

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF TEXAS
DALLAS DIVISION

SUPERMEDIA, INC., ET AL.,)	
)	
Plaintiffs,)	CIVIL ACTION NO.
)	
VS.)	3:12-CV-2034-G
)	
LINTON BELL, ET AL.,)	

EMERGENCY MOTION TO STAY OR SUSPEND CASE

COMES NOW, Defendants Claire Palmer, Sandra Noe, Carol Foy, and Stanley Russo and file this motion for a stay or suspension of all proceedings in this Civil Action No. 3:12-CV-2034-G and, as grounds, they show as follows:

1. Defendants Claire Palmer and Sandra Noe are the named Plaintiffs in a class action that has been pending before this Court for several years, *Murphy, et al., v. Verizon, et al.*, Civil Action No. 3:9-CV-2262-G. Defendants Carol Foy and Stanley Russo are members of the plaintiff class of 2,750 retirees in the *Murphy* action (hereinafter “*Murphy Class*”). The *Murphy Class* of retirees contend they were surreptitiously and involuntarily transferred from Verizon Communication Inc.’s retiree benefit plans and sent to Idearc/SuperMedia’s retiree benefit plans and they should be granted appropriate equitable relief under the Employee Retirement Income Security Act (“ERISA”) and reinstated into Verizon’s sponsored retirement benefit plans. In this present related action, the SuperMedia Plaintiffs have sued Ms. Palmer, Ms. Noe, Ms. Foy, Mr. Russo, nineteen additional retired individuals, and three local unions and also seek certification of a defendant class of 3,685 retirees, including the entire *Murphy Class*. The SuperMedia Plaintiffs are seeking the Court’s approval that the SuperMedia Plaintiffs may subject the

Murphy Class of retirees and others to further benefit reductions. Pursuant to Fed.R.Civ.Proc. Rule 6(b) and the “prior pending action doctrine”, and for other equitable reasons stated hereinbelow, said defendants respectfully ask this Court to stay or suspend this second action pending the outcome of summary judgment rulings in the *Murphy* action.

2. Under Fed.R.Civ.P. 6(b), this Court has discretion to extend the time in which various acts must be completed for good cause. The *Murphy* Class of retirees maintain that good cause exists to suspend all further proceedings in this second newly filed action while the parties’ motions for summary judgment in the *Murphy* action remain pending. Specifically, filing a responsive pleading, conducting discovery, preparing disclosures and participating in scheduling procedures in this second action will be unfruitful and potentially unnecessary in the event the Court grants the *Murphy* Class of retirees a summary judgment and orders appropriate equitable relief, including reinstatement of the *Murphy* Class into Verizon’s retiree benefit plans and an order that the retirees to be made whole. In such event, the Supermedia Plaintiffs’ claims against Palmer, Noe, Foy and Russo, as well as the other 2750 retirees in the *Murphy* action will be moot.

3. It is well established that federal district courts have broad discretion to stay proceedings in the interest of justice and in control of their dockets. *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544–45. (5th Cir. 1983). “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254–255, 57 S.Ct. 163, 166 (1936) (citing *Kansas City Southern R. Co. v. United States*, 282 U.S. 760, 763, 51 S.Ct. 304, 305, 306 (1931)).

4. In addition, this Court may apply the “prior pending action doctrine” which is based on federal court efficiency and may be applied when two pending federal court actions involve the same or similar claims and parties. Under the doctrine, the first federal action is generally given priority absent a showing of greater convenience or special circumstances that favor the second action in order to avoid duplicative litigation. The second action may be either stayed or dismissed. *Friedlander v. Cook*, Not Reported in F.Supp.2d, 2008 WL 4820820 at *9 (D. N.M. August 13, 2008); *Cupe v. Lantz*, 470 F.Supp.2d 128, 132 (D. Conn. 2007) (citing *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 19 (2nd Cir. 1986)); see also *In re Canter* (“*Canter*”), 1 B.R. 172, 175 (Bankr. D. Mass. 1979). The decision to not hear the subsequent action is discretionary. See *Adam v. Jacobs*, 950 F.2d 89, 92 (2nd Cir. 1991). Generally, a court may decline to hear a subsequent lawsuit when (1) “an identity of issues exists [with the prior pending action],” and (2) “the controlling issues in the dismissed action [the subsequent action] will be determined in the other lawsuit.” 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1360, p. 89 (3d ed. 2004); see also *Canter*, 1 B.R. at 175 (Bankr. D. Mass.1979). In determining whether a claim should be either stayed or even barred by the prior pending action doctrine, this Court may compare the pleadings filed in the *Murphy* action and this second action. See *Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F.Supp. 1291, 1293 (D. Conn.1986).

