

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STONE CREEK MECHANICAL, INC.,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 02-CV-1907
	:	
CARNES COMPANY, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM/ORDER

GREEN, S.J.

OCTOBER _____, 2002

Presently before the Court are Defendant's Motion to Dismiss, Transfer and/or Stay, Plaintiff's Response, and Defendant's Reply. For the following reasons, Defendant's Motion to Dismiss will be granted.

I. Factual and Procedural Background

Plaintiff, a Pennsylvania corporation, performs heating, ventilation, and air conditioning ("HVAC") construction work. Defendant, a Wisconsin corporation, is in the business of manufacturing and selling HVAC equipment to construction contractors. On February 22, 2001 Plaintiff issued a purchase order to Defendant in the amount of \$640,000 for certain HVAC equipment Plaintiff needed in connection with a Pennsylvania construction contract. Defendant accepted Plaintiff's purchase order and began manufacturing the equipment. Approximately five to six months thereafter a dispute arose between the two parties. The dispute concerned Plaintiff's refusal to pay the bills of third party contractors to whom Defendant had apparently assigned portions of the purchase order. Plaintiff demanded that Defendant take responsibility for the third party work while Defendant demanded that Plaintiff release additional contract

funds.

From the Fall of 2001 through early February, 2002 Plaintiff and Defendant communicated through counsel in an attempt to resolve their dispute. As late as February 14, 2002 Plaintiff advised Defendant that Plaintiff would commence litigation against Defendant if the dispute was not resolved within the week. However, before Plaintiff acted on its warning, Defendant brought a breach of contract suit (“Wisconsin action”) against Plaintiff in Wisconsin state court. Shortly after being served with the complaint Plaintiff had the suit removed to the United States District Court for the Western District of Wisconsin on April 8, 2002. Plaintiff filed a Motion to Dismiss or Transfer to the Eastern District of Pennsylvania, arguing that Wisconsin lacked personal jurisdiction. Finding that Wisconsin did have personal jurisdiction over Plaintiff, the United States District Court for the Western District of Wisconsin denied Plaintiff’s motion. *See Carnes Company, Inc. v. Stone Creek Mechanical, Inc.*, No. 02-C-0208-C (W.D. Wis. Jun. 6, 2002).¹

Concurrent with the filing of its Motion to Dismiss in the Western District of Wisconsin, Plaintiff filed the current action (“Pennsylvania action”) in this Court, alleging breach of contract and demanding a Declaratory Judgment that Defendant’s assignment of work to third parties constituted a breach of the purchase order. Both the Wisconsin and Pennsylvania actions center around the same facts and essentially involve the same claims. Plaintiff does not dispute the fact that the Wisconsin action was brought before the Pennsylvania action.

In its’ present Motion to Dismiss, Transfer, and/or Stay Defendant argues that the first-filed rule controls, such that the Court must enjoin Plaintiff from prosecuting its current action in

¹ The opinion, authored by the Honorable Barbara A. Crabb, has not been published yet.

this district. Defendant further argues that the Court should either dismiss Plaintiff's action outright or transfer it to the Western District of Wisconsin.

II. Discussion

A. The First-Filed Rule

Since its adoption in *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941), the first-filed rule has been employed by the Third Circuit to enjoin, where appropriate, "the subsequent prosecution of 'similar cases... in different federal district courts.'" *EEOC v. University of Pennsylvania*, 850 F.2d 969, 971 (3d Cir. 1988) (quoting *Compagnie Des Bauxites De Guinea v. Insurance Co. of North America*, 651 F.2d 877, 887 n.10 (3d Cir. 1981)). The first-filed rule simply dictates that, "in cases of federal concurrent jurisdiction involving the same parties and issues, the court of first-filing must proceed to decide the matter." *Zelenkofske Axlerod Consulting, L.L.C. v. Stevenson*, No. 99-CV-3508, 1999 WL 592399, at *2 (E.D. Pa. Aug. 5, 1999) (citing *EEOC*, 850 F.2d at 971). Although the courts do have discretion in applying the first-filed rule, the Third Circuit has adopted a policy which requires the existence of unusual or exceptional circumstances before a court may choose to depart from the rule. *See Berkshire International Corp. v. Marquez*, 69 F.R.D. 583, 586 (E.D. Pa. 1976); *Communication Workers of America v. AT&T Paradyne Corp.*, No. 92-CV-7430, 1993 WL 76214, at *2 (E.D. Pa. Mar. 16, 1993).

Circumstances which may justify a departure from the first-filed rule include: 1) bad faith on the part of plaintiff in the first-filed action; 2) forum shopping being a motivation for the filing of the first action; 3) the second filed action being further developed than the first at the time the motion is made; and 4) the filing of the first suit in one forum to preempt the opponent's

imminent filing of a suit in a different, less favorable forum. *See Zelenkofske*, 1999 WL 592399, at *2; *EEOC*, 850 F.2d at 976 (declining to apply the first-filed rule after concluding that defendant had filed its prior action in the District of Columbia in order to avoid unfavorable precedent in the Third Circuit).

