SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Eileen Bransten **PART** 3
Justice

Index Number : 650990/2012
ERRICO, JOSEPH P.
vs.
STRYKER CORP.
SEQUENCE NUMBER : 006
DISMISS ACTION

INDEX NO. 650990/2012
MOTION DATE 9/10/12
MOTION SEQ. NO. 006

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ **No(s).** 1

Answering Affidavits — Exhibits ____ **No(s).** 2

Replying Affidavits ____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

[redacted]

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1-14-13

Eileen Bransten, J.S.C.

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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JOSEPH P. ERRICO and DR. THOMAS J. ERRICO, individually and as representatives of the former common stockholders of SPINECORE, INC. and PHYSICIANS' FELLOWSHIP PARTNERS, LLC,

Plaintiffs,

-against-

Index No. 650990/12
Motion Sequence No.: 006
Motion Date: 9/10/12

STRYKER CORPORATION and HOWMEDICA OSTEONICS CORP.,

Defendants,

-and-

WARBURG PINCUS PRIVATE EQUITY VIII, L.P., VERTICAL FUND I, L.P., VERTICAL FUND II, L.P.,

Declaratory Judgment Defendants.

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BRANSTEN, J.:

Plaintiffs Joseph P. Errico and Dr. Thomas J. Errico (the "Erricos"), individually and as representatives of the former common stockholders of Spinecore, Inc. and Physicians' Fellowship Partners, LLC bring this action against defendants Stryker Corporation ("Stryker") and Howmedica Osteonics Corp. ("Howmedica"), as well as declaratory judgment defendants Warburg Pincus Private Equity VIII, L.P., Vertical Fund I, L.P. and Vertical Fund II, L.P. (collectively, the "Funds"), for breach of a merger

agreement. This case involves parties and claims almost identical to a case that is currently pending in Michigan, which Stryker filed sixteen months prior to the filing of this action by plaintiffs.

Defendants move, pursuant to CPLR 3211(a)(4), for an order dismissing the complaint and the declaratory judgment defendants' cross claims against defendants, or, in the alternative, staying this action pending resolution of the Michigan action.

For the reasons set forth below, defendants' motion is granted.

Background

Stryker is a Michigan corporation with its principal place of business in Kalamazoo, Michigan. Stryker manufactures and sells medical devices. In 2004, pursuant to a merger agreement (the "Agreement"), Stryker acquired a start-up medical device company called SpineCore. SpineCore had designed and developed, though not received FDA approval for, two spinal implants called FlexiCore and CerviCore. Plaintiffs and the Funds sold SpineCore to Stryker, and are counter-parties to the Agreement.

The Erricos are residents of New Jersey. They are the former holders of SpineCore's common stock, and serve as representatives for all of SpineCore's former

stockholders. J.P. Errico also controls plaintiff Physicians' Fellowship Partners, which is a Delaware limited liability company.

The Funds are three venture capital funds, all of which are Delaware limited partnerships. The Vertical Funds are based in New Jersey, and the Warburg Fund is based in New York.

In 2004, Stryker began negotiating with plaintiffs to acquire SpineCore, and on August 12, 2004, Stryker and plaintiffs executed the Agreement. Pursuant to the terms of the Agreement, plaintiffs were paid $118 million. The Agreement also provided that, if certain contingencies were met in the future, plaintiffs had the possibility of receiving additional milestone payments if the FDA approved FlexiCore and CerviCore, and Stryker "commercially launched" the devices in the United States.

At the time that the parties executed the Agreement, the Erricos signed additional agreements with Stryker. J.P. Errico agreed to serve as an employee of – and later as a consultant to – Stryker through co-defendant Howmedica, Stryker's wholly owned subsidiary. Thomas Errico also agreed to serve as a consultant.

