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DISTRICT II

March 11, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1889 Gabriel Yandoli v. REV Group, Inc. (L.C. #2018CV1163)

Before Reilly, P.J., Gundrum and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

REV Group, Inc.[1] petitioned for leave to appeal a nonfinal order denying its motion to stay state court proceedings in favor of a first-filed, federal class action seeking relief for claimed violations of federal securities laws in connection with two public stock offerings.[2] REV Group argues that the circuit court committed an error of law in concluding that the state court proceeding should not be stayed. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily reverse and remand to the circuit court for further proceedings consistent with this opinion.

REV Group is a Milwaukee-based manufacturer of specialty vehicles. The subject of this appeal is an initial public offering and a secondary public offering of shares of the company's stock, which occurred in January 2017 and October 2017, respectively. On June 6, 2018, REV Group announced that its "fiscal second quarter results were below [its] expectations and

[1] We will refer to all the Defendants-Appellants in this case as "REV Group" going forward.

[2] This court granted leave to appeal the order. *See* WIS. STAT. § 809.50(3) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

were impacted by a number of factors," resulting in a drop in REV Group's stock price by $3.39 per share.

A securities class action was filed in federal court within days, and similar suits followed shortly thereafter.[3] The initial complaints in the federal actions argued that REV Group's offering materials contained false and misleading statements in violation of Section 11 and Section 15 of the Securities Act of 1933 (15 U.S.C. §§ 77k and 77o (2018)). The complaints also alleged violations of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b) and 78t(a)).[4] The plaintiffs claimed that "[t]his is a federal securities class action brought on behalf of a class consisting of all persons and entities, other than Defendants and their affiliates, who purchased or otherwise acquired publicly traded securities of REV Group" during the initial public offering.[5] In August 2018, several entities or individuals moved the federal court under the Private Securities Litigation Reform Act to consolidate the federal actions and appoint a lead plaintiff in the case. *See* 15 U.S.C. § 77z-1(a)(3)(B). The motion was granted by the federal court in September 2018.

[3] The first of the federal filings, which all began in the Central District of California, on June 8, 2018, was ***Marinoff v. REV Group, Inc.***, followed by ***Rajaram v. REV Group, Inc.*** and ***Bitar v. REV Group, Inc.*** These cases have all been consolidated and transferred from the Central District of California to the United States District Court for the Eastern District of Wisconsin. We will refer to these cases collectively as the "federal actions."

[4] Federal courts have exclusive jurisdiction over 1934 Act claims, 15 U.S.C. § 78aa(a), and, accordingly, the federal actions cannot be stayed, *see* ***Medema v. Medema Builders, Inc.***, 854 F.2d 210, 213 (7th Cir. 1988).

[5] As described in footnote 6, subsequently filed, consolidated complaints in both the federal actions and the state court actions included claims pursuant to both the initial and the secondary public offerings.

This action was filed by New Jersey resident Gabriel Yandoli in the Waukesha County Circuit Court on June 26, 2018. The complaint alleged that "[t]his is a securities class action on behalf of all persons who purchased REV Group common stock in or traceable to the Company's" initial public stock offering and alleged violations under the 1933 Act "for false and misleading statements in the [offering documents]." Therefore, the only substantive difference in the claims between the federal actions and the state action appears to be that Yandoli made no 1934 Act claims, as those are exclusively under federal jurisdiction.

REV Group filed the motion to stay proceedings in the instant case on July 31, 2018, arguing that "the [federal actions and the state case] will address the same alleged misstatements and the same essential factual questions" and a stay would "avoid the inefficiencies that would result if this case and the federal actions proceed concurrently."[6] The circuit court heard oral arguments and denied the motion, concluding, among other things, that as Yandoli is not a named plaintiff in the federal actions, "everyone is not a party to the federal action[s]" and under Wisconsin law "there is not identity of parties." REV Group petitioned this court for leave to

[6] After REV Group filed its motion to stay, but before the circuit court ruled on the motion, the attorneys representing Yandoli filed a second class action in the circuit court: ***Bucks County Employees Retirement System v. REV Group, Inc.***, No. 2018CV1501. ***Bucks County*** alleged 1933 Act claims for a class of securities purchasers based on the secondary public offering occurring in October 2017. In September 2018, Yandoli moved to consolidate this action with ***Bucks County***, which was granted by the circuit court in October 2018. The circuit court allowed a consolidated complaint, which alleged claims under Sections 11, 12(a)(2), and 15 of the 1933 Act for "all persons who purchased REV Group common stock in or traceable to the Company's" initial and/or secondary private offerings.

In November 2018, the lead plaintiff in the federal actions also filed a consolidated complaint, asserting five causes of action: Sections 11, 12(a)(2) and 15 of the 1933 Act and two claims under the 1934 Act. The consolidated complaint in the federal actions also included claims under the initial and/or the secondary private offerings.

appeal the circuit court's order denying the motion to stay proceedings, which we granted and ordered a stay pending resolution of the appeal.[7]

We review a circuit court's denial of a motion to stay proceedings for an erroneous exercise of discretion. ***North Cent. Dairymen's Coop. v. Temkin***, 86 Wis. 2d 122, 128, 271 N.W.2d 890 (1978). "A circuit court's discretionary decision is upheld as long as the court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (citation omitted). Although the circuit court concluded that there was an identity of the claims in the federal and state cases, it ultimately denied the stay as it concluded that Yandoli was "not a party to the federal action" and, therefore, "there is not identity of the parties." We conclude that the circuit court erred under the law.

[7] Yandoli has argued several times before this court that this appeal is moot due to recent filings in the federal actions and that, as a result, this court should have dismissed this appeal. The recent filings in the federal actions include REV Group's motion to dismiss the amended complaint filed in November 2018. *See supra* note 6. REV Group's motion argued that the lead plaintiff lacked standing to pursue the 1933 Act claims. In response, and instead of opposing the motion, the lead plaintiff moved the court for permission to amend the complaint to remove the 1933 Act claims and amend the 1934 Act claims. In its briefs, REV Group suggests improper collusion between the federal lead plaintiff's attorney and Yandoli's attorney based on this course of events as well as statements made by the parties. We do not reach the issue of collusion.

While this appeal has been pending, the federal court reached a decision, granting the motion to amend but doing so without prejudice. Yandoli commits a significant portion of his brief in this case to arguing that there are no longer duplicative claims as only the 1934 claims are in federal court and only the 1933 claims are in state court. We, again, decline to find that this issue is moot. "An issue is moot when its resolution will have no practical effect on the underlying controversy." ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. We disagree that resolution of this issue will have no practical effect on the controversy as it corrects what we see as an error of law and the federal court granted the federal lead plaintiff's motion to remove the 1933 Act claims *without prejudice*, meaning that these claims could at some point be resurrected.

In ***In re Phelan***, 225 Wis. 314, 324, 274 N.W. 411 (1937), our supreme court explained that "where an action similar in all respects, involving the same issues and the same parties, is pending in a court of the United States" and "where the action in the state court has been commenced after the commencement of the action in the federal court," "the state court should unquestionably defer to the jurisdiction of the federal court and stay all proceedings in the action in its court." ***Phelan***, 225 Wis. at 324; *see also* ***Temkin***, 86 Wis. 2d at 127-28. We defer to federal court jurisdiction under these circumstances unless "it is reasonably necessary for the protection of some substantial right of a party that proceedings be also had in a court of this state" or "unless the action in the federal court be dismissed, leaving the state court free to proceed without conflicting with the jurisdiction of the federal court." ***Phelan***, 225 Wis. at 324. "The principal reason for the exercise of the power to stay proceedings appears to be the protection of [a] litigant from multiplicity of actions where there is no legitimate advantage to the opposing party." ***Temkin***, 86 Wis. 2d at 127. "This rule rests on comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results." ***Id.*** (citation omitted).

The principal question in this case, therefore, is whether the state and federal actions "are substantially identical as being two separate actions involving the same parties and adjudicating the same legal principles." ***Temkin***, 86 Wis. 2d at 127. This case undoubtedly satisfies the requirements under ***Phelan*** and ***Temkin***. This is a class action lawsuit. As the complaints in each case state, the securities class actions were brought "on behalf of all persons who purchased REV Group common stock in or traceable to the Company's" stock offerings. The plaintiffs, named or not, are all in the same *class*. The fact that the named plaintiff is different in each

lawsuit does not change the analysis; it is a distinction without a difference. Neither the circuit court nor Yandoli set forth a Wisconsin case where a stay was denied under these circumstances based on the court holding a *class action* to a standard of identical named plaintiffs. If that were the case, a stay would rarely be granted. Instead, we conclude that the policy arguments behind granting a stay of state court proceedings, such as judicial efficiency and protecting litigants from the multiplicity of actions, are certainly upheld by finding that a stay of a state court class action is appropriately granted where the plaintiff class is the same, but the named plaintiff may be different. As the circuit court correctly observed, Yandoli "would be a member of the class if a class action was commenced in any of the federal court proceedings."[8] Further, it does not appear to be in dispute that these cases arise out of the same operable facts based on the initial and secondary public offering of securities of REV Group. And, finally, all the claims in the state court case were also present in the federal actions.[9]

[8] Yandoli relies heavily on ***First National Bank of Wisconsin Rapids v. Dickinson***, 103 Wis. 2d 428, 441 n.6, 308 N.W.2d 910 (Ct. App. 1981), for, at least in part, the proposition that because the class was not certified, Yandoli was not a plaintiff in the federal action. We conclude that ***Dickinson*** is not controlling. First, ***Dickinson*** did not involve a stay of state court proceedings, and second, the case addressed whether res judicata barred an unnamed plaintiff from pursuing dismissed claims. ***Id.*** at 439-442 & n.6. In ***Dickinson***, this court considered the decision in ***North Central Dairymen's Cooperative v. Temkin***, 86 Wis. 2d 122, 126-27, 271 N.W.2d 890 (1978), but it did so noting that the case was similar as in both situations the cause of action was not the same: in ***Temkin*** the "Wisconsin action [raised] issues peculiarly of state character" and in ***Dickinson*** "[t]he claims in federal court pertained to federal issues and common law fraud … [while the] state court counterclaims raise[d] issues of breach of contract, violations of Wisconsin securities and misrepresentation laws, and violations of the Wisconsin Consumer Protection Act." ***Dickinson***, 103 Wis. 2d at 440-41. A motion for a stay of state court proceedings typically occurs early in the proceedings, and there is no indication in the Wisconsin law presented by the parties that a stay in a state court class action should be dependent upon certification of the class.

[9] We recognize the federal court's decision granting the lead plaintiff's motion to amend the complaint to remove the 1933 Act claims, but, again, the decision was made without prejudice and does not impact our legal conclusion in this case.

In reaching its conclusion, the circuit court relied on our supreme court's decision in ***Lorenz v. Dreske***, 62 Wis. 2d 273, 214 N.W.2d 753 (1974), which we conclude is inapplicable under the circumstances. ***Lorenz***, first and foremost, was not a class action case; second, it did not involve parallel federal and state actions; and, finally, there was neither an identity of the causes of action nor the parties as there were different contracts at issue, the parties were different, and the parties that were the same had "reversed positions in the two actions." ***Id.*** at 293-94. The circuit court also referenced the United States Supreme Court's recent decision in ***Cyan, Inc. v. Beaver County Employees Retirement Fund***, 138 S. Ct. 1061 (2018), for the proposition "that public policy is strong, that a valid 1933 claim can proceed in state court." In ***Cyan***, the Court rejected the argument that Congress intended that 1933 Act class actions be litigated in federal court, upholding the "longstanding jurisdiction" of state courts to "adjudicate class actions alleging only 1933 Act violations." ***Cyan***, 138 S. Ct. at 1078. ***Cyan***, however, did not involve two competing cases pending in federal and state court and did not stand for the proposition that state courts cannot stay 1933 Act claims in class action suits.

Under the circumstances, a stay of the state court proceedings should have been entered as the federal actions seek the same relief, on behalf of the same class members, arising out of the same stock offerings.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this matter is remanded to the circuit court for additional proceedings consistent with this order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals