

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LIONEL I. BRAZEN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

TYCO INTERNATIONAL LTD., L. DENNIS
KOZLOWSKI, MICHAEL A. ASHCROFT,
JOSHUA M BERMAN, RICHARD S.
BODMAN, JOHN F. FORT, III, STEPHEN
W. FOSS, PHILIP M. HAMPTON, JAMES S.
PASMAN, JR., W. PETER SLUSSER and
FRANK E. WALSH, JR.,

Defendants.

No. 02 CH 11837

Hon. Thomas P. Quinn

ORDER

This matter comes before the Court on the Defendant Tyco International Ltd.'s ("Tyco") Section 2-619 motion to dismiss, Defendants Michael A. Ashcroft, Joshua M Berman, Richard S. Bodman, John F. Fort, III, Stephen W. Foss, James S. Pasman, Jr., and W. Peter Slusser's (collectively "outside directors") Section 2-301 motion to dismiss for lack of jurisdiction and Defendant Frank E. Walsh Jr.'s motion adopting the arguments of the outside directors.¹ The following alleged facts are according to the First Amended Complaint. The complaint arises from a merger between Defendant Tyco and Mallinckrodt, Inc., ("MLKT") which took place on October 17, 2000. (Comp. ¶ 1, 2.) Under the terms of the merger, owners of MLKT stock received shares of Tyco stock in exchange for their MLKT shares, based on an exchange rate. (Comp. ¶ 1.) The number of Tyco shares the MLKT shareholders received was determined by

¹ Neither Defendant L. Dennis Kozlowski nor Defendant Philip M. Hampton took part in any of the motions considered in this order.

the average price of Tyco shares publicly traded over the five days preceding the merger. (Comp. ¶ 1.) Ultimately, MLKT shareholders received 0.9384 shares of Tyco stock for each share of MLKT stock they owned.² (Comp. ¶ 2, 166.)

According to the plaintiff, Tyco's financial reports, acquisition costs and claimed success of its acquisitions were falsified, in addition to Tyco not disclosing looting by its executives through self-dealing. (Comp. ¶ 36.) Defendants' statements in the Registration Statement and Merger/Proxy Prospectus connected to the merger, including the Tyco SEC filings and financial statements incorporated therein, misrepresented and/or omitted adverse material facts regarding Tyco. (Comp. ¶ 6.) The defendants failed to disclose hundreds of acquisitions in the fiscal year prior to the merger, causing harm to Tyco. (Comp. ¶ 6.) These problems were hidden from the investing public and specifically from MLKT shareholders. (Comp. ¶ 48.) As a result of various material omissions, Tyco's reported revenues and earnings were inflated and the price of Tyco stock was inflated both at the time of the merger and at the time that MLKT shareholders approved the merger. (Comp. ¶ 158.)

Plaintiff Lionel I. Brazen owned 354 shares of MLKT stock at the time of the merger. (Comp. ¶ 13.) He seeks to represent the class of all MLKT shareholders who received Tyco stock in exchange for MLKT stock as part of the merger. (Comp. ¶ 29.) If the market price of the Tyco stock was not artificially inflated by misrepresentations and concealments at the time of the merger, then MLKT shareholders would have received more Tyco stock in exchange for their MLKT stock, or they would not have approved the merger. (Comp. ¶ 13.) As a result, plaintiff filed this action alleging violations of the Securities Act of 1933.

The outside defendants moved to dismiss the claims against them under § 2-301 arguing that this court lacks personal jurisdiction over those defendants. Defendant Walsh also filed a

² Some shareholders received cash rather than fractional Tyco shares. (Comp. ¶ 1.)

motion to dismiss for lack of personal jurisdiction, in which he adopted the arguments of the outside directors. Plaintiff argues that jurisdiction in this court is proper under Section 22(a) of the Securities Act of 1933. 15 U.S.C. § 77v(a). Section 22(a) provides:

(a) Federal and State courts; venue; service of process; review; removal; costs. The district courts of the United States and United States courts of any Territory shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 16 with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendants may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. Except as provided in section 16(c), no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts. 15 U.S.C. § 77v(a).

With regard to the exception, "as provided in section 16 with respect to covered class actions," Section 16 applies to class actions based upon State law and does not apply to this case, which is based solely on federal law. 15 U.S.C. § 77p(b); accord *In Re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116 (D. N.H. 2004).

No case cited by plaintiff stands for the proposition that § 22(a) of the Securities Act gives a state court personal jurisdiction over a defendant where such jurisdiction would not otherwise exist on an independent basis. The cases cited by plaintiff undermine the position that § 22(a) of the Securities Act allows for personal jurisdiction of these defendants in any state. See *Ritter v. Zuspan*, 451 F. Supp. 926, 928 (E. D. Mich. 1978) ("The securities laws have special jurisdiction and venue provisions, which provide that any suit may be brought in the district (1)

wherein the defendant is found; or (2) is an inhabitant; or (3) transacts business; or (4) wherein any act or transaction constituting the violation occurred.”), *citing* 15 U.S.C. § 77v.

Furthermore, the language of Section 22(a) belies plaintiff's assertions. Section 22(a) provides, “Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein.” 15 U.S.C. § 77v(a). Clearly, this language limits where the defendant may be hailed into court, even if the section goes on to allow service of process wherever the defendant may be found.

Finally, Section 22(a) cannot grant this Court jurisdiction over a defendant when the due process clause of the Constitution would not allow it. The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful “contacts, ties, or relations.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *citing Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945). Plaintiff has plead no facts to suggestion minimum contract between this jurisdiction and either the outside directors or Walsh. Thus, even if plaintiff's interpretation of § 22(a) of the Securities Act of 1933 were correct, such an interpretation would violate the due process clause in this case.

