FTI, LLC, et al. v. Duffy, et al. (Lawyers Weekly No. 12-056-17)

By: Tom Egan in Business Law, Fulltext Opinion, Superior Court May 31, 2017

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT.
1684CV03176-BLS2

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FTI, LLC and FTI CONSULTING, INC.
v.
ROBERT J. DUFFY, STEPHEN L. COULOMBE, ELLIOT A. FUHR, and BERKELEY RESEARCH GROUP, LLC

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MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO STAY THE PROCEEDING AND DENYING DEFENDANT FUHR'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Defendants Robert Duffy, Stephen Coulombe, and Elliot Fuhr used to work for FTI, LLC, or its parent FTI Consulting, LLC (collectively "FTI"). These three defendants quit in May 2016 to work for Berkeley Research Group ("BRG"). At around the same time BRG and the individual defendants filed suit in California seeking a declaration that these individuals' non-competition agreements with FTI are void and unenforceable and an injunction barring FTI from seeking to enforce those covenants. FTI filed this Massachusetts lawsuit five months later, in October 2016. FTI claims that: (i) the individual defendants breached their non-competition, non-solicitation, and confidentiality agreements; (ii) Defendants each misappropriated trade secrets belonging to FTI; (iii) the individual defendants breached fiduciary duties by using FTI's resources and corporate opportunities to help BRG compete with FTI; (iv) BRG aided and abetted those alleged breaches of fiduciary duty; (v) all Defendants tortiously interfered with advantageous relationships FTI had with various third-parties; and (vi) BRG has engaged in unfair competition and unfair trade practices.

All four defendants have moved to stay this case pending final resolution of the civil action they filed in California. Separately, Mr. Fuhr has moved to dismiss the claims against him for lack of personal jurisdiction.

The Court will deny both motions. A stay would be inappropriate because the California action concerns only part of a few claims at issue here and because the California action is on hold until the California Supreme Court decides whether that case should be dismissed. This court can and should exercise personal jurisdiction over Mr. Fuhr because this lawsuit arises directly from Fuhr's constitutionally

– 2 –

sufficient contacts with Massachusetts and the exercise of jurisdiction over Fuhr would be reasonable, fair, and just.

1. Motion to Stay Proceedings. A trial judge has broad discretion to grant or deny a stay of proceedings pending resolution of the same or similar claims in another forum. Travenol Laboratories, Inc. v. Zotal, Ltd., 394 Mass. 95, 97 (1985).

The Court concludes, in the exercise of its discretion, that there is no good reason to stay this action until after final resolution of the related California case. It will therefore DENY Defendants' motion to stay.

1.1. First-Filed Rule and Exceptions. When entirely duplicative lawsuits are filed in different jurisdictions at materially different times, typically the later-filed action is stayed pending final resolution of the first-filed action. See, e.g., TPM Holdings, Inc. v. Intra-Gold Industries, Inc., 91 F.3d 1, 4 (1st Cir. 1996).

Although this principle is often referred to as the first-filed or first-to-file "rule," a court has broad discretion whether to apply it in any particular case. See, e.g., Chavez v. Dole Food Company, Inc., 836 F.3d 205, 210 (3d Cir. 2016); Baatz v. Columbia Gas Transmission, LLC, 814 F.3d 785, 793 (6th Cir. 2016). "Exceptions to the rule are not rare," and a judge "has discretion to give preference to a later-filed action when that action will better serve the interests involved." EMC Corp. v. Parallel Iron, LLC, 914 F. Supp. 2d 125, 127 (D.Mass. 2012) (Saylor, J.); accord, e.g., Blair v. Equifax Check Srvcs., Inc., 181 F.3d 832, 838 (7th Cir. 1999).

Where two lawsuits overlap only in part, as in this case, the judgment as to whether to stay the second-filed action must take into account all the relevant circumstances, including "the extent of overlap, the likelihood of conflict, the comparative advantage and the interest of each forum in resolving the dispute." TPM Holdings, supra. And "where there is less overlap" between the two actions, the second court "has considerably more discretion" to decline to

stay the second-filed action. In re Telebrands Corp., 824 F.3d 982, 984 (Fed. Cir. 2016).