This case is the third, and the last-filed, of three identical lawsuits between the parties, involving the same dispute and the same claims. In May 2010, the Erricos first sued Stryker in federal court in the Southern District of New York. In that action, the Erricos alleged that Strkyer had breached the Agreement by not using "commercially

reasonable" efforts to achieve the commercial launch of FlexiCore and CerviCore, and sought to recover the additional milestone payments. The Funds were not named as parties, despite the fact that they were signatories to the Agreement, and were entitled to the first portion of milestone payments.

Because the Funds' interest in any milestone payments made them necessary parties to the dispute, Stryker moved to join them as required parties under Federal Rule of Civil Procedure 19(a). The Court agreed and granted Stryker's joinder motion. *See Errico v. Stryker Corp.*, 2010 WL 5174361, *4, 2010 US Dist LEXIS 133567, *10-12 (S.D.N.Y. 2010) (holding that the Funds were "necessary parties," and that "Stryker incurs a substantial risk in proceeding without the [Funds], who are also signatories to the Merger Agreement," because in their absence, "Stryker could be subjected to multiple or inconsistent obligations"). The Court ordered the Funds to appear or show cause why their joinder was not possible.

In response to the Court's order, the Funds created a new, non-diverse shell entity to act as their representative under the Agreement, in an attempt to avoid the diversity jurisdiction of the federal court. As the Court recognized, the Funds formed this entity specifically to make their joinder in the federal action impossible. *See Errico v. Stryker Corp.*, 281 F.R.D. 182, 189-190 (S.D.N.Y. 2012).

Stryker then moved to dismiss the Southern District of New York action for failure to join necessary parties, and in March of 2011, filed a defensive declaratory judgment action in Kalamazoo County, Michigan against the Erricos and the Funds, which court had jurisdiction over all of the parties.

Instead of filing an action in this court and joining the Funds, plaintiffs continued to fight to maintain the federal action, and defend against the Michigan action. However, the federal court rejected plaintiffs' arguments, and granted Stryker's motion to dismiss, expressly recognizing that "Stryker's lawsuit in Michigan state court ... is already underway and provides an adequate forum for Plaintiffs (and the Preferred Stockholders) to litigate their rights under the Merger Agreement." *Id.* at 192.

While Stryker's motion to dismiss the federal action was pending, the Michigan defendants moved to dismiss Stryker's complaint in the Michigan action. They argued that Michigan was not a "convenient" forum, that the Michigan court lacked jurisdiction over them, and that the case could not proceed under Michigan Court Rule 2.11(6)(C)(6), which is Michigan's equivalent to CPLR 3211(a)(4). After briefing and oral argument, the Michigan court denied the Michigan defendants' motion to dismiss, holding that it had jurisdiction over all of the parties, and that Michigan is a convenient forum in which to proceed.

The Michigan court temporarily stayed discovery in that case pending a final ruling from the federal court that the Funds were necessary parties, which, as previously discussed, the federal court entered shortly thereafter.

On March 30, 2012, plaintiffs filed this action. On April 17, 2012, the Funds asserted cross claims against Stryker, based upon the identical conduct alleged in the complaint. Plaintiffs filed this action after the federal court concluded that the federal action should be dismissed, and more than a year after Stryker filed the Michigan action.

In the Michigan action, the Michigan defendants renewed their argument that the action should be dismissed, in light of their newly filed New York state court action. In the alternative, the Michigan defendants argued that the Michigan action should be stayed, pending resolution of this action. On June 4, 2012, the Michigan court rejected those arguments, and lifted its temporary stay in light of the federal court's order dismissing that case. *See* Affirmation of Georgia N. Alexakis ("Alexakis Affirm."), Ex. 2 ("[T]his Court does have competence ... to hear this particular case") (5/21/12 Hearing Tr., at 24); *id.* at 35 ("[T]his Court should, in fact, exercise its responsibility and hear this particular proceeding); *id.* at 36 ("So, as to today, bottom line, the Court is going to lift the stay"); *see also* Alexakis Affirm., Ex. 22 (June 4, 2012 Order Lifting Stay).

The Michigan case is currently proceeding. The Erricos have answered the complaint, and have asserted counterclaims against Stryker identical to their claims in this

case. The parties have exchanged discovery, and have exchanged drafts of an agreed scheduling order that calls for a trial-ready date by August 2013.

Discussion

Defendants seeks dismissal or stay of this action, pursuant to CPLR 3211(a)(4), arguing that this case must be dismissed because a previously filed case involving the same parties and identical causes of action is pending in Michigan. CPLR 3211(a)(4) authorizes dismissal where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States."

Pursuant to CPLR 3211(a)(4), a court has broad discretion as to the disposition of an action when another is pending. *Whitney v. Whitney*, 57 N.Y.2d 731, 732 (1982). In considering whether to dismiss or stay a later-filed action in deference to an earlier-filed action, courts will consider whether the first-filed action "was motivated simply by plaintiffs' wish to gain a tactical advantage through forum shopping." *Certain Underwriters at Lloyd's, London v. Hartford Acc. & Indem. Co.*, 16 A.D.3d 167, 168 (1st Dep't 2005).

In addition, while complete identity of the parties is not a necessity for dismissal, the court should determine whether there is a "substantial identity" of the parties. *White Light Prods. v. On the Scene Prods.*, 231 A.D.2d 90, 93-94 (1st Dep't

1997); *see also Montalvo v. Air Dock Sys.*, 37 A.D.3d 567, 567 (2d Dep't 2007). "Substantial identity" of the parties "'generally is present when at least one plaintiff and one defendant is common in each action.'" *Proietto v. Donohue*, 189 A.D.2d 807, 807-808 (2d Dep't 1993) (quoting *Morgulas v. Yudell Realty*, 161 A.D.2d 211, 213 (1st Dep't 1990)).

Further, to warrant dismissal or a stay, the two actions must be sufficiently similar, and the relief sought must be "'the same or substantially the same.'" *White Light Prod., Inc.*, 231 A.D.2d at 94 (quoting *Kent Dev. Co. v. Liccione*, 37 N.Y.2d 899, 901 (1975)). "It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding," but "[r]ather, it is necessary that 'both suits arise out of the same subject matter or series of alleged wrongs.'" *Simonetti v. Larson*, 44 A.D.3d 1028, 1029 (2d Dep't 2007) (citations omitted).

Courts routinely dismiss later-filed cases pursuant to CPLR 3211(a)(4) where, as here, the identity of the parties and the causes of action are substantially the same, thus raising the danger of conflicting rulings relating to the same matter. *See, e.g., Employers Ins. of Wausau v Primerica Holdings*, 199 A.D.2d 178, 178 (1st Dep't 1993) (dismissing New York lawsuit where prior action in New Jersey had been filed six months before the New York action and the New Jersey court had denied a motion to dismiss for forum non conveniens); *Certain Underwriters at Lloyd's, London*, 16 A.D.3d

at 168 (dismissing New York action where a suit involving the same parties and substantially the same claims had been pending for over a year in a Connecticut court).

The general rule in New York is that the "court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 58 (1969) (internal quotation marks and citation omitted). This is particularly true where, as here, the later New York action comes after the court in the earlier action has denied a motion to dismiss on the basis of forum non conveniens, among other reasons. *See, e.g., Employers Ins. of Wausau*, 199 A.D.2d 178 (trial court did not abuse discretion in dismissing later New York action under CPLR 3211(a)(4) where court in prior New Jersey action had denied forum non conveniens motion); *see also National Union Fire Ins. Co. of Pittsburgh, Pa. v. Jordache Enters.*, 205 A.D.2d 341, 343 (1st Dep't 1994) (noting that under Section 3211(a)(4) "priority in time is not always controlling" but "the common thread running through all the exceptional cases is that in none was there an intervening disposition on an unsuccessful motion to dismiss the first action before the second was commenced.").

