

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STEVEN J. SMITH and EILEEN)	
SMITH,)	
)	
Plaintiffs,)	
)	C.A. No. N09C-02-099 CLS
v.)	
)	
PEPCO HOLDINGS, INC., et. al.,)	
)	
Defendants.)	

Date Submitted: May 13, 2011

Date Decided: May 25, 2011

On Plaintiffs' Motion to Dismiss or, in the Alternative, to Stay the Above-Captioned Action. **GRANTED in part and DENIED in part.**

ORDER

Lawrance Spiller Kimmel, Esq., P.O. Box 8149, Newark, DE 19714. John E. Savoth, Esq., One Liberty Place, 52nd Floor, 1650 Market Street, Philadelphia, PA 19103. Attorneys for Plaintiffs.

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Attorney for Defendant Delmarva Power & Light Company and Pepco Holdings,
Inc.

Scott, J.

Introduction

Before the Court is the Plaintiffs' motion to dismiss or, in the alternative, a motion to stay. The Court has reviewed the parties' submissions and heard argument. For the reasons that follow, the Plaintiffs' motion is **GRANTED in part and DENIED in part**.

Facts

Plaintiff Steven J. Smith ("Plaintiff" or "Smith") was an employee of Delmarva Power and Light ("DPL") at the Naaman's substation in Claymont, Delaware. On February 12, 2007, Smith was standing near a 69kV oil circuit breaker ("OCB"), which was allegedly placed into the stream of commerce by General Electric Co. ("GE"). Allegedly without warning, the OCB failed causing an explosion. As a result of the alleged explosion, Smith was covered in hot, burning oil, which engulfed his body in flames. It is alleged that the OCB had been contaminated with water, lowering the insulated quality of the oil, causing the alleged explosion. Smith filed this suit against Pepco Holdings, Inc. ("PHI"), Pepco Energy Services, Velcon Filters, Inc., BLC Corporation, Matlack Leasing, LLC, Suttles Truck Leasing, LLC, Brenntag Northeast, Inc., Exxon Mobile Corp., BOC Group, Inc., and GE. PHI is the parent corporation of DPL.

On July 26, 2010, an order granting the stipulated dismissal of Defendant Exxon Mobile Corp. was entered. On October 7, 2010, an order granting the

stipulated dismissal of Defendant BLC Corp. was entered. On December 14, 2009, an order granting the stipulated dismissal was entered for Defendants BOC Group, Inc. and DPL.¹ On January 25, 2010, an order granting the stipulated dismissal was entered for Defendants PHI and Pepco Energy Services. GE then filed a motion to vacate the stipulated dismissal of PHI pursuant to Super. Ct. Civ. R. 60(b) alleging newly discovered evidence.² Plaintiffs filed this motion to dismiss, or in the alternative to stay this action. Plaintiffs filed their case simultaneously in this Court and the Court of Common Pleas in Philadelphia (“Philadelphia Action”).³ The claims and parties are identical. The Philadelphia Action is to be trial ready by August 1, 2011. Discovery in that case ended in December of 2010.

Discussion

Plaintiffs move to dismiss this case in favor of the Philadelphia Action pursuant to Super. Ct. Civ. R. 41(a)(2) or, in the alternative, Plaintiffs move to stay this action.

I. The Motion to Dismiss is Denied

Plaintiffs move to voluntarily dismiss this case pursuant to Super. Ct. Civ. R. 41(a)(2). Whether or not to grant the dismissal is at the discretion of the Court.⁴ A

¹ BOC Group, Inc. jointed DPL as an additional defendant.

² The motion has not been decided. This motion will be decided first since it will stay the case.

³ The case number for that action is 090201548.

⁴ *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 860 (Del. 1993).

dismissal is appropriate when the defendant will not suffer “plain legal prejudice.”⁵

The factors to consider are: (1) the defendants’ expended effort in preparing for trial; (2) any lack of diligence or excessive delay by plaintiff in prosecuting the case; (3) insufficient justification to dismiss the case; and (4) whether the defendant has filed a motion for summary judgment.⁶ Defendant GE has expended effort in preparing for trial, but they have been preparing the same case in two forums simultaneously. A review of the docket indicates the parties are actively conducting discovery in this case so there is no delay by Plaintiffs in prosecuting the case. Plaintiffs have sufficient justification for dismissing this case since an identical action will be ready for trial in the Court of Common Pleas in Philadelphia on August 1, 2011. The final factor does not apply because there are no outstanding motions for summary judgment. Therefore, the factors indicate Defendant GE will not suffer plain legal prejudice if this case is dismissed. However, the motion to dismiss is denied because the more appropriate exercise of discretion is to stay the case pending final resolution of the Philadelphia Action.⁷

II. The Motion to Stay is Granted

A stay of this action is appropriate to avoid wasteful duplication of resources and to avoid inconsistent rulings. When two actions are filed in separate

⁵ *Id.* at 863.

⁶ *Id.* at 864.

⁷ *Local Union 199, Laborers' Int'l Union of N. Am. v. Plant*, 297 A.2d 37, 38-39 (Del. 1972).

jurisdictions involving the same parties and the same issues, the Court may exercise its discretion and stay the current action pending the outcome of the other action.⁸ The grant of a stay is appropriate when the other court is capable of providing prompt and complete justice.⁹ A stay will prevent wasteful duplication of resources and expense, as well as the possibility of conflicting and inconsistent rulings.¹⁰

A stay is appropriate in this action since the Philadelphia Action has a trial ready date of August 1, 2011, whereas this case is still in discovery. The two actions were filed on the same day, involving the same parties and the same issues. Plaintiffs contend they filed this action as a savings action¹¹ in case the Philadelphia Action was dismissed. Even if it were not a savings action, as Defendant GE contends¹², the proper exercise of discretion of the Court is to stay the action pending resolution of the Philadelphia Action. In both actions the parties and claims are identical. The two actions were filed on the same day. However, the Philadelphia Action has a trial ready date of August 1, 2011. All discovery deadlines have passed. The Plaintiffs concede no substantive portion of

⁸ *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (1964).

⁹ *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010) (citing *McWane Cast Iron Pipe Corp.*, 263 A.2d at 283.).

¹⁰ *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

¹¹ Motion to Dismiss ¶ 17.

¹² Defendant General Electric Company's Opposition to Plaintiffs' Motion to Dismiss ¶ 6.

the litigation has taken place in this Court.¹³ Since the Philadelphia Action has progressed to the point of being trial ready by August 1, 2011, the motion to stay this action is granted.

III. Outstanding Motions

Defendant GE seeks to take the depositions it noticed before Plaintiffs filed this motion to stay. Defendant GE also seeks further inspection of the GE breaker, resolving the outstanding motion to preserve evidence directed towards Defendant DPL. Defendant DPL was dismissed from the case on December 14, 2009, so the Court does not have the authority to compel it to preserve evidence.¹⁴ Additionally, this case is unlikely to go to trial negating the need to continue discovery. All outstanding motions are stayed.

Conclusion

Based on the forgoing, Plaintiffs' motion to dismiss or, in the alternative, to stay the case is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

¹³ *Id.*

¹⁴ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (One is not bound by a ruling in a case where the entity is not a party.).