1.2. Analysis of Stay Issues. The overlap between this action and the California lawsuit is rather limited. The California action is concerned only with the individual defendants' non-competition agreements and nothing else. Whatever the end result of the California action, it will not resolve FTI's claims in this case that

– 3 –

Defendants violated their non-solicitation and confidentiality agreements, misappropriated trade secrets, breached fiduciary duties (in the case of the individual defendants) or aided and abetted others in doing so (in the case of BRG), unlawfully interfered with advantageous relationships between FTI and various other parties, and engaged in unfair competition and trade practices.

The California action may not even resolve FTI's claims for breach of the individual defendants' non-competition agreements. FTI moved to dismiss the California lawsuit. The trial court denied the motion to dismiss. The California Supreme Court has exercised its discretion to review that interlocutory order. If the California Supreme Court were to order that the California action be dismissed, or if it affirms the denial of dismissal but on remand the California Superior Court were to hold that the disputed covenants can be enforced by FTI, then FTI would still have to litigate its claims in this Massachusetts action that the individual defendants breached their covenants not to compete. (FTI has apparently not asserted a breach-of-contract counterclaim in the California action.)

There seems to be relatively little chance that a decision in this case will conflict with any future decision in the California action. The individual defendants' restrictive covenants not to compete against FTI expire in less than three weeks, on May 23, 2017, one year after those defendants stopped working for FTI. As a result, neither action is likely to result in a substantive ruling regarding FTI is entitled to obtain injunctive relief enforcing those contracts. There is no reason to expect that courts in California and Massachusetts, faced with the same facts, would reach conflicting decisions regarding FTI's claim under the individual defendants' non-competition agreements. And, as explained above, none of FTI's other claims are at issue in the California proceeding.

To the extent that either forum has a comparative advantage, that factor weighs against staying the Massachusetts action. The one claim as to which one forum has an advantage is FTI's claim under Mass. G.L. c. 93A; since this claim is brought under a Massachusetts statute, and FTI has no right to a jury trial with respect to that claim, it seems reasonable that Massachusetts courts have a comparative advantage in deciding that claim compared to California courts.

– 4 –

The contracts at issue provide that they are governed by Maryland law; a California court has no greater expertise in applying Maryland contract law than does a Massachusetts court. Although the parties have not fully briefed any other choice of law issues, neither side suggests that California and Massachusetts law are materially different with respect to FTI's common law claims.

The interests of California and Massachusetts in resolving this dispute are equally strong. California has an interest because BRG is located in California and there is some evidence that the individual defendants will be working at or reporting to a BRG office in California. But Massachusetts has an equally strong interest because FTI claims that the individual defendants committed various business torts and violated c. 93A while working at FTI's office in Massachusetts, or supervising employees who worked there (in the case of Mr. Fuhr), and that BRG committed other legal violations by poaching employees from FTI's Massachusetts office.

The California action has not moved any closer to resolution than this Massachusetts case, and it is unlikely to do so. Although the California suit was filed in May 2016, so far all that has happened is that FTI tried without success first to remove the action to federal court and then to convince the California Superior Court to dismiss the action. Now that the California Supreme Court has agreed to review the denial of FTI's motion to dismiss, it seems unlikely that any resolution of the merits could happen in the California action for many months if not longer.

Finally, Defendants have not suggested that they would be unfairly prejudiced by having to litigate in Massachusetts instead of in California and thus have not moved to dismiss under the doctrine of forum non conveniens.

Under the circumstances, the Court concludes denying the requested stay and allowing the Massachusetts action to proceed will best serve the interests of justice.

2. Personal Jurisdiction over Mr. Fuhr. FTI argues that the Court may exercise personal jurisdiction over Mr. Fuhr because the claims against him arising from Fuhr's transaction of business in Massachusetts. See G.L. 223A, § 3(a). Although Fuhr is the one moving to dismiss for lack of personal jurisdiction, FTI has "the burden of establishing facts to show that the ground relied on under § 3 is present."

– 5 –

Roberts v. Legendary Marine Sales, 447 Mass. 860, 863 (2006), quoting Tatro v. Manor Care, Inc., 416 Mass. 763, 767 (1994).

2.1. Legal Standards for Personal Jurisdiction. Generally, a Massachusetts court may only exercise personal

jurisdiction over an unwilling defendant if doing so is both "authorized by statute" and "consistent with basic due process requirements mandated by the United States Constitution." Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5–6 (1979).

However, since the Massachusetts long-arm statute, G.L. c. 223A, § 3, "functions as 'an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States,' … the two questions tend to converge." Id. at 6, quoting "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 443 (1972). "It is appropriate, therefore, for the court to 'sidestep the statutory inquiry and proceed directly to the constitutional analysis….' " Wolverine Proctor & Schwartz v. Aeroglide Corp., 394 F.Supp.2d 299, 306 (D.Mass. 2005) (Dein, M.J.), quoting Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002); accord Cardno Chemrisk, LLC v. Foyton, no. 1484CV03932-BLS1, 33 Mass. L. Rptr. 130, 2015 WL 9275648, *3 (Suffolk Sup. Ct. 2015) (Leibensperger, J.).

Since FTI argues that the court can exercise jurisdiction over Mr. Fuhr because the claims against him arise from his transaction of business in Massachusetts, FTI must prove three things to establish that the exercise of such "specific jurisdiction" would satisfy the constitutional due process requirements.1 See generally Bulldog Investors General Partnership v. Secretary of the Commonwealth,

1 The Supreme Court refers to personal jurisdiction that arises from or relates to the defendant's contacts with the forum as "specific jurisdiction." See Daimler AG v. Bauman, 134 S.Ct. 746, 754 (2014). A court may also assert "general jurisdiction" over a defendant whose contacts with the forum "are so 'continuous and systematic' as to render them essentially at home in the forum state." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 916, 919 (2011), quoting International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, 326 U.S. 310, 317 (1945). FTI claims that the Court has specific, not general, jurisdiction over Defendants.

457 Mass. 210, 217 (2010); Cannonball Fund, Ltd. v. Dutchess Capital Mgmt, LLC, 84 Mass. App. Ct. 74, 99 (2013). First, jurisdiction must be based on activity on or contacts with Massachusetts by which Mr. Fuhr "purposefully avail [ed] [him]self of the privilege of conducting activities" here, "thus invoking the benefits and protections of its laws" and establishing constitutionally sufficient "minimum contacts" with Massachusetts. Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty., 480 U.S. 102, 109 (1987), quoting Burger King Corp. v. Rudzewicz, 471 Mass. 462, 474, 475 (1985).

Second, FTI's claims "must arise out of, or relate to," Fuhr's contacts with Massachusetts. Tatro, 416 Mass. at 772; Burger King, supra at 472. "This factor 'does not require that the cause of action formally "arise from" defendant's contacts with the forum; rather, this criterion requires only "that the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities." ' " Bird v. Parsons, 289 F.3d 865, 875 (6th Cir. 2002), quoting Third Natl. Bank in Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1091 (6th Cir.1989), quoting in turn Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 384 n. 27 (6th Cir. 1968). This is a "flexible, relaxed standard," not a stringent test. Adelson v. Hananel, 652 F.3d 76, 81 (1st Cir. 2011), quoting Pritzker v. Yari, 42 F.3d 53, 61 (1st Cir. 1994); accord Schneider v. Hardesty, 669 F.3d 693, 703 (6th Cir. 2012) ("lenient standard").

Third, "the assertion of jurisdiction over the defendant must not offend 'traditional notions of fair play and substantial justice.' " Tatro at 773, quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). "In practical terms, this means that an assertion of jurisdiction must be tested for its reasonableness, taking into account such factors as the burden on the defendant of litigating in the plaintiff's chosen forum, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining relief," Id. as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and the "shared interest of the several States in furthering fundamental substantive social policies," Burger

King, supra, at 477, quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)2.

2.2. Analysis of Personal Jurisdiction Issues. All three of these requirements are satisfied here, which means that the constitutional and statutory tests for exercising personal jurisdiction over Mr. Fuhr in this case have been met.

2.2.1. Purposeful Availment / Minimum Contacts. Mr. Fuhr purposefully transacted and conducted business in Massachusetts. During the last six years he worked for FTI, from 2010 to 2016, Fuhr led the company's "Office of the CFO." He supervised roughly 50 employees, six of whom worked in FTI's Boston office. Fuhr regularly travelled to Boston to supervise those employees. From 2013 to 2015 Fuhr flew to Boston twelve times and stayed overnight in Boston five times while conducting business for FTI. During 2014 alone, Fuhr billed a total of 132.3 hours for FTI while he was in Boston.3 This is more than enough to establish that Fuhr transacted business in Massachusetts within the meaning of G.L. c. 223A, § 3(a), and that he purposefully established more than "minimum contacts" with Massachusetts. See, e.g., Cannonball Fund, 84 Mass. App. Ct. at 98-100 (ongoing business relationship with

affiliates in Massachusetts sufficient basis for exercising personal jurisdiction).

2.2.2. Relatedness of Claims. In addition, the claims against Mr. Fuhr arise from or relate to his business contacts with Massachusetts. It appears to be undisputed that all of the FTI employees whom Fuhr had supervised in the Boston office followed him to BRG. FTI claims that Fuhr provided BRG with confidential information belonging to FTI regarding relationships with clients that were serviced from the Boston office and compensation of the individuals employed

2 The United States Court of Appeals for the First Circuit refers to these considerations of reasonableness and substantial justice as the "gestalt factors." See, e.g., Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28, 40 (1st Cir. 2016). Neither the Supreme Court nor the Supreme Judicial Court has embraced that label.

3 This evidence is admissible as a useful summary of the underlying business records, even though FTI's affiant does not appear to have personal knowledge of Fuhr's travels or billings. See Commonwealth v. Greenberg, 339 Mass. 557, 581-582 (1959); Mass. Guide to Evid. § 1006. Fuhr's argument to the contrary is without merit.

– 8 –

in that office to help BRG solicit FTI's clients and employees. That is enough to show that FTI's claims resulted and arise out of or from Mr. Fuhr's business contacts with Massachusetts.

Fuhr's insistence that FTI cannot establish personal jurisdiction unless it proves that these claims have substantive merit is incorrect. A claim arises from the transaction of business in the forum state so long as the claim "is not completely unmoored" from the defendant's contacts with the state, "regardless of the ultimate merits of the claim." Licci v. Lebanese Canadian Bank, 984 N.E.2d 893, 900 (N.Y. 2012) (applying New York long-arm statute); accord Jet Wine & Spirits, Inc. v. Bacardi & Co., Ltd., 298 F.3d 1, 4 (1st Cir. 2002) (holding that trial court had personal jurisdiction "whatever the ultimate merits" of plaintiff's claims); In re Chinese-Manufactured Drywall Products Liability Litigation, 753 F.3d 521, 549 (5th Cir. 2014) (due process requires that cause of action arise out of forum-related contacts, "whatever the claims' ultimate merits").

Just as a plaintiff does not have to "prevail on the merits to secure standing," see Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 518, rev. denied, 460 Mass. 1108 (2011), so FTI need not prove its claims are likely to succeed in order to establish that a court may exercise personal jurisdiction over Fuhr. Cf. Attorney General v. Industrial Nat. Bank of Rhode Island, 380 Mass. 533, 534 (1980) (court should resolve defense of lack of personal jurisdiction "before dealing with questions, such as rule 12(b)(6) motions, that go to the merits of the case"); Cannonball Fund, 84 Mass. App. Ct. at 89 (dismissal for lack of personal jurisdiction is not on the merits).

2.2.3. Reasonableness of Exercising Jurisdiction. Finally, it is perfectly fair and reasonable for Massachusetts courts to exercise jurisdiction over Mr. Fuhr under these circumstances. As discussed above, Massachusetts has an interest in adjudicating this dispute, FTI has an interest in getting it resolved, and doing so here would be efficient.

The Court is not convinced by Fuhr's argument that it would be unfairly burdensome to force Fuhr to defend himself in Massachusetts. It appears that Mr. Fuhr still resides in New York. In May 2016, Fuhr stated in the complaint he filed in

– 9 –

California that he resides in Briarcliff Manor, New York. Although Fuhr states in the November 2016 affidavit he filed in this case that he now works in BRG's office in Century City, California, Fuhr does not assert that he has moved to California or that he will be doing so in the foreseeable future. The Court therefore infers that Fuhr still lives in New York, even though he works for BRG out of a California office. Having filed suit against FTI in California, Mr. Fuhr has revealed that he is willing to travel across the country to litigate this matter. It would be substantially less burdensome for him to defend himself in Massachusetts.

ORDER

Defendants' motion for a stay of proceedings is DENIED. Defendant Elliot A. Fuhr's motion to dismiss for lack of personal jurisdiction is also DENIED.

May 3, 2017

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Kenneth W. Salinger
Justice of the Superior Court

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