5. This Court should apply the prior pending action doctrine and stay this second action on the basis that the *Murphy* Class action concerns the rights of same parties regarding the retirees’ claims and issues. Indeed, SuperMedia Inc., the lead plaintiff in the most recently filed second action, has stipulated to be bound by any equitable relief to be ordered by this Court in the *Murphy* class action. (See *Murphy* Docket 15).

6. In the *Murphy* action, the retirees have alleged that “Plaintiffs and class members have suffered a significant loss of retiree welfare and incidental benefits, a situation not encountered by any of the other 100,000 Verizon retirees who were not transferred and who remained as participants in Verizon’s sponsored pension and welfare benefit plans.” (See *Murphy* case Docket 64, Second Amended Complaint, ¶ 80). In bad faith, the SuperMedia EBC denied those allegations. (See *Murphy* case Docket 118, Amended Answer to Second Amended Complaint, ¶ 80). Now, all of the SuperMedia Plaintiffs, including the SuperMedia EBC, are focused on taking action that, certainly, will make the retirees far worse off than they were when they filed the Second Amended Complaint in *Murphy*!

7. As this Court previously noted in the order for consolidation, there is significant overlap between some of the parties and some of the ERISA claims pending in the two actions. (See Docket 8, Order for consolidation, stating, “It appears to the court that these two cases arise out of a common nucleus of facts.”). The Court's subsequent order vacating the order of consolidation confirmed that the two cases “do arise out of a common nucleus of facts,” but found that “they are at very different procedural stages. In 3:09-CV-2262-G, discovery has closed and there are pending motions for summary judgment. In contrast, in 3:12-CV-2034-G, the parties are still in the earliest stages of pleading.” (See Docket 11, Order). These different procedural stages underscore the appropriateness of a stay.

8. Material facts essential to this second action are already teed up for summary judgment rulings in the prior *Murphy* action. The vital ERISA issues raised by the SuperMedia Plaintiffs in this second action will be mooted with respect to the *Murphy* Class of 2,750 retirees with the Court’s order(s) granting them ERISA Section 502(a)(3) equitable relief in the form of reinstatement into Verizon’s retiree benefit plans.

9. The equities do not favor allowing SuperMedia Plaintiffs to go forward with this new second action when the outcome of the *Murphy* action may very well obviate the need and desire for the SuperMedia Plaintiffs to cause further reduction and loss of the *Murphy* Class's panoply of retirement benefits. The pleadings in this second action reflect that on the *same* day SuperMedia Inc. formally announced corporate plans to detrimentally affect the retirees' benefits – June 26, 2012 – the SuperMedia Plaintiffs instantly commenced this second action. (See Docket 23, ¶ 64). There is no scintilla of a showing of due process or any decency on the part of SuperMedia Plaintiffs to give any warning whatsoever to retirees living thousands of miles from this court forum that they should reasonably be expected to be hauled into the Dallas federal court and suffer the attendant burdens of shouldering litigation expenses. Without even offering to reimburse the retirees for legal counsel fees and expenses, the SuperMedia Plaintiffs aver that the 23 individually named defendants “will fairly and adequately protect the interests of the Defendant Class.” (Docket 23, First Amended Complaint, ¶ 67(d).¹

10. Lastly, the SuperMedia Plaintiffs acknowledge that in response to the June 26, 2012 notice sent to the retirees, “[t]o date, SuperMedia has received over 900 executed Claim Forms from the Defendant Class” and that the retirees have submitted “a written claim for continued retiree benefits.” (See Docket 23, First Amended Complaint, ¶ 65; Docket 23-46, a collection of retirees' written claim forms.). In bad faith, prior to filing this lawsuit and harassing unsuspecting retirees from the far corners of this nation, there was no effort by the SuperMedia Plaintiffs to comply with the plans' internal claims process and give the retirees a full and fair review of their written claims. The SuperMedia Plaintiffs specifically solicited the

¹ The most recent docket report for this second case shows that SuperMedia Plaintiffs have amassed a legal team consisting of no less than six attorneys who have entered an appearance.

retirees to send in a conforming written claim form specifically prepared by SuperMedia.

However, numerous retirees sent SuperMedia a much different written claim form that states:

I was surreptitiously and involuntarily transferred from Verizon's sponsored retiree benefit plans. I have never consented to being enrolled in Idearc/SuperMedia's sponsored retiree benefit plans. I expressly object to each and every negative detrimental change that has been proposed and announced by SuperMedia. SuperMedia has no right to amend, modify, revoke or terminate any of my retiree benefits. I submit this as a written claim for continued retiree benefits, and for all of the reasons stated and established in the legal arguments and supporting documentation submitted by attorneys for the Plaintiffs/Class Representatives in the pending *Murphy* lawsuit, I expressly demand that, immediately, I be transferred out of SuperMedia's retiree benefit plans and reinstated into Verizon's retiree benefit plans and restored all lost benefits. (emphasis added).

(See generally, Docket 23-46, a sample collection of retirees' written claim forms). In all fairness, the SuperMedia Plaintiffs should have first responded to the retirees' written claims before filing this second federal court lawsuit. What's good for the goose is good for the gander. In *Belmonte v. Examination Management Services, Inc.*, Not Reported in F.Supp.2d, 2010 WL 1741330 (N.D. Tex. April 29, 2010), this district court ruled that "[e]xhaustion of administrative remedies is a prerequisite to an ERISA action in federal court" (citing *Swanson v. Hearst Corp. Long Term Disability Plan*, 586 F.3d 1016, 1018 (5th Cir. 2009) (citing *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corps.*, 215 F.3d 475, 479 (5th Cir. 2000)). Since the SuperMedia Plaintiffs did not first give any of the retirees any form of a full and fair internal review before filing this action, this Court should stay or suspend this second case.

11. No party to this second action can seriously contend that there is a potential harm to delaying proceedings in the second action, including that, with the passage of time, key witnesses' memories may fade or documents may become lost or inadvertently destroyed. Indeed, it is the position of SuperMedia Plaintiffs that "[e]xtrinsic or substantial factual

development will prove unnecessary or inappropriate.” (Docket 23, First Amended Complaint, ¶ 78).

12. The defendants request this Court require the parties to expeditiously file any response in opposition and reply to this motion, as there are elderly retirees being needlessly served with summonses and, thereby, having soon to hire out-of-state counsel and file formal responses to the First Amended Complaint. Many of the named defendant retirees are naturally completely bewildered upon being formally served with a banker’s box of papers, since they have never either been involved in litigation or seen the inside of a federal courthouse.

WHEREFORE, Defendants Claire Palmer, Sandra Noe, Carol Foy and Stanley Russo respectfully request that this Court order the SuperMedia Plaintiffs expeditiously respond to this motion, that this Court grant this motion and exercise its discretion to stay or suspend all proceedings in this Civil Action No. 3:12-CV-2034-G until after this Court has ruled upon the motions for summary judgment pending in the *Murphy* action.

DATED this 10th day of August, 2012.

Respectfully submitted,

s/ Curtis L. Kennedy

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CERTIFICATE OF CONFERENCE

Prior to filing this motion, counsel for the *Murphy* Class and Defendants Palmer, Noe, Foy and Russo conferred with Counsel for CWA unions and Counsel for SuperMedia Plaintiffs.

Counsel for CWA unions has confirmed that there is no opposition to this motion. There is another named IBEW union and almost twenty other named defendant retirees who do not yet have any counsel appearing in this case.

However, Counsel for the SuperMedia Plaintiffs, Fulbright & Jaworski Attorney Rachel Williams, confirmed in her email message dated August 7, 2012, that: “[I]f you plan to file a Motion to Stay Cause No. 3:12-CV-2034-G, SuperMedia will oppose this motion. As the two cases are no longer consolidated, we do not believe the proceeding of this cause of action will delay or prejudice the interests of the parties, but will rather prevent a delay in adjudication and serve the interests of justice.” Therefore, this motion is opposed by the SuperMedia Plaintiffs.

DATED this 10th day of August, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2012, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system causing a copy to be emailed to all counsel of record.

Also, copy of the same was delivered via email to Defendants Palmer, Noe, Foy and Russo.

s/ Curtis L. Kennedy

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