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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COVESTRO, LLC,

Marshall County Circuit Court

Plaintiff

Civil Action No. 18-C-202

v.

HON. DAVID W. HUMMEL, JR.

AXIALL CORPORATION,
ALLTRANSTEK LLC, and RESCAR, INC.
t/d/b/a RESCAR COMPANIES,

Defendants

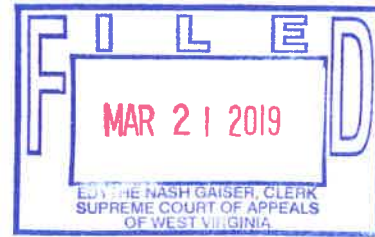
AXIALL CORPORATION,

Third-Party Plaintiff

v.

SUPERHEAT FGH SERVICES, INC.,

Third-Party Defendant



-----AND-----

AXIALL CORPORATION,

Marshall County Circuit Court

Plaintiff

Civil Action No. 18-C-203

v.

HON. DAVID W. HUMMEL, JR.

ALLTRANSTEK LLC, RESCAR, INC.
t/d/b/a RESCAR COMPANIES, and
SUPERHEAT FGH SERVICES, INC.,

Defendants

**REPLY MEMORANDUM TO JUDICIAL
MOTION TO REFER CASE TO BUSINESS COURT DIVISION**

Plaintiff Axiall Corporation (“Axiall”), by its undersigned counsel, submits this Reply Memorandum to the Judicial Motion to Refer Case to Business Court Division (the “Motion”).

I. INTRODUCTION

Axiall opposes the referral of these consolidated cases to the Business Court Division (the “Division”) on the grounds that Civil Action No. 18-C-203 filed by Axiall (“Axiall’s WV Action”) should be again stayed until Axiall’s nearly identical first-filed action in Pennsylvania is concluded.¹ Additionally, the Order consolidating Axiall’s WV Action with Civil Action No. 18-C-202 filed by Covestro, LLC (“Covestro”) should be dissolved because the consolidation of those cases will burden the parties and will not conserve judicial resources or avoid expenses.²

As discussed at length below, the venue of the action filed in Pennsylvania was chosen by Axiall and defendants AllTranstek LLC (“AllTranstek”) and Rescar, Inc. (“Rescar”) in the transactional documents which established the relationship among these parties. The Pennsylvania case is pending before the Commerce and Complex Litigation Center of the Civil

¹ On March 1, 2019 Axiall filed a Motion for Reconsideration of Order Lifting Stay. A true and correct copy of Axiall’s Motion for Reconsideration of Order Lifting Stay and Memorandum of Law in Support of Motion to Reconsider Order Lifting Stay is attached hereto as Exhibit A. Defendants AllTranstek and Rescar filed a Response in Opposition to that Motion on March 6, 2019. On March 7, 2019, Axiall filed a Reply in Further Support of its Motion for Reconsideration of Order Lifting Stay, which requested that Oral Argument on that Motion be scheduled. A true and correct copy of Axiall’s Reply Memorandum in Further Support of its Motion for Reconsideration of Order Lifting Stay is attached hereto as Exhibit B.

² On March 20, 2019, Axiall and Covestro filed a Joint Motion for Reconsideration of Consolidation Order and Memorandum of Law in Support of the same. A true and correct copy of the Joint Motion for Reconsideration of Consolidation Order and Memorandum of Law in Support of the same is attached hereto as Exhibit C.

Division of the Court of Common Pleas of Allegheny County, which sits in Pittsburgh. This is a specialized court which only hears complex commercial disputes. Because the action in Pennsylvania has progressed beyond preliminary motions and is now in the discovery phase, staying the WV Action pending the disposition of the action pending in Pennsylvania is the most efficient way to resolve the parties' claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Axiall's West Virginia Action

Axiall's WV Action was commenced by filing a Complaint on August 24, 2018 against Defendants AllTranstek, LLC ("AllTranstek"), Rescar, Inc. ("Rescar") and Superheat FGH Services, Inc. ("Superheat") (the "WV Complaint"). The WV Complaint states claims against all defendants for negligence and against AllTranstek and Rescar for breach of contract, breach of express warranty and declaratory judgment in connection with various contracts entered into between Axiall and those defendants. (WV Compl. ¶¶36-67.)

In short, Axiall's claims against AllTranstek, Rescar and Superheat arise from their negligent work on one of Axiall's railroad tank cars, AXLX1702, which was used to transport liquefied chlorine. (*Id.* at ¶¶7-35.) Rescar and Superheat performed various work on AXLX1702, after which AllTranstek inspected the railroad tank car and pronounced it ready for chlorine service. (*Id.* at ¶¶19-22.) On August 27, 2016, shortly after AXLX1702 had been loaded with a cargo of liquefied chlorine for the first time after defendants worked on it at Axiall's Natrium Facility, the railroad tank car ruptured, releasing its contents and causing serious damage. (*Id.* at ¶¶23-29.)

Specifically, within Axiall's facility the chlorine plume damaged or destroyed everything in its path, including but not limited to instrumentation, lagging and banding, electronics,

communications equipment, piping and vessels. (*Id.* at ¶28.) While Axiall is still in the process of obtaining bids for the work necessary to address the damage resulting from the rupture, it is clear that the total amount of damages will significantly exceed \$50,000,000 and is expected to exceed \$250,000,000. (*See id.* at ¶29.)

B. Axiall's Pennsylvania Action

Axiall's contracts with Rescar and AllTranstek include forum selection provisions which mandate that litigation between Axiall and AllTranstek or Rescar be commenced in federal or state court in Pittsburgh, Pennsylvania. (WV Compl., Ex. A-1, ¶15.) In compliance with those provisions and **prior to filing its WV Action**, Axiall filed a nearly identical lawsuit in the Court of Common Pleas of Allegheny County, Pennsylvania at Docket No. GD 18-010944 (the "PA Complaint"). A true and correct copy of the PA Complaint is attached as hereto Exhibit D. The PA Complaint asserts the same claims against the same parties to the instant action.³

The PA case is pending in Allegheny County's Commerce and Complex Litigation Center (the "Allegheny County Commerce Court"), which is designed to adjudicate complex cases requiring the expenditure of a substantial amount of judicial resources and that will benefit significantly from case management. Administrative Judge Christine A. Ward, who recently

³ The WV Action was filed out of an abundance of caution. Since the filing of the PA and WV actions, the period of limitations for certain of Axiall's claims has expired. Axiall's caution was entirely appropriate, particularly in light of the fact that Superheat is not a signatory to the parties' contracts but is bound by their Terms and Conditions as a subcontractor to Rescar. Moreover, AllTranstek and Rescar have inconsistently argued that the Terms and Conditions are not enforceable, while asserting Counterclaims based on Axiall's alleged failure to abide by them. Understandably, Axiall took the precaution of filing this case to ensure that if its claims in PA were dismissed on jurisdictional or venue grounds after the running the of the statute of limitations on certain of those claims, it would still have a viable forum to litigate all of its claims.

presided over the trial of another case related to the Natrium Facility, is also presiding over the PA action.

The action filed in the Allegheny County Commerce Court (the "PA Court") has progressed significantly:

- a. All defendants filed preliminary objections seeking the dismissal of some or all of the claims stated against them in the Complaint, which were denied by the PA Court in their entirety.
- b. Defendants have answered the Complaint, and defendants AllTranstek and Rescar have filed counterclaims. Axiall's preliminary objections seeking the dismissal of those counterclaims were granted by Order dated February 25, 2019.
- c. A Confidentiality and Protective Order has been entered by the PA Court.
- d. Axiall has served and the defendants have responded to two sets of written discovery requests.
- e. Axiall has filed a motion to compel discovery with respect to the discovery responses served by AllTranstek and Rescar. Axiall's motion has been fully briefed and argued before the PA Court.
- f. Axiall has filed a motion seeking the entry of a protocol governing the production of electronically stored information, which the PA Court has taken under advisement.
- g. The PA Court held a status conference on February 19, 2019 and has scheduled a second status conference for April 23, 2019.
- h. The parties have agreed to and presented to the PA Court a proposed scheduling order.

No party has moved to stay the PA action. On March 15, 2019, AllTranstek and Rescar filed a Motion to Dismiss Pursuant to 42 PA.C.S. § 5322(e) requesting that the PA Court dismiss the PA action pursuant to the doctrine of *forum non conveniens* and representing to that Court that Marshall, County West Virginia is the proper forum to hear Axiall's claims against defendants. (A true and correct copy of the Motion to Dismiss Pursuant to 42 PA.C.S. § 5322(e) filed by AllTranstek and Rescar (the "PA Motion to Dismiss") is attached hereto as Exhibit E,

¶¶16, 23, 24.) This is completely inconsistent with the argument that AllTranstek and Rescar made to the Circuit Court of Marshall County requesting that Axiall's WV Action be dismissed due to the pendency of the PA action. In their WV Motion to Dismiss, AllTranstek and Rescar stated: "This case should also be dismissed because the Pennsylvania case was actually filed first, at 3:34 p.m. on August 24, 2018, whereas this case was filed at 4:22 p.m. on August 24, 2018." (Exhibit F, WV Motion to Dismiss of AllTranstek and Rescar, p. 3 n.3.)

C. Covestro's West Virginia Lawsuit

Covestro, LLC ("Covestro") filed a lawsuit against Axiall, AllTranstek and Rescar in the Circuit Court of Marshall County. Axiall joined Superheat as a third party defendant in Covestro's lawsuit. Covestro seeks to recover the damages it claims to have suffered to its plant as a result of the chlorine release. (Covestro Compl. ¶¶22-26.) Specifically, Covestro claims to have suffered damage to, among other things, its stainless steel piping and tanks, stainless steel bolts, valves, cladding, control boxes, gutters, doors and ductwork. (*Id.* at ¶¶24-25.) To date, Covestro's damages are approximately \$20,000,000.

Covestro has agreed to conduct discovery in its lawsuit jointly with the discovery conducted in the PA action. (Memorandum of Law in Support of Joint Motion to Reconsider Consolidation Order, Exhibit C, p. 4.) Moreover, while Covestro is certainly seeking to recover its damages from the party(ies) found to be liable in the PA action, it does not wish to be directly involved in the time-consuming and expensive litigation of that issue. (*Id.* at p. 6.) Rather, Covestro has agreed to apply the PA Court's determination of liability regarding the rupture to its case. (*Id.*)

D. Stay and Consolidation of Axiall's West Virginia Lawsuit

On January 22, 2019, Axiall filed a motion requesting that this lawsuit be stayed. This

Court granted Axiall's motion by Order dated January 28, 2019. On February 19, 2019 AllTranstek and Rescar filed a motion which requested that the stay be lifted. Before Axiall could file a response to the motion, the stay was lifted by Order dated February 22, 2019. On March 1, 2019, Axiall filed a Motion to Reconsider Order Lifting Stay. (Exhibit A.) Defendants AllTranstek and Rescar filed a Response in Opposition to that Motion on March 6, 2019. On March 7, 2019, Axiall filed a Reply in Further Support of its Motion for Reconsideration of Order Lifting Stay, which requested that Oral Argument on that Motion be scheduled. (Exhibit B.)

On or about February 25, 2019, AllTranstek and Rescar filed a Motion to Consolidate Axiall's WV Action and Covestro's case. Before Axiall could file a response to that motion, it was granted by Order of Court dated February 28, 2019. On March 20, 2019, Axiall and Covestro filed a Joint Motion to Reconsider Consolidation Order. (Exhibit C.)

III. ARGUMENT

Axiall opposes the assignment of these consolidated cases to the Division on the grounds that: (1) the order consolidating Axiall's WV Action and the Covestro's case should be dissolved, and (2) Axiall's WV Action should remain in the Circuit Court of Marshall and again be stayed pending the conclusion of the PA action.

A. The Order Consolidating Axiall's WV Action and the Covestro Case Should be Dissolved

The Order consolidating Axiall's WV Action with the Covestro Case should be dissolved so that those cases can proceed separately. West Virginia Rule of Civil Procedure 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may

tend to avoid unnecessary costs or delay.” When exercising its discretion in deciding consolidation issues under Rule 42(a), courts should consider the following:

- (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;
- (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits;
- (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and
- (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 302 n.7 (W.V. 1996).

Collectively, these factors weigh against consolidation of the Covestro case and Axiall’s WV action.

While the cases filed by Axiall and Covestro do have one common question of law or fact, namely the determination of liability for the rupture and release, the remaining scope and focus of those cases are very different. In the event that it is not stayed and/or that the issues involved are not first decided by the PA Court, Axiall’s WV Action will focus on the hundreds of millions of dollars of damages that it suffered as a result of the release. The litigation of this issue will undoubtedly involve significant and time-consuming discovery and testimony, including that of multiple experts.

This issue has absolutely no bearing on Covestro’s case, which is focused solely on the damages that it claims to have suffered as a result of the release. There is no overlap in the discovery and evidence that will be used to establish Axiall’s and Covestro’s damages. However, if the cases remain consolidated and are transferred to the Division, Covestro will be compelled to participate in the extensive litigation of an issue in which it has absolutely no interest. Thus, the consolidation of the cases will be a substantial burden to Covestro and will not eliminate the need to separately determine the extent and scope of both Axiall’s and Covestro’s damages. The length of time required to adjudicate those issues will be the same

regardless of whether the cases are consolidated or tried separately. Therefore, consolidation will not conserve judicial resources or avoid expenses.

Moreover, the issue of liability for the release and Axiall's resulting damages will and should be tried in the PA Court. AllTranstek and Rescar have agreed to litigate Axiall's claims against them in the PA Court, and should not now be permitted to evade that agreement. (WV Comp., Ex. A-1, ¶15.) The parties' contracts include choice of forum provisions which mandate that litigation between Axiall and AllTranstek or Rescar be commenced in federal or state court in Pittsburgh, Pennsylvania. (WV Compl., Ex. A-1, ¶15.) AllTranstek and Rescar have moved to dismiss Axiall's WV Action on the grounds that the same issues are already being litigated in the PA Court. (Exhibit F, Motion to Dismiss of AllTranstek and Rescar, p. 3 n.3.) Moreover, the PA Court has already expended its resources and made significant progress in that case. And as is discussed above, it is also well-equipped to preside over that action.

The PA Court's determination of liability will be binding in the Covestro action. *In re B.C.*, 755 S.E.2d 664, 669 (W. Va. 2014) (quoting *State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995)). Covestro has agreed to conduct discovery jointly with the PA action, does not wish to be directly involved in the litigation of liability for the release and does not wish to have any involvement in litigating Axiall's resulting damages. (Joint Motion to Reconsider Consolidation Order, Exhibit C, p. 6.) Consequently, no efficiency is lost by having the PA Court determine liability for the release and Axiall's resulting damages, particularly in light of the substantial progress already made in the PA action. Rather, it is most efficient to first allow the PA Court to determine both liability for the release and Axiall's resulting damages (while Axiall's WV Action is stayed) and to then apply the PA Court's liability determination in Covestro's case, so

that only the parties determined to be liable need participate in the litigation of Covestro's damages.

B. Axiall's West Virginia Action Should Again be Stayed

Axiall's WV Action should again be stayed and remain in the Circuit Court of Marshall County until the PA action is concluded. W. Va. Code 56-6-10 ("Whenever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order."). A stay of proceedings based upon the existence of a prior pending action involving the same subject matter and the same parties should be entered in the interests of justice. *See Berger v. Berger*, 350 S.E.2d 685, 686-87 (W. Va. 1986) (a stay of proceedings should have been entered where there was then pending other proceedings between the same parties concerning the same subject matter). A stay was properly entered in this case because the PA action, which involves identical parties and claims, was commenced first.

Moreover, as stated above, the PA action is significantly further along than the instant case. And AllTranstek and Rescar have agreed to litigate Axiall's claims against them in the PA Court, and should not now be permitted to evade that agreement. (WV Compl., Ex. A-1, ¶15.) The parties' contracts include choice of forum provisions which mandate that litigation between Axiall and AllTranstek or Rescar be commenced in federal or state court in Pittsburgh, Pennsylvania. (WV Compl., Ex. A-1, ¶15.)

Furthermore, the PA action will settle the matter in controversy because the decision of the PA Court regarding liability and damages associated with the chlorine rupture will be binding

upon Covestro and the parties in Axiall's WV Action. The West Virginia Supreme Court has held:

Collateral estoppel will bar a claim if four conditions are met: (1) The issue⁴ previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

In re B.C., 755 S.E.2d 664, 669 (W. Va. 2014) (quoting *State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995)). Collateral estoppel "only requires the party against whom the doctrine is invoked to have been a party to the prior action." *In re B.C.*, 755 S.E.2d at 670.

Axiall, AllTranstek, Rescar and Superheat are all parties to the PA action. Therefore, the PA Court's determination of liability will be binding on those parties in all future actions in which that legal matter is put in issue, including the lawsuit filed by Covestro. In addition, Covestro has agreed to be bound by the PA Court's determination regarding liability for the rupture. (Joint Motion to Reconsider Consolidation Order, Exhibit C, p. 6.) Thus, there is no risk of duplicative litigation and multiple trials on the same issues.

IV. CONCLUSION

For all of the reasons set forth above, the consolidated cases should not be transferred to the Division. Rather the consolidation order should be dissolved and Axiall's WV Action should be again stayed and remain in the Circuit Court of Marshall County pending the conclusion of PA action.

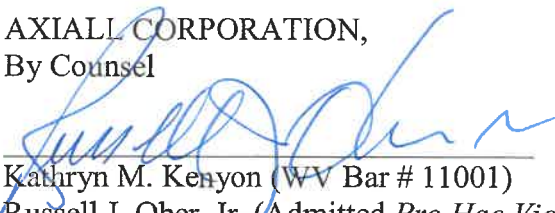
⁴ "An 'issue' is 'any right, fact or legal matter which is put in issue[.]'" *In re B.C.*, 755 S.E.2d at 672 (citing *Miller*, 459 S.E.2d at 120).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Reply Memorandum to Judicial Motion to Refer Case to the Business Court Division were served upon counsel for defendants by electronic and first class United States mail, postage prepaid this 20th day of March, 2019 addressed as follows:

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A handwritten signature in blue ink, appearing to read "Kevin M. Eddy", is written over a horizontal line.