Stryker filed the Michigan action on February 22, 2011, and, on January 18, 2012, the Michigan court denied the Michigan defendants' motions to dismiss that action. Yet, plaintiffs did not file this action until more than 16 months after Stryker filed the

Michigan action, and more than two months after the Michigan court denied their motions to dismiss. There is no dispute that the Michigan action is the "first-filed" action, and that the Michigan court has already exercised its jurisdiction, holding that the case will proceed there. Thus, pursuant to CPLR 3211(a)(4), this case must thus be dismissed in deference to the first-filed Michigan action.

Moreover, it is clear that the relief sought in this action and the Michigan action is "the same or substantially the same," both actions arise out of the same operative facts, and there is a substantial identity of the parties. Both this action and the Michigan action address identical causes of action. The two primary issues, both asserted as breaches of contract, are: (1) whether Stryker breached the terms of the Agreement in connection with the fact that neither FlexiCore nor CerviCore achieved "commercial launch"; and (2) whether the Erricos breached their employment/consulting agreements in acting against Stryker's interests and misappropriating confidential information. The claims asserted in this action are word-for-word identical to those asserted in Michigan. This is because the declaratory judgment claims pending in Michigan with respect to the breach of the Merger Agreement are the same as those asserted by the Erricos here. As counsel for the Erricos acknowledged to the Michigan court: "You can line up the latest counterclaims in New York with the claims against the Erricos personally here and see they're identical." (Alexakis Affirm., Ex. 25 ("12/2/11 Hearing Tr."), at 8). Thus,

plaintiffs' claims here are the same claims that Stryker presses for resolution in the context of the Michigan action. As such, the Michigan action will necessarily resolve all of the issues raised by these causes of action, and will thus eliminate the need for duplicate hearings, and the possibility of inconsistent rulings.

In opposition to the motion, plaintiffs argue that dismissal or stay under CPLR 3211(a)(4) is not appropriate because Howmedica is not a party to the Michigan action. The court rejects this argument, as "[s]ubstantial, not complete, identity of parties is all that is required to invoke" CPLR 3211(a)(4). *Barringer v. Zgoda*, 91 A.D.2d 811, 811 (3d Dep't 1982). "Substantial identity" of the parties "generally is present when at least one plaintiff and one defendant is common in each action." *Morgulas,* 161 A.D.2d at 213. This is obviously present here. Indeed, where, as here, "there is an additional party in the plaintiff's action in New York, it is substantial rather than complete identity of the parties which is required" to warrant dismissal. *Case Capital Corp. v. Morgan Invs.*, 154 A.D.2d 501, 501 (2d Dep't 1989); *see also White Light Prods., Inc.*, 231 A.D.2d at 93-94. In any event, the addition of Howmedica, Stryker's wholly-owned subsidiary, would not negate the "substantial" identity of the parties in this case and the Michigan action, as Howmedica's interest in this case is identical to Stryker's, and the primary adverse party in both cases is the same – Stryker.

The court also rejects plaintiffs' argument that the Michigan action was a "transparently tactical maneuver." (Plaintiffs' Memorandum in Opposition to Motion to Dismiss ("Pls.' Mem."), at 3.) To the contrary, as the federal court recognized, the Erricos' failure to include the Funds in the federal action exposed Stryker to the risk of multiple and inconsistent judgments. Thus, Stryker's filing of the Michigan action was a logical and necessary step to protect itself, and to establish a forum in which the entire dispute between all parties could be resolved, thus avoiding the risk of multiple inconsistent judgments. And, as the federal court concluded, Michigan is an "adequate" forum to resolve the entire dispute between the parties.

Thus, defendant's motion to dismiss this action and the Funds' cross claims, pursuant to CPLR 3211(a)(4), is granted. The court has considered the remaining arguments, and finds them to be without merit.

Conclusion

Accordingly, it is

ORDERED that motion of defendants Stryker Corporation and Howmedica Osteonics Corp. to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants

as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Stryker Corporation and Howmedica Osteonics Corp. to dismiss the cross claims of declaratory judgment defendants Warburg Pincus Private Equity VIII, L.P., Vertical Fund I, L.P. and Vertical Fund II, L.P. is granted.

Dated: New York, New York
January 14, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.