

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1346

SIGNALIFE, INC.,

Plaintiff,

v.

RUBBERMAID INCORPORATED.,
et al.,

Defendants.

ASSIGNED TO NC BUSINESS COURT
JUDGE ALBERT DIAZ

**REPLY BRIEF IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

As shown in the defendants' opening brief, binding North Carolina law requires dismissal of this second-filed state court action. Signalife does not dispute the controlling law from the North Carolina Supreme Court: "When there is a prior action pending, a plea in abatement must be sustained to a second cause of action involving the same matters." *Demoret v. Lowrey*, 252 N.C. 187, 113 S.E.2d 199, 200 (N.C. 1960).¹ It also remains undisputed that at the time this state court case was filed, there was a prior action pending involving the same matters.

Signalife's opposition brief mistakenly argues that the order of filing should be disregarded because the federal action was filed seven hours earlier than the state court case, and that the parties and issues are not substantially similar. However, as demonstrated below, courts adhere to the order of filing when applying the "prior action pending" rule, even when both actions are filed on the same day -- particularly when

¹ See also *Gardner v. Gardner*, 294 N.C. 172, 240 S.E.2d 399, 406 (N.C. 1978) (husband's second-filed action for divorce was a compulsory counterclaim under Rule 13(a) to wife's first-filed divorce action, and it was reversible error not to grant wife's motion to dismiss or stay).

they are preceded by dispute resolution negotiations between the parties. Further, as Signalife has already admitted in the federal court action, and as the federal court expressly held in its December 28, 2007 Order denying Signalife's motion to stay the first filed federal case, the parties and issues are substantially similar

1. The Federal Court Action Was First-Filed.

It is an undisputed fact that Rubbermaid filed its lawsuit in federal court before Signalife filed the instant action in state court. When Signalife filed this action in state court later the same day, it already knew that a prior action was pending because it had already received a courtesy copy of Rubbermaid's federal court lawsuit. See Notice of Termination and Courtesy Copy of Complaint, attached as Exhibit 1.² Instead of asserting its claims as compulsory counterclaims as required by Rule 13, Signalife chose to create parallel litigation.

Signalife cites three inapposite cases, which are neither controlling nor persuasive, for the proposition that the two cases here should be treated as "simultaneously" filed. See *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 551-52 (Del. Ch. 1999); *Bartoi v. Bartoi*, 20 Misc.2d 262, 264 (NY Sup. Ct. 1959); *Chick v. Chick*, 164 N.C. App. 444, 596 S.E.2d 303 (N.C. App. 2004).

Friedman, a Delaware Chancery Court opinion, involved a dispute for priority between a consolidated federal action that was comprised of twenty-six separate federal lawsuits, which were filed at different times -- including some that were filed after the Delaware Chancery Court action. 752 A.2d at 548. In addition, the North Carolina "prior action pending" doctrine would not apply to *Friedman* because that case involved

² Signalife neglects to point out that it could have filed first in federal court, if it chose to do so.

cases filed in different states. The "prior action pending" doctrine only applies if both the duplicative actions are filed within the territorial limits of North Carolina. Further, the court notes that cases filed so close in time are "*generally*" treated as filed simultaneously. Therefore, even the *Friedman* court recognizes that the actual order of filing controls in some instances, as it should here.

Bartoi and *Chick* are also inapposite. *Bartoi*, a 1954 New York trial court miscellaneous opinion, is factually different because it involved two separate actions commenced by service at exactly the same time by the husband against his wife. 20 Misc.2d at 264. One action was for divorce and recovery of money, the other action was *in rem*, seeking title to land purchased by the wife, which had to be filed where the property was located. *Chick* involved two custody actions, one filed in Vermont and the other in North Carolina. 596 S.E.2d 303. However, the relative order of filing was not a factor in determining jurisdictional priority. Neither party even argued that one action should have priority due to the order of filing. Rather, the case turned on the children's "home state" test, under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *Id.* at 307. The Court held that the Vermont court had jurisdiction under the UCCJEA because the children spent the last six months in Vermont. *Id.* at 310. Note that, like in *Friedman*, the "prior action pending" doctrine would not have applied anyway, because the actions were filed in different states.

In contrast to these inapposite decisions cited by Signalife, numerous cases hold that the first-filed case has priority, even over a case filed only hours later, where dispute resolution negotiations preceded the filing of the cases. See, e.g., *Plating Resources, Inc. v. UTI Corp.*, 47 F. Supp. 2d 899, 904 (N.D. Ohio 1999); *Veryfine Prod.*,

Inc. v. Phlo Corp., 124 F. Supp. 2d 16, 21-24 (D. Mass. 2000); *First Health Group Corp. v. Motel 6 Operating L.P.*, No. 00 C 524, 2000 U.S. Dist. LEXIS 10437, *2-6 (N.D. Ill. Jul. 17, 2000) (denying motion for reconsideration of dismissal of second-filed action under the first-to-file rule, where the second-filed action came less than one half hour later).