Separately, Tyco argues that under § 2-619(a)(3), this case should be dismissed or stayed or the class allegations stricken. For a motion to dismiss under 735 ILCS 5/2-619, all well-pleaded facts and reasonable inferences are accepted as true for the purpose of the motion and the motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Feltmeier v. Feltmeier*, 207 Ill. 2d 267, 277-78 (2003). Under § 2-619(a)(3), a court may dismiss an action where, “There is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3).

In addition to this case, forty cases have been consolidated before Judge Paul J. Barbadoro of the U.S. District Court for the District of New Hampshire. *In Re Tyco*, 322 F. Supp. 2d 116. In the New Hampshire action, the plaintiffs filed a Consolidated Securities Class Action Complaint consisting of twelve counts and 772 paragraphs. (Tyco Brief, Ex. J.) That complaint seeks to certify a class of all purchasers or acquirers of Tyco securities from December 13, 1999 through June 7, 2002, which includes the date of the MLKT merger. (Cons. Comp. ¶ 705.) The defendants named in that action are Tyco, Kozlowski, Mark H. Swartz, Mark A. Belnick, Walsh, Ashcroft and PricewaterhouseCoopers LLP. (Cons. Comp.) Judge Barbadoro remanded this case and also remanded six cases, which are currently pending in the Florida state court, *In Re Tyco*, 322 F. Supp. 2d 116. Plaintiff does not contest that this action is the same cause as the New Hampshire action, but rather, argues that this court should exercise discretion and allow this action to proceed.

Section 2-619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose. *Kellerman v. MCI Telecom. Corp.*, 112 Ill. 2d 428, 447 (1986). Nevertheless, even when the "same cause" and "same parties" requirements are met, § 2-619(a)(3) does not mandate automatic dismissal. *Id.* Rather, the decision to grant or deny defendant's § 2-619(a)(3) motion is discretionary with the trial court. *Id.* The more reasonable construction of section 2-619(a)(3) is that the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed. *Id.* The factors that a court should consider in deciding whether a stay under section 2-619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction;

and the *res judicata* effect of a foreign judgment in the local forum. *Id.* at 447-48. This Court is not required to apply the *Kellerman* factors. *Overnight Transport. Co. v. Int'l Brotherhood of Teamsters*, 332 Ill. App. 3d 69, 76 (1st Dist. 2002).

With regard to comity, as Judge Barbadoro pointed out, it would be easier for him to supervise the action before him if this case were stayed. (Tyco Brief, Ex. F, p. 27.) However, Judge Barbadoro has taken a lead in coordinating discovery among this action, the New Hampshire action and the Florida actions. Plaintiffs in this action would be able to share discovery with the plaintiffs in the New Hampshire action, thus, this action would have little impact on Judge Barbadoro's oversight of discovery in the New Hampshire action.

Furthermore, as a matter of comity, this Court must respect Judge Barbadoro's decision to remand this action. *See In Re Tyco*, 322 F. Supp. 2d 116. Judge Barbadoro interpreted the Security Act of 1933 to require a remand to this court. If plaintiff was entitled to a remand and was entitled to choose this forum, then his claims should be allowed to proceed. If this court were to stay this action at this point, it would undermine Judge Barbadoro's interpretation of Congress's intent in requiring that remand.

With regard to the prevention of multiplicity, vexation, and harassment, no fact suggests that this action was filed to be vexatious or harassing. This action was filed prior to the consolidation of the cases in the District of New Hampshire, rather than a subsequent effort to harass the defendant. The plaintiff apparently has been cooperating in coordinating discovery with the other pending actions, rather than harassing defendants by requiring separate discovery.

As to the factor of the likelihood of obtaining complete relief in the foreign jurisdiction, the New Hampshire action is still in the early stages, as no class has been certified yet. (Plaintiff Brief, p. 12.) Plaintiff's claims in this action involve only a narrow subset of the large number of

transactions included in the New Hampshire action. Because this case only involves the merger of MLKT and Tyco, it could easily be lost in the shuffle of the New Hampshire action. However, according to Judge Barbadoro's reading of the Securities Act of 1933, plaintiff is entitled to have this claim heard in the forum of his choosing. To stay this action would have the effect of forcing plaintiff into the class in the New Hampshire action, contrary to the remand order that was granted.

Finally, a foreign judgment would not have a *res judicata* effect in this action. Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). In this case, the plaintiff is not the same party as the plaintiff in the New Hampshire action or the Florida action. The plaintiff in this action can opt out of any class certified in the other actions, thus it would not be the same parties. Therefore, *res judicata* would not apply.

Finally, this court should weigh the prejudice to the non-movant if the motion is granted against the policy of avoiding duplicative litigation. *Overnight*, 332 Ill. App. 3d at 78. Here, the plaintiff would be prejudiced by having his claims subsumed, against his will, by the much larger class action pending in New Hampshire. However, allowing this action to move forward would cause little difficulty to the defendant, as the parties have already begun to coordinate discovery between this action and the New Hampshire action.

Accordingly, the Defendants Michael A. Ashcroft, Joshua M. Berman, Richard S. Bodman, John F. Fort, III, Stephen W. Foss, James S. Pasman, Jr., W. Peter Slusser's and Frank E. Walsh, Jr. are dismissed pursuant to 735 ILCS 5/2-301 with prejudice, and this is a final order under S.C.R. 304(a) with regard to those defendants. Defendant Tyco's motion is denied.

JUDGE THOMAS P. QUINN
JUL 22 2005
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Judge Thomas P. Quinn