B. Plaintiff's Response

In its response to the present motion Plaintiff attempts to persuade the Court that, due to the existence of several special circumstances, the first-filed rule should not be enforced to enjoin Plaintiff from prosecuting its action in this district.² Plaintiff argues that: 1) both the Wisconsin and Pennsylvania actions are at the same stages of development (i.e., litigating motions to dismiss); 2) the fact that Defendant filed its action after having been put on notice of Plaintiff's intent to sue indicates that Defendant sought to preempt Plaintiff's current action; and 3) Defendant acted in bad faith by filing its Wisconsin action while engaging in settlement discussions with Plaintiff. For the following reasons the Court finds Plaintiff's arguments to be unpersuasive.

First, Plaintiff makes an inconsequential point by noting that both the Wisconsin and Pennsylvania actions are at the same stages of development. A court may depart from the first-filed rule by declining to enjoin the prosecution of a second-filed action which is further developed than the first-filed action. *See Zelenkofske*, 1999 WL 592399, at *2; *EEOC*, 850 F.2d at 976. However, Plaintiff cites no precedent within the Third Circuit, or any other circuit,

²Plaintiff also argues that because Wisconsin lacks personal jurisdiction over it and its principals- thus destroying the necessary element of concurrent federal jurisdictions- the first-filed rule is not applicable. As already noted, however, the district court presiding over the Wisconsin action has already ruled that Wisconsin does hold personal jurisdiction over Plaintiff. Consequently, Plaintiff's argument on this point is now moot.

which supports the proposition that a court may depart from the first-filed rule solely because a second-filed action is at the same stage of development as the first-filed action.

Second, Plaintiff argues that since Defendant filed its suit after it had been put on notice of Plaintiff's intent to sue, the Wisconsin action should be viewed as preemptive and designed to avoid litigation in the Eastern District of Pennsylvania. Plaintiff, however, has failed to point to any negative law within the Third Circuit which Defendant may have sought to avoid, nor does Plaintiff argue that Defendant was motivated by anything other than convenience when it chose to bring its action in its home state of Wisconsin.

The court in *Zelenkofske* addressed the issue of forum shopping via preemptive filing by quoting language from *Roadmaster Corp. v. Nordic Track, Inc.*, No. CIV.A.93-1260C, 1993 WL 625537, at *3 (N.D. Ill. Sept. 20, 1993). The court in *Roadmaster* declared that, "[i]f filing in a district that is more convenient to the plaintiff than to the defendant is enough to open the plaintiff up to a charge of forum shopping, then the exception would swallow the [first-filed] rule." *Id.* The *Roadmaster* court went on to state that forum shopping "is seeking out a forum solely on the basis of having the suit heard in a forum where the law or judiciary is more favorable to one's cause than in another." *Id.* Since there is no evidence that Defendant was solely, or even primarily, motivated by the desire to avoid negative law in the Third Circuit or seek shelter under more favorable law in Wisconsin, I find Plaintiff's argument for a departure from the first-filed rule based on Defendant's alleged preemptive filing to be unpersuasive.

Plaintiff also argues that Defendant acted in bad faith when it filed its suit while the two parties were still discussing a settlement. The *Zelenkofske* court directly addressed this issue when it declared:

That defendants engaged in settlement negotiations until filing suit ...does not demonstrate bad faith. The settlement of disputes is encouraged, but parties frequently engage in settlement discussions while preparing to litigate. A party does not relinquish its right ultimately to decide to sue in its forum of choice by engaging in settlement discussions. A party by virtue of engaging in settlement discussions is not obligated to provide notice to his adversary that he has decided to sue to allow the adversary to commence suit first. This is not a case where one party lulled another into sacrificing some substantive advantage.

Zelenkofske, 1999 WL 592399, at *3. Contrary to Plaintiff's assertions, Defendant acted within its right when it filed suit against Plaintiff while still engaged in settlement negotiations.

Plaintiff has failed to persuade the Court that any circumstances exist which would justify a departure from the first-filed rule in this matter. *See Zelenkofske*, 1999 WL 592399, at *2; *see also EEOC*, 850 F.2d at 976. I, therefore, conclude that pursuant to the first-filed rule, Plaintiff's action should be dismissed.

Conclusion

When the first-filed rule applies, a court may dispose of a second-filed action by dismissing it without prejudice to the plaintiff repleading his claims in the district of prior action or, under 28 U.S.C. §1404(a)³, transferring the second action to the court of first-filing for consolidation. *See Zelenkofske*, 1999 WL 592399, at *4; *see also New View Gifts & Accessories, Ltd. v. Tri-Coastal Design Group*, No. 02-VC-3428, 2002 U.S. Dist. Lexis 15331, at *2 (E.D. Pa. Aug. 15, 2002). In its response to Defendant's motion, Plaintiff has not indicated a preference for transfer or dismissal. As such, I will dismiss Plaintiff's suit without prejudice, so that it may choose its next course of action. I will also deny Defendant's Motions to Transfer and/or Stay as

³ Where venue of a civil action is proper in more than one judicial district, a court may, in the interest of justice and for the convenience of the parties, order transfer of that case to any other judicial district where the case may have been brought.

moot.

An appropriate order follows.

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v.	:	
	:	NO. 02-CV-1907
	:	
CARNES COMPANY, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of October, 2002, upon consideration of Defendant's Motion to Dismiss, Transfer and/or Stay, Plaintiff's Response, and Defendant's Reply, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss is **GRANTED**, without prejudice to Plaintiff repleading its claims in the Western District of Wisconsin. **IT IS FURTHER ORDERED** that Defendant's Motions to Transfer and/or Stay are **DENIED** as moot.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.