UTI involved dueling breach of contract suits filed six hours apart on the same day. 47 F. Supp. 2d at 904. In granting the motion to transfer the second filed case, the court specifically considered and rejected plaintiff's argument that the first-to-file rule should not apply when cases are filed so close together in time. The court found this argument particularly unavailing where, as here: "negotiations to resolve the dispute were underway before the parties filed these actions, [thus] either party was in a position to file suit 'before the other.'" Considering this, the chronology of the events favors applying the first-to-file rule." *Id.* *Veryfine* also followed the first filed rule, even though the parties filed suit within 24 hours of each other. *Id.* at 9

Here, Signalife cannot credibly argue that it was surprised by Rubbermaid's lawsuit. As part of the negotiations stemming from the concerns voiced by Rubbermaid due to Signalife's failure to tender a marketable product within the timeframe required by the agreement, the parties executed a "standstill" agreement that prevented Rubbermaid from filing suit until January 24, 2007. See Standstill Agreement, attached as Exhibit 2. Signalife understood that litigation would result if the parties could not reach an agreement for Signalife to pay significant sums to Rubbermaid.

Moreover, in addition to serving judicial economy, the equities favor Rubbermaid's first-filed suit taking precedence over this second-filed action because Rubbermaid is the "true plaintiff," as evidenced by the pre-suit negotiations.

2. The Subject Matter And Parties Are Substantially Similar In Both Matters.

Tellingly, Signalife's opposition fails to address the relevant considerations for determining whether two actions involve substantially similar subject matter and parties. *Stevens v. Henry*, 121 N.C. App. 150, 464 S.E.2d 704, 707-08 (N.C. App. 1995); *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E.2d 880, 881-83 (N.C. App. 1983). Here, the actions involve the exact same agreement and conduct.

Indeed, Signalife has already made a judicial admission on this point in its motion to dismiss or stay the first-filed federal court action:

In this case, there is no question that the state proceedings involve substantially the same parties and issues as this case. All of the claims and anticipated counterclaims in both the federal action and the state action relate to the actions, or inaction, of the parties in the period leading up to the execution of the Agreement or to their performance or failure to perform their obligations under Agreement, which is evident from even a cursory review of the complaints in the two actions.

Brief in Support of Signalife's Motion to Dismiss/Stay (emphasis supplied), p. 6-7 attached as Exhibit 3.

In determining that the first-filed federal lawsuit should go forward, U.S. District Judge Robert J. Conrad has also made a finding that the subject matter and parties are substantially similar:

Here, the threshold question of whether the federal and state cases concern substantially similar parties and substantially similar issues is met. **The parties are substantially the same.** The additional parties added in the state case are

directly related to Rubbermaid, Inc. NRS is the parent of Rubbermaid, Inc., and the individual defendants are employees of Rubbermaid, Inc. **Likewise, the issues are substantially the same.** All claims arise from the same transaction, namely the execution of the underlying Sales and Marketing Agreement.

Order and Memorandum (emphasis supplied), p. 5, attached as Exhibit 4.

Signalife's new claim that it "cannot obtain true relief against Newell, Gary Scott and/or David Hicks" in the federal action is belied by the fact that Signalife now plans to add Newell Rubbermaid Inc., Gary Scott, and David Hicks as counterclaim-defendants in the federal action.³ See Signalife's Proposed Motion to Join Additional Parties Pursuant to Rule 13(h), attached as Exhibit 5. In fact, Signalife sought and received Rubbermaid's agreement to accept service of process on the new counterclaim-defendants' behalf.⁴ See Kruppa E-mail, dated January 14, 2008, attached as Exhibit 6.

Accordingly, the subject matter and parties are even more than substantially similar, they are identical.

³ Signalife's claims against Newell, Scott, and Hicks, while lacking substantive merit, may proceed in the federal action from a jurisdictional standpoint pursuant to 28 U.S.C. § 1367.

⁴ Even if the parties were not going to be identical in both actions, as here, they would still be substantially similar, as required by North Carolina law. See, e.g., *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 387 S.E.2d 168, 172 (N.C. 1990) (the parties were "sufficiently similar," requiring application prior action pending doctrine, where the second suit had one common plaintiff and one common defendant, and the other non-identical parties were either related to parties in the first action, or had not moved to dismiss).

Conclusion

In the interests of justice, for all of the reasons above and in the motion and opening brief, this action should be dismissed because at the time it was filed there was a "prior action pending" involving substantially similar subject matter and parties in a North Carolina federal court.

This the 23rd day of January, 2008.

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Counsel for Defendants

CERTIFICATION OF COMPLIANCE WITH RULE 15.8

Counsel for Defendants certifies that the foregoing Reply Brief in Support of Defendants' Motion to Dismiss Plaintiff's Amended Complaint complies with the limitations of Rule 15.8 regarding the length of the Brief.

This the 23rd day of January, 2008.

s/ Douglas W. Ey, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of January 2008, a copy of the foregoing was served upon the following by electronic filing and by hand delivery:

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And that a hard copy of the foregoing with exhibits was hand delivered to the Court contemporaneously therewith.

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