UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MIRRA COMPANY, INC.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-165-P-H***
	)	
MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 35,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO DISMISS

The defendant, Maine School Administrative District No. 35 ("MSAD 35"), moves to dismiss this action alleging breach of contract pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), contending that a parallel proceeding is pending in state court and "wise judicial administration" warrants dismissal. MSAD 35's Motion to Dismiss Mirra's Complaint, etc. ("Motion") (Docket No. 2) at 3. I recommend that the court deny the motion.

In *Colorado River* the Supreme Court noted that

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

424 U.S. at 813 (internal quotation marks and citation omitted). After reviewing the traditional categories of abstention by federal courts, none of which is applicable to the instant case, the Court

went on to discuss "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions." *Id*. at 817. "Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Id*. (citation and internal quotation marks omitted). Noting that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them, the Court noted that exceptional circumstances may exist which permit the dismissal of a federal suit due to the presence of a concurrent state proceeding. *Id*. at 817-18.

In assessing whether "reasons of wise judicial administration" make such dismissal appropriate, a federal court may consider which court has first assumed jurisdiction over property, the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which the courts obtained jurisdiction, but no single factor is necessarily determinative and "[o]nly the clearest of justifications will warrant dismissal." *Id*. at 818-19. In *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court refined this list by holding that the order in which the courts involved obtained jurisdiction should be considered not exclusively in terms of which complaint was filed first, "but rather in terms of how much progress has been made in the two actions." *Id*. at 21. The Court also added two more factors for consideration — whether federal law provides the rule of decision on the merits and whether the state court proceeding would be adequate to protect the rights of the party moving for dismissal. *Id*. at 23, 26.

The list of six factors "was not intended to be exhaustive." *Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991). Other factors that merit consideration include the vexatious or contrived nature of the federal claim and respect for the principles underlying removal jurisdiction. *Id*. "[T]he pendency of an overlapping state court suit is an insufficient basis in and of itself to warrant dismissal of a

federal suit." *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 12 (1st Cir. 1990). The weight to be given each factor varies depending on the circumstances of the case at issue. *Id*.

Here, MSAD 35 points to an action that it filed in the Maine Superior Court (York County) on or about May 18, 2000, seeking $32,396 in damages from the plaintiff, Mirra Company, Inc., for an alleged breach of a contract involving construction of a high school. Complaint, *Maine School Administrative District No. 35 v. Mirra, Inc.*, Maine Superior Court (York County), Docket No. CV-00-134 (copy attached to Motion). The instant action, in which Mirra seeks at least $1,187,906.24 in damages on a theory of *quantum meruit* and also alleges breach of contract, clearly arises out of the same contract. Complaint (Docket No. 1) ¶¶ 3, 8, 17, 20. This action was filed on June 21, 2001. Docket. Action in the state court has been stayed at least since June 14, 2000 pending the outcome of an action filed in this court by Mirra seeking to compel arbitration of the dispute (Docket No. 00-158-P-H, complaint filed May 23, 2000) and the instant action. Motion at 2-3 and Orders of the Maine Superior Court attached to Motion. Mirra's motion to compel arbitration was denied and that action was finally resolved by the decision of the First Circuit Court of Appeals on June 5, 2001. Motion at 2-3.

MSAD 35 contends that Mirra's claims in this action "would qualify as compulsory counterclaims" in the state court action and, accordingly, that there "is perfect identity of issues" in the two proceedings. Motion at 4. It admits that the first *Colorado River* factor "is of no significance here" because there is no real property involved. *Id*. at 5. It suggests that the state court in York County "is modestly more convenient to the parties and witnesses" than this court in Cumberland County but also acknowledges that "this factor standing alone would be insufficient to justify abstention." *Id.* Based on its contention that the two proceedings "will be identical" as to issues, MSAD 35 argues that the third *Colorado River* factor supports its position because abstention is

accordingly necessary in order to avoid piecemeal litigation. *Id*. It contends that the fourth factor "weighs heavily in favor of . . . abstention" because the instant action was filed more than a year after it filed the state-court action. *Id*. at 6. It suggests that Mirra's filing of the instant action is designed to circumvent the statute governing removal of state-court actions to federal court, *id.*, a factor considered by the Seventh and Ninth Circuits, *Lumen Constr., Inc. v. Brant Const. Co.*, 780 F.2d 691, 694 (7th Cir. 1985); *American Int'l Underwriters v. Continental Ins. Co.*, 843 F.2d 1253, 1260-61 (9th Cir. 1988), but not mentioned by the First Circuit in its reported decisions on this subject. Finally, MSAD 35 notes that the instant action involves only state law and that the state court is an adequate forum to protect the rights of both parties, so that the fifth and sixth factors "weigh in favor of dismissal." *Id*. at 7.

While it may well be that Mirra's claims set forth in the instant action are properly characterized as compulsory counterclaims in the state-court action, the fact remains that the state-court action was stayed before any counterclaims had to be filed and any such counterclaims are not presently before the state court. As they stand, the state and federal actions are not identical. They present separate and distinct claims, albeit brought by the same parties and arising out of the same factual circumstances. MSAD 35 cites no authority for its necessarily-implied argument that the existence of a potential compulsory counterclaim in a state-court action, when pleaded instead as a direct claim in a federal action, requires or supports dismissal of the federal action. *See AAR Int'l, Inc. v. Nimelias Enter. S.A.*, 250 F.3d 510, 522 (7th Cir. 2001) ("However, the appellees point to no authority (nor have we found any) suggesting that a federal action is parallel to a state or foreign action for *Colorado River* abstention purposes when the claim upon which the federal action is based is pleadable as a compulsory counterclaim in the other action."). The two actions, as they stand, may be resolved without any conflict between the two results, whichever party wins in either case.

> [I]n considering whether the concern for avoiding piecemeal litigation should play a role . . ., the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the state court.

Burns, 931 F.2d at 146 (internal punctuation and citation omitted). Where the case "presents a straightforward application of state . . . laws and, thus, the possibility that harsh, contradictory or unfair consequences will result is slim," abstention or stay in the federal action is inappropriate. *Id*. For all that appears, that is the case here. The third *Colorado River* factor therefore does not weigh in favor of dismissal. *See generally Huffmire v. Town of Boothbay*, 35 F.Supp.2d 122, 128 (D. Me. 1999).

MSAD 35's presentation of the facts underlying the fourth *Colorado River* factor require some clarification. While the instant action was filed more than a year after MSAD 35 filed its claim in state court, nothing further, including the filing of responsive pleadings, has occurred in the state court. That action is no further advanced than the instant action. Thus, this factor weighs against abstention. *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 651 (5th Cir. 2000). In fairness to Mirra, it must also be noted that the instant action was filed shortly after its action seeking arbitration, which was filed five days after the state-court action was filed, was finally resolved. There was no reason to file the instant action until the arbitration claim was resolved. In addition, Mirra did not file this action after it missed a deadline in the state-court action for filing a counterclaim, and the amount sought by MSAD 35 in the state-court action is below the jurisdictional threshold for diversity actions in federal court. The former situation appears to have been the Seventh Circuit's concern with respect to the removal statute, *see Kent v. Cook*, 637 F. Supp. 1005, 1011 (N.D. Ind. 1986), and, since Mirra could not have removed the state-court action to this court, this factor, if it is to be considered in this circuit, is not applicable, *id*. Similarly, the Ninth Circuit's concern, that a repetitive suit may be

filed in federal court by the plaintiff in a state-court action, *Continental Ins.*, 843 F.2d at 1260, is not at issue here.

There is nothing in the record before the court to even suggest that the instant action has been brought with a vexatious motive, another factor weighing against abstention. *See Huffmire*, 35 F.Supp.2d at 130. With respect to the fact that only state law is involved, while the presence of issues of federal law "must always be a major consideration weighing against" abstention, only in "rare circumstances" will the presence of state-law issues weigh in favor of abstention. *Moses H. Cone*, 460 U.S. at 26. Such rare circumstances exist only when a case presents complex questions of state law that would best be resolved by a state court. *Huffmire*, 35 F.Supp.2d at 131 (quoting *Villa Marina*, 915 F.2d at 15). No such rare circumstances are present in this case. Inadequacy of the state forum will operate against dismissal, but adequacy of the state forum does not weigh in favor of dismissal. *Rojas-Hernandez v. Puerto Rico Elec. Power Auth.*, 925 F.2d 492, 496 (1st Cir. 1991).

Assuming *arguendo* that MSAD 35's assertion that Alfred, Maine, provides a forum that is "modestly more convenient" for the parties and witnesses in this case than is Portland, Maine, is correct, it has failed to establish that any of the other factors identified by the Supreme Court would support this court's exercise of its discretion in favor of dismissing the instant action. As MSAD 35 admits, that "modest" increase in convenience, standing alone, cannot justify abstention. Accordingly, I recommend that the motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of October, 2001.

_____

David M. Cohen
United States Magistrate Judge

MIRRA COMPANY INC DAVID P. RAY, ESQ.

plaintiff

BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200

v.

MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 35 JERROL A. CROUTER 772-1941

defendant

DRUMMOND, WOODSUM & MACMAHON
245 COMMERCIAL ST.
P.O. BOX 9781
PORTLAND, ME 04101
207-772-1941