

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-81298-CV-MARRA/MATTHEWMAN

JULIAN BIVINS, as Personal Representative
of the Ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, STEPHEN M. KELLY, as
successor guardian, BRIAN M. O'CONNELL,
ASHLEY N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN, BEYS
LISTON MOBARGHA & BERLAND, LLP
f/k/a BEYS STEIN MOBARGHA & BERLAND,
LLP, and LAW OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.

**DEFENDANTS, KELLY'S, O'CONNELL'S, CRISPIN'S,
STEIN'S, THE CLO LAW FIRM'S, AND THE STEIN LAW FIRM'S,
MOTION TO DISMISS OR STAY, WITH INTEGRATED MEMORANDUM OF LAW**

Defendants, Stephen M. Kelly, Brian M. O'Connell ("O'Connell"), Ashley N. Crispin ("Crispin"), Keith B. Stein, Ciklin Lubitz & O'Connell ("the CLO Law Firm"), and the Law Office of Keith B. Stein, PLLC ("the Stein Law Firm") (collectively "the Moving Defendants"), by and through the undersigned counsel and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, hereby respectfully submit their Motion to Dismiss or Stay with Integrated Memorandum of Law.

I. SUMMARY OF MOTION

Under the Colorado River doctrine, a federal court should dismiss or abstain from exercising jurisdiction over a case if there is a parallel proceeding in state court and the interests

of wise judicial administration demand abstention. This Court may consider matters outside the pleadings to determine the relevant issues, including (1) whether the proceedings are parallel; (2) the order in which the courts assumed jurisdiction over property; (3) the relative inconvenience of the fora; (4) avoidance of piecemeal litigation; (5) the order in which jurisdiction was obtained and the relative progress of the two actions; (6) whether federal law provides the rule of decision; (7) whether the state court will adequately protect the rights of all parties; (8) forum shopping; and (9) vexatious or reactive nature of the second suit.

Here, Plaintiff seeks to litigate based directly on guardianship proceedings that have been pending in the probate division of a Florida state court since 2011. Over the years, the Plaintiff, as an interested person, has participated in the guardianship proceedings and contested numerous matters therein. Since the ward passed away on March 2, 2015, the Plaintiff, in his purported capacity of personal representative of the former ward's estate, has participated in the guardianship proceedings. The allegations that form the basis for the Plaintiff's Amended Complaint (and initial Complaint) in this federal court are squarely before the state court presiding over the guardianship proceedings, and all of the factors above are either inapplicable or inure in favor of the moving Defendants. Accordingly, as set forth below, Plaintiff's Amended Complaint should be dismissed or this action stayed.

II. INTRODUCTION TO TIMELINE AND PARTIES¹

On or about January 2, 2011, a petition to determine incapacity of Oliver Bivins, Sr. ("Oliver Sr." or "the Ward") was filed in the Probate Division of the Circuit Court of the Fifteen Judicial Circuit in an for Palm Beach County, Florida (hereinafter, "the Florida State

¹ The Moving Defendants accept the Plaintiff's allegations as true solely for the purposes of this Motion.

Probate/Guardianship Court").² On or about May 10, 2011, the Court appointed Defendant Curtis Cahalloner Rogers, Jr. ("Rogers") as the limited guardian of the person and property of Oliver Sr. (DE 18, Amended Complaint, ¶ 44).³ According to the Amended Complaint, Rogