SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	
	:	
Plaintiffs,	:	**Case No. 2017 CA 005989 B**
	:	**Judge Todd E. Edelman**
v.	:	
	:	
DAVID H. HOFFMAN, *et al.*,	:	
	:	
Defendants.	:	

ORDER

This matter comes before the Court upon Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, Sidley Austin partner David Hoffman, and American Psychological Association's ("APA") (collectively, "Defendants") Contested Motion (1) To Stay This Action in Favor of the Identical First-Filed Lawsuit in Ohio and (2) To Extend the Time to File Rule 12(b)(6) Motions in Response to the Complaint ("Motion"), filed October 11, 2017. Plaintiffs Stephen Behnke, L. Morgan Banks, III, Debra L. Dunivin, Larry C. James, and Russell Newman ("Plaintiffs") filed their Opposition on October 18, 2017, to which Defendants filed their Reply on October 25, 2017. Defendants filed a Praecipe notifying the Court of a new development relevant to their Motion on November 28, 2017, to which Plaintiffs filed their response on November 29, 2017.

Defendants move to stay the above-captioned "second-filed" lawsuit commenced by Plaintiffs until the final resolution of the appeal of Plaintiffs' "first-filed" lawsuit with identical claims, currently pending in Ohio's Second District Court of Appeals. Defs.' Mot. at 1. In the alternative, if the case is not stayed, Defendants move to extend the time for filing Rule 12(b)(6) motions until resolution of pending motions to compel arbitration and to dismiss under the Anti-SLAPP Act. *Id.* at 2.

I. Background

Plaintiffs filed this action asserting claims for defamation and false light invasion of privacy against Sidley Austin and APA in the Superior Court on August 28, 2017. *See* Pls.' Compl. The Complaint focuses on an independent review and report that Sidley delivered to the APA in July 2015. *See id.* at 1. The same Plaintiffs had previously filed an essentially identical defamation and false light complaint against the same Defendants (omitting only the LLP that operates Sidley's DC office, an additional defendant in this action) in the Ohio Court of Common Pleas on February 16, 2017. *See* Defs.' Mot. at 4. On August 25, 2017, the Ohio court dismissed that complaint for lack of personal jurisdiction. *See id.* On September 22, 2017, Plaintiffs appealed the dismissal to the Ohio Second District Court of Appeals (the "Ohio appeal"). *See id.* On November 27, 2017, Plaintiffs filed their opening brief in the Ohio appeal. *See* Defs.' Praecipe Regarding Defs.' Mot. at 2. Defendants' appellee briefs were due by December 18, 2017. *See id.*

II. Analysis

A. Defendants' Request to Stay This Litigation

Defendants pose the question whether this Court should abstain from acting while an appeal of essentially the same litigation proceeds in another jurisdiction—where the case being appealed was filed first. There are sound reasons to do so, especially given that the Ohio appeal is currently underway and the effect a decision would have on the litigation before this Court.

While the District of Columbia Court of Appeals has not directly ruled on this issue, the so-called "first-to-file rule" is well-established in the federal court system. *See Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) ("Where two cases between

the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first . . . .") (further quotation omitted); *Utahamerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012); *Food Fair Stores Inc. v. Square Deal Market Co.*, 187 F.2d 219, 220 (D.C. Cir. 1951); *Speed Products Co. v. Tinnerman*, 171 F.2d 727, 729 (D.C. Cir. 1948). While the case law pertains specifically to cases in federal court, the Court sees no reason why the same policy considerations that underlie the first-to-file rule in federal court should not lead to the same outcome here. As the United States Court of Appeals for the District of Columbia Circuit explained in *Ragonese*, "[c]onsiderations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *Ragonese*, 617 F.2d at 830. As such, "[s]ound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided." *Utahamerican Energy Inc.*, 685 F.3d at 1124 (further citations and quotations omitted); *see also Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349–350 (D.C. Cir. 2003) (applying the rule and explaining the desire to "avoid duplicative litigation").

Here, the Ohio action was filed first, and it concerns the same issues essentially between the same parties. Plaintiffs concede that "Plaintiffs and Defendants agree that two essentially identical lawsuits should not proceed simultaneously in two courts." Pls.' Opp'n at 1. Proceeding with the District of Columbia action could, if Plaintiffs' appeal were granted, result in trial courts in Ohio and the District of Columbia simultaneously, or nearly simultaneously, deciding the same issues. These considerations strongly favor a stay of this action.

In opposing Defendants' Motion, Plaintiffs argue that this action should not be stayed because Plaintiffs need to review Defendants' Rule 12(b)(6) motions to determine whether Defendants will raise an issue that can only be cured in Ohio, claiming they want to avoid being prejudiced by abandoning the Ohio appeal. *See* Pls.' Opp'n at 1; Pls.' Resp. to Praecipe Regarding Defs.' Mot. at 1. Plaintiffs stated in their Opposition that they would only pursue the appeal after seeing Defendants' Rule 12(b)(6) motions, *see* Pls.' Opp'n at 6, but the appeal is now moving forward, with Plaintiffs having filed their opening appellant brief on November 27, 2017 and Defendants' briefs having been due by December 18, 2017. Plaintiffs' filing of their opening brief supports Defendants' contention that there is no legitimate need for Plaintiffs to review Defendants' Rule 12(b)(6) motions before proceeding with the Ohio appeal. It is also true that Defendants have generally discussed the arguments they intend to make in their Rule 12(b)(6) motions, *see* Defs.' Mot. at 7–8, and that they do not pertain to the questions of personal jurisdiction at issue in the appeal.

Plaintiffs ask the Court to reject the first-filed rule where Defendants are not trying to defeat Plaintiffs' original choice of forum.[1] *See* Pls.' Opp'n at 7. However, a stay may be warranted by circumstances sufficient to move the discretion of the court, and that discretion should be exercised freely in favor of the stay where a prior action is pending elsewhere involving the same parties and issues. *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). In considering the circumstances presented here, Plaintiffs filed their first action in Ohio based on "the residence of one of the Plaintiffs; substantial activities conducted by the Defendants in that forum, including multiple publications

[1] Plaintiffs contend that even if the first-filed rule were applicable, the Court need not apply it because each sovereign state has unrestricted powers. Pls.' Opp'n at 7–8. The cases cited by Plaintiffs for this proposition both hold that comity must be considered in determining whether to stay a later-filed action. *See In re Old Am. Cnty. Mut. Fire Ins. Co.*, 2012 WL 6699052, *4–6 (Tex. Ct. App. Dec. 20, 2012); *Advanced Bionics Corp. v. Medtronic*, 59 P.3d 231, 237 (Cal. 2002). Here, the considerations of comity set forth *supra* favor a stay.

of the defamatory statements read by Ohio residents; and permissive joinder of multiple plaintiffs." Pls.' Opp'n at 5. The potential for Plaintiffs' success on appeal warrants staying this action and avoiding the possibility of litigating the same issues simultaneously in different jurisdictions. Given the strong interests in conserving the resources of the parties and the judicial system and in avoiding inconsistent results from simultaneously-pending lawsuits, the Court finds that the circumstances presented here impel a stay until the Ohio action has concluded.

B. Defendants' Request to Extend Rule 12(b)(6) Motion Deadline

Defendants argue that the deadlines for filing Rule 12(b)(6) motions should be extended until after the other currently pending motions have been decided. *See* Defs.' Mot. 7–8. Having granted Defendants' request to stay this action, Defendants' request to extend the Rule 12(b)(6) motion deadline has become moot.

Accordingly, it is this 16th day of February 2018 hereby

ORDERED that Defendants' Motion to Stay This Action and to Extend Time to File Rule 12(b)(6) Motions is GRANTED IN PART; and it is

FURTHER ORDERED that this action is STAYED; and it is

FURTHER ORDERED that the February 23, 2018 Scheduling Conference is VACATED; and it is

FURTHER ORDERED that a status hearing is scheduled in this case for May 18, 2018 at 9:30 a.m.; and it is

FURTHER ORDERED that the parties shall file a Praecipe updating the Court on the status of the Ohio litigation if any rulings are made in that case; and it is

FURTHER ORDERED that the following motions are HELD IN ABEYANCE: (i) Defendant American Psychological Association's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, filed October 13, 2017; (ii) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Motion to Compel Arbitration, filed October 13, 2017; (iii) Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David Hoffman's Contested Special Motion to Dismiss Under the District of Columbia Anti-SLAPP Act, filed October 13, 2017; (iv) Defendant American Psychological Association's Contested Motion to Compel Arbitration, filed October 13, 2017; and (v) Plaintiff's Opposed Motion for Limited Discovery in Preparation for their Oppositions and Expedited Hearings for Trial, filed November 30, 2017.

Todd E. Edelman
Associate Judge
(Signed in Chambers)

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