinion by: Youlee Yim You

Opinion

FINDINGS AND RECOMMENDATION

YOU, Magistrate Judge:

Defendant **Montana** Merchandising, Inc. d/b/a **Montana**

Milling, Inc. ("MMI") has filed a motion to dismiss plaintiffs' second and third claims for declaratory relief under *FRCP 12(b)(7)* and *FRCP 19* asserting that indispensable parties have not been joined. ECF #18. Alternatively, pursuant to *FRCP 12(b)(3)*, 28 U.S.C. § 1406(a), and 28 U.S.C. § 1404(a), MMI moves for an order dismissing or transferring this action to the District of **Montana** for improper venue and the convenience of the parties. Finally, MMI moves for a stay under the *Colorado River* doctrine pending adjudication of the ongoing parallel litigation in the District of **Montana**. For the reasons discussed [*2] below, MMI's motion should be GRANTED and this action should be dismissed without prejudice.

I. STANDARDS

Motions to dismiss or transfer for improper venue are governed by *FRCP 12(b)(3)*, 28 U.S.C. § 1406(a), and 28 U.S.C. § 1404(a). Under *Rule 12(b)(3)*, the plaintiff bears the burden of proving that venue is proper. See *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). The court must draw all reasonable inferences in favor of the nonmoving party; however, the pleadings need not be accepted as true and the court may consider facts outside the pleadings. *Holland Am. Line Inc. v. Wartsila N.A., Inc.*, 485 F.3d 450, 455 (9th Cir. 2007). *Doe 1 v. AOL, LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). Whether to dismiss or transfer an action for improper venue is entirely within the discretion of the district court. See *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S. Ct. 219, 96 L. Ed. 200, 1952 Dec. Comm'r Pat. 407 (1952); *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

Under 28 U.S.C. § 1404(a), "the district court has discretion 'to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.'" *Jones v. GNC Fran., Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org.*

v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)).

II. BACKGROUND

A. First-Filed Action: District of Oregon

Plaintiffs Dave's Killer Bread, Inc. ("DKB") and Flowers Foods, Inc. ("Flowers Foods") filed this action on February 11, 2017. Complaint, ECF #1. Flowers Foods is a publicly traded Georgia corporation that produces packaged bakery foods for sale across the United States. *Id.* at 2. Flowers Foods acquired DKB in September 2015. *Id.* DKB employs over 250 people to produce organic breads at its bakery in [*3] Milwaukie, Oregon. *Id.* Plaintiffs allege MMI threatened them with a lawsuit stemming from contracts DKB and MMI entered into on January 5, 2014 and January 17, 2014 ("the wheat contracts"). *Id.* at 2, 4. Plaintiffs brought a breach of contract claim and two claims for declaratory judgment relating to the performance of the wheat contracts. *Id.* at 3, 7-9. They allege disagreements arose between themselves and MMI about, *inter alia*, the quantity of organic wheat DKB had agreed to accept and the length of time DKB had agreed to accept it for. *Id.* at 10.

B. Second-Filed Action: District of Montana

Ten days after DKB and Flowers Foods and brought suit in the District of Oregon, MMI and two grain farmers, Hinebauch Grain, Inc. and OCC-O'Connor Crops and Cattle, LLC, brought suit in the District of Montana against DKB, Flowers Foods, Goode Partners, and DKB's previous owners in their individual capacities and as trustees of their individual family trusts. Montana Complaint, ECF #19-1, Ex. A. There, plaintiffs brought claims for breach of contract, promissory estoppel, tortious interference with contract, intentional interference with business opportunity, constructive fraud, negligent misrepresentation, and unjust enrichment [*4] under the same wheat contracts at issue in the first-filed action. *Id.*

Plaintiffs allege that DKB began expanding its organic wheat breadlines in 2013 and began working with MMI to procure prodigious amounts of organic wheat for future years. *Id.* at 3. MMI alleges DBK officers attended conferences in Montana and met with Montana wheat farmers to promote the expansion of their organic wheat crops. *Id.* MMI further alleges it expanded its milling capacity in December 2014 in reliance on DKB's promises to increase its purchase of organic wheat. *Id.*

at 5.

DKB and Flowers Foods filed a Motion to Dismiss, Transfer Venue, or, in the Alternative, Stay, ECF #47-1, Ex. 1; Joint Status Report, ECF #51, at 2. On June 9, 2017, United States District Judge Brian Morris issued an opinion and order denying the motion, thus retaining the case in the District of Montana. ECF #51-1. A trial date has been set for May 18, 2018. Kristin Olson, Transcript of Oral Argument (May 23, 2017), ECF #50, at 30.

III. FINDINGS

A. First-to-File Rule and the Doctrine of Federal Comity

Under the first-to-file rule, when cases involving the same parties and issues have been filed in two different federal districts, the district court of the [*5] second-filed action has discretion—under the doctrine of federal comity—to transfer, stay, or dismiss the second-filed action. *Cedars—Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *Pacesetter Sys. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir.1982). The first-to-file rule "should not be disregarded lightly." *Alltrade*, 946 F.2d at 625. Technically, this discretion to transfer, stay, or dismiss is unavailable to the court of the first-filed action. *Church of Scientology of California v. U.S. Dept. of Army*, 611 F.2d 738, 749 (9th Cir. 1979), *overruled on other grounds by Animal Leg. Def. Fund v. United States FDA*, 836 F.3d 987 (9th Cir. 2016). However, "[w]hen considering issues raised by the comity doctrine, . . . courts are not bound by technicalities." *Id.* at 749; see also *R.R. St. & Co. Inc. v. Transport Ins. Co.*, 656 F.3d 966, 976 (9th Cir. 2011) ("The mere fact that the district court's decision preserved the later-filed Removed Action instead of the earlier-filed Federal Action is of no consequence.").

The purpose of the first-to-file rule "is to maximize judicial economy, consistency, and comity." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). The principle behind the rule is to "avoid duplicative litigation" and "to promote judicial efficiency." *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir.2000) (citations omitted).

Generally, application of the rule turns on three factors: "(1) the chronology of the actions; (2) the similarity of the parties; and (3) the similarity of the issues." *Kohn*

Law, 787 F.3d at 1240. "No precise test has evolved for determining whether one action is duplicative of another." Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). What is clear, however, is that district courts are to be accorded a great deal [*6] of latitude and discretion when undertaking considerations of this nature. Kerotest Mfg., 342 U.S. at 183-84. The "rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982).

B. Exceptions to the First-to-File Rule

The first-to-file rule should not be applied if a court determines that equitable interests counsel otherwise; typical exceptions to the rule include bad faith, anticipatory suit, and forum shopping. Alltrade, 946 F.2d at 628. Indeed, while not particularly common, there are instances where federal courts of appeals have affirmed district courts that refused to follow the first-to-file rule citing the plaintiff's misconduct. E.g., Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599 (5th Cir. 1983); Boatmen's First Nat'l Bank of Kansas City v. Kansas Pub. Emps. Ret. Sys., 57 F.3d 638, 641 (8th Cir. 1995).

Even in a case where no such misconduct was present, however, the Ninth Circuit has held that the court of the first-filed action may defer to the court of the second-filed action if the court of the second-filed action asserts jurisdiction and advances the litigation. For example, in Church of Scientology of California v. U.S. Dept. of Army, the Church filed two actions, first in September 1975 against the Department of the Army and second in December 1975 against the Department of Defense. 611 F.2d at 741. The litigation in the first-filed [*7] action lagged behind the litigation in the second-filed action, and the first-filed action was dismissed. *Id.* On appeal of the first-filed action, the Ninth Circuit held that:

[i]n the present case, the litigation in the [second-filed action] has already progressed to a judgment on the merits, an appeal, and a remand. While judicial economy would have been best served by the district court in [the second-filed action] deferring to the [district court in the first-filed action] at the outset, we cannot now say that efficiency demands that we remand to the district court below. Under the circumstances, the goal of judicial efficiency will be best met if we overlook the "first to file" rule, and defer to the litigation in progress in the [second-filed action.] The need for fashioning a flexible response to the issue of concurrent

jurisdiction has become more pressing in this day of increasingly crowded federal dockets.

Church of Scientology, 611 F.2d at 750.

Here, the District of Montana found that while the first-to-file rule might otherwise apply—noting the similarities between the issues and the parties—the sorts of red flags and misconduct that should suspend application of the rule were present. ECF #51-1, at 2-5, 9-13. Specifically, [*8] the court found "it appears that [DKB and Flowers Foods] filed an anticipatory suit in the District of Oregon as an apparent attempt to forum shop." *Id.* at 10. The Montana court noted another red flag, that DKB and Flowers Foods' sought declaratory judgments for two of their three claims in the District of Oregon. *Id.* at 8. These claims can be brought as counterclaims in the District of Montana. FRCP 13; see also Huth v. Hartford Ins. Co. of the Midwest, 298 F.3d 800, 803 (9th Cir. 2002) (noting the "well-accepted rule that the decision whether to exercise jurisdiction over a declaratory action lies in the sound discretion of the district court").

The Montana court also weighed the 28 U.S.C. § 1404(a) transfer-of-venue factors, including the relative convenience to the parties and potential witnesses, and ultimately concluded: "This case should be tried [in Montana]." ECF # 51-1, Ex. A, at 7, 9-10, 14. While DBK and Flowers Foods argue that litigating in Oregon is more convenient for them, surely litigating the case in Montana is more convenient than litigating both cases simultaneously.

The Montana court's finding that DKB and Flowers Foods filed this action as an apparent attempt to forum shop, coupled with its ruling that the first-to-file rule should not apply, persuades this court to defer to the [*9] Montana court.

C. Appropriate Remedy

Dismissal without prejudice is the appropriate remedy. First, there is no risk of dismissal in the Montana action. Generally, "where the first-filed action presents a likelihood of dismissal, the second-filed suit should be stayed, rather than dismissed." Alltrade, 946 F.2d at 629. Here, the Montana court in the second-filed action has already determined the case should be tried in Montana. Second, DKB and Flowers Foods may safely assert counterclaims before the statutes of limitations run. Because the contracts at issue were executed in January 2014, there is no risk that the statutes of

limitations will lapse before DKB and Flowers Foods may assert their counterclaims. ORS 12.080(1) (six years); Mont. Code Ann. § 27-2-202(1) (eight years). In sum, DKB and Flowers Foods will suffer no prejudice that would otherwise necessitate a stay or transfer.

Because MMI's motion to dismiss is dispositive, this court does not reach the remaining arguments regarding indispensable parties and the *Colorado River* doctrine.

IV. RECOMMENDATION

For the reasons discussed above, MMI's motion (ECF #18) should be GRANTED and this action should be dismissed without prejudice.

V. SCHEDULING ORDER

This Findings and Recommendation will be referred [*10] to a district judge. Objections, if any, are due Friday, July 07, 2017. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

VI. NOTICE

This Findings and Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of a judgment.

DATED June 23, 2017.

/s/ Youlee Yim You

Youlee Yim You

United States Magistrate Judge

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