

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NATIONAL MEDICAL CARE, INC.	:	
d/b/a Fresenius Medical Care North America,	:	
Plaintiff	:	
VS.	:	3:CV-01-0702
	:	
AMERICAN RENAL ASSOCIATES, INC., ARA-HAZLETON LLC, t/d/b/a The Kidney Center of Greater Hazleton,	:	(CHIEF JUDGE VANASKIE)
VINCENT BOBBY, D.O., ALICE B.H. FINDLER, AMBRISH RASTOGI, DAVID L. BRISTOL, and ROBERT CHERRY,	:	
Defendants	:	

MEMORANDUM

**BACKGROUND**

Plaintiff, National Medical Care, Inc., d/b/a Fresenius Medical Care North America (“Fresenius”), filed the instant action on April 23, 2001 against American Renal Associates, Inc. (“ARA”), ARA Hazleton LLC, t/d/b/a The Kidney Center of Greater Hazleton (“ARA Hazleton”), Vincent Bobby, D.O., Alice B.H. Findler, d/b/a AFA Architects, Ambrish Rastogi, d/b/a AU Engineers, David L. Bristol, and Robert Cherry. In its Complaint, Fresenius seeks enforcement, pursuant to 17 U.S.C. § 502(b), of a preliminary injunction entered on January 29, 2001 by the

United States District Court for the Western District of Pennsylvania in related litigation.<sup>1</sup> The Complaint also seeks damages for copyright infringement based on Defendants' alleged copying and use of Fresenius' "Facility Room Space Standards and Guidelines Manual" as well as Fresenius' "BMA Standard Details" in the design and construction of various kidney dialysis facilities, and in particular, a facility located in Hazleton, Pennsylvania. In addition, the Complaint asserts a number of state common law tort claims. Altogether, the Complaint asserts seven causes of action: Count I - enforcement of the Western District of Pennsylvania injunction pursuant to 17 U.S.C. § 502(b); Count II - copyright infringement; Count III - unfair competition; Count IV - breach of contract; Count V - intentional/tortious interference with contract; Count VI - accounting; and Count VII - misappropriation of trade secrets.

In addition to the Western District of Pennsylvania case, Fresenius instituted similar litigation in the United States District Court for the District of Columbia. That action has been stayed pending the outcome of the first-filed case in the Western District of Pennsylvania.

There are presently five pending motions. On May 2, 2001, Defendant ARA filed a Motion to Dismiss, or, in the Alternative, to Transfer. (Dkt. Entry 17.) On May 23, 2001, Defendant Bristol filed a Motion to Dismiss, or, in the Alternative, to Transfer (Dkt. Entry 45), in

---

<sup>1</sup>A copy of the injunction, entered in National Medical Care, Inc. d/b/a Fresenius Medical Care North America v. David L. Bristol, American Renal Associates, Inc., Mark D. Pavey, and Butler-ARA, LLC, No. Civil Action 00-2086, in the Western District of Pennsylvania is Exhibit D to Plaintiff's Exhibits in Support of the Complaint. (Dkt. Entry 8.)

which he incorporated by reference the motion and brief filed by ARA. Similarly, on May 31, 2001, Defendants Alice Findler and Ambrish Rastogi filed a Motion to Dismiss, or, in the Alternative, to Transfer (Dkt. Entry 53), in which they also incorporated by reference ARA's motion and brief. On June 25, 2001, Defendant Robert Cherry filed a Motion to Dismiss, asserting lack of personal jurisdiction.<sup>2</sup> (Dkt. Entry 61.)

In its brief in support of dismissal (Dkt. Entry 27), ARA asserts three arguments. First, ARA argues that judicial comity requires dismissal of this action, contending that the Western District case and this matter “involve the same parties, the same legal issues, the same documents, and will require that the same witnesses testify concerning the same topics . . . .” (Reply Brief in Supp. of Mot. to Dismiss (Dkt. Entry 55) at 2.) Second, ARA argues that a forum-selection clause and mediation provision contained in the agreement between ARA and Fresenius requires dismissal of the entire action. Third, ARA argues that the state law claims are preempted by the Copyright Act. In the alternative, if dismissal is not granted, ARA argues that the action should be transferred to the Western District of Pennsylvania for consolidation with the related action pursuant to 28 U.S.C. § 1404(a).

On May 24, 2001, Fresenius filed its brief in opposition to ARA's Motion to Dismiss. (Dkt. Entry 49.) On June 11, 2001, ARA filed a reply brief. (Dkt. Entry 55.) In its reply brief, ARA, for the first time, raises the additional argument that, in the event that the case is not dismissed or

---

<sup>2</sup>Defendant Cherry's Motion to Dismiss will be addressed in a separate Opinion.

transferred, the action should be stayed pending a resolution of the Western District of Pennsylvania action. ARA asserts this most recent argument based on the stay entered in the related matter of National Medical Care, Inc., d/b/a Fresenius Medical Care North America v. American Renal Associates, Inc. et al., No. 1:01-CV-00795, filed in the United States District Court for the District of Columbia.

The fifth and final motion pending in this matter involves the filing of ARA's reply brief. On June 15, 2001, Fresenius filed a "Motion to Strike ARA Defendants' Reply Memorandum in Support of Their Motion to Dismiss, or in the Alternative, to Transfer" ("Motion to Strike"). (Dkt. Entry 58.) In support of striking ARA's reply memorandum, Fresenius asserts that (1) the reply brief was untimely filed, and (2) ARA is unable to raise its stay argument for the first time in its reply brief. In the event that the reply brief is not stricken, Fresenius requests leave of Court to file a response to address the stay issue.

## **DISCUSSION**

### **Timeliness of the Reply Brief**

As stated earlier, ARA filed its Motion to Dismiss on May 2, 2001 and filed its Brief in Support on May 10, 2001. Fresenius filed its Brief in Opposition on May 24, 2001. Thereafter, on June 11, 2001, ARA filed its reply brief. On June 15, 2001, Fresenius filed the Motion to Strike. In its Brief in Support of the Motion to Strike (Dkt. Entry 59), Fresenius primarily asserts that ARA's reply brief was filed out of time, citing Local Rule 7.7, which states:

An original and two (2) copies of a brief in reply to matters argued in respondent's brief may be filed by the moving party within ten (10) days after service of the respondent's brief. No further briefs may be filed without leave of court.

Fresenius further asserts that:

Since [it] served its Responsive Brief on May 24, 2001, any reply brief filed on behalf of the ARA Defendants should have been filed on or before June 4, 2001. [FN 1] Since the tenth day fell on Sunday, June 3, 2001, Defendants actually had until Monday, June 4, 2001 to file a reply brief . . . . The Reply Memorandum appears to have been filed on June 11, 2001. ARA Defendants' Reply Memorandum was filed approximately seven (7) days after the date it should have been filed.

(Dkt. Entry 59, p. 2-3.)

On June 25, 2001, ARA filed its Brief in Opposition to the Motion to Strike (Dkt. Entry 60), citing Fed.R.Civ.P. 6(a), which states:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(Emphasis added.) ARA asserts that, "because the Local Rules prescribe a period less than 11 days, the intermediate Saturdays, Sundays, and legal holidays (in this case Memorial Day) are excluded from the calculation." (Id., p. 2.) "Furthermore," ARA asserts:

Fed.R.Civ.P. 6(e) . . . provides a party with an additional three days to respond if

service is made by mail.<sup>3</sup> Because [Fresenius] served its opposition by first class mail, ARA received 3 more days to respond. The proper time calculation thus made ARA's reply memorandum due on June 11, 2001 - not June 4, 2001, as [Fresenius] erroneously asserts in its moving papers.

(Id.)

ARA is correct in its assertions regarding the timeliness of its reply brief. As ARA points out, "[Fresenius] served -- by first class mail -- its opposition brief to ARA's Motion to Dismiss or, in the Alternative, to Transfer, on May 24, 2001." (Id.) Therefore, Rule 6(e) applies to the case at bar, because, as discussed by Professors Wright and Miller, Rule 6(e) "clearly is intended to protect parties who are served notice by mail from suffering a systematic diminution of their time to respond through the application of Rule 5(b), which provides that service is complete upon mailing, not receipt." 4A Wright & Miller, Federal Practice & Procedure, § 1171, p. 514 (1987).

Though correct in its conclusion, ARA did not provide the manner in which it determined the June 11, 2001 deadline. The procedure for determining the appropriate deadline is important because there are several different ways that the provisions of Rule 6(a) can be interpreted along with the extension in 6(e). For example, which period is counted first? In

---

<sup>3</sup>Rule 6(e) states:

Additional Time After Service under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

other words, is the three day extension applied before or after the ten day period? Does it make a difference? Also, does the 13 day total now fall outside of the provisions for periods “less than 11 days,” thus eliminating the conditions for intermediate Saturdays, Sundays and legal holidays? Or, is the three day extension a separate period altogether, one that is “less than 11 days,” therefore, one in which the provisions for intermediate weekends and holidays need also be applied? Wright & Miller address these exact concerns and discuss three different approaches to integrating Rule 6(a) with the extension in 6(e), ultimately concluding that:

The third method of integration attempts to eliminate any unjustified discrepancies based on the type of service employed. Under this method, the ten-day period is computed under 6(a), excluding weekends and holidays, and three calendar days are added to the resulting period pursuant to Rule 6(e). To assure consistent application, and to reflect accurately the presumption that the three days allowed under Rule 6(e) represent transmission time in the mail, the three days always should be counted first, followed by the ten day period. . . . Regardless when the three days end, the ten-day period should begin on the next business day. The ten-day period should not begin on a Saturday, Sunday, or legal holiday, inasmuch as these days are excluded from the period.

§ 1171, p. 520.

Therefore, according to the rationale of Wright & Miller, the deadline for the filing of ARA's reply brief should be calculated as follows: Fresenius' responsive brief was filed and served upon ARA by mail on Thursday, May 24, 2001. Therefore, the three day extension in Rule 6(e) includes Friday May 25th, Saturday May 26th, and Sunday May 27th. Since Monday May 28th was Memorial Day, the ten day period began to run according to the provisions of 6(a) on Tuesday May 29th. After discounting the intermediate Saturdays and Sundays, namely

Saturday and Sunday June 2nd and 3rd, and Saturday and Sunday June 9th and 10th, the deadline for filing ARA's reply brief was Monday, June 11, 2001. Since it is undisputed that ARA's reply brief was filed with the Court on June 11, 2001, Fresenius' untimeliness argument fails. In fact, in its reply brief in support of the Motion to Strike (Dkt. Entry 65), Fresenius fails to revisit the timeliness issue. Therefore, ARA's filing on Monday, June 11, 2001 was timely.

### **Raising an Argument for the First Time in a Reply Brief**

In support of the Motion to Strike, Fresenius also asserts that ARA's reply brief should be stricken because it raises its stay argument for the first time in its reply brief. In support of this contention, Fresenius asserts that "Local Rule 7.7 of the Middle District of Pennsylvania sets forth that a 'reply to matters argued in respondent's briefs may be filed.'" (Dkt. Entry 59, p. 3; emphasis in original.) Fresenius contends that "Defendants' argument that the proceedings in the instant litigation be stayed fails to comply with Local Rule 7.7 and should be stricken from their brief." (*Id.*, p. 4.)

In reply, ARA asserts that its challenged brief merely called the Court's attention to developments occurring since its motion, noting:

ARA filed its Memorandum of Law in support of its Motion to Dismiss or, in the Alternative, to Transfer, on May 9, 2001.<sup>4</sup> Thereafter, on May 11, 2001, in ruling on a nearly identical motion in the dispute between ARA and [Fresenius] in the D.C. District Court, Judge Hogan chose not to transfer *or* dismiss that action, but

---

<sup>4</sup>ARA's Memorandum in Support of the Motion to Dismiss, or, in the Alternative to Transfer was filed with the Court on May 10, 2001. (Dkt. Entry 27.)

instead to stay the case until the original action in the Western District has been resolved. As a consequence, in its reply memorandum, ARA informed this Court of Judge Hogan's stay order as another possible form of relief here.

(Dkt. Entry 60, p. 2.)

Fresenius counters by claiming that Judge Hogan's action is irrelevant and that there are factors distinguishing this matter from the D.C. action. (Dkt. Entry 65, p. 3.) In the event that the reply brief is not stricken, Fresenius requests that the Court grant leave to file a response to ARA's stay argument.

Contrary to Fresenius' assertions, the developments in a related action are clearly relevant and it was proper to inform this Court that another judge has exercised discretion to stay litigation pending resolution of similar issues in a related case. Nor was it improper for ARA to suggest the alternative relief of a stay of litigation in its reply brief. Judicial economy in the face of a proliferation of related litigation is an important consideration, and was implicit in the request to transfer this case to the Western District of Pennsylvania. It was entirely appropriate to propose a stay of litigation in response to Fresenius' opposition to the transfer of this case.

On the other hand, Fresenius should be accorded a full opportunity to address the matter of staying this case. Furthermore, in light of the substantial passage of time, there may be developments in the Western District or in the District of Columbia cases that bear on this question. Consequently, resolution of the pending motions to dismiss or transfer (Dkt. Entries

17, 45, and 53) will be stayed pending briefing by the parties on the stay issue.<sup>5</sup>

## **CONCLUSION**

For the reasons set forth above, Plaintiff's "Motion to Strike ARA Defendants' Reply Memorandum in Support of their Motion to Dismiss" (Dkt. Entry 58) will be denied. In addition, Fresenius will be accorded an opportunity to address the stay issue. Therefore, resolution of the pending motions to dismiss (Dkt. Entries 17, 45, and 53) will be stayed pending briefing on the stay issue. An appropriate Order follows.

---

<sup>5</sup>ARA raises the additional argument that the Motion to Strike should be denied because Fresenius failed to seek ARA's concurrence in the filing of the motion. In support of that contention, ARA states:

Local Rule 7.1 provides that "[a]ll motions filed prior to trial must be written, and shall contain a certification by counsel for the movant that he or she has sought concurrence in the motion from each party, and that it has been either given or denied." . . . Because [Fresenius] failed to abide by the Local Rules, the Court should deny its motion.

(Dkt. Entry 60, p. 3.) ARA concludes by stating that Fresenius' Motion to Strike "should be denied and ARA should be awarded its costs for having to respond to this baseless and unnecessary motion." (Id.) Although ARA correctly points out the requirements of Local Rule 7.1, and while Fresenius' failure to follow Local Rule 7.1 is not to be countenanced, sanctions are not warranted. It is obvious that ARA did not concur in the motion. The purpose of the certificate of concurrence requirement is to apprise the Court of motions that are unopposed so that quick action may be taken, and the failure to include such a certificate does not obviate the filing of an opposition brief. The failure to file the certificate of non-concurrence did not cause ARA to take any action that would not otherwise have been necessary. Moreover, the motion to strike was not frivolous. Thus, ARA is not entitled to sanctions.

---

Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

FILED: September 17, 2002



Avenue, Scranton, PA 18501. Counsel can obtain information on courtroom assignment by contacting the Clerk's office the Friday before the scheduled appearance.

---

Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

C:\My Documents\01v0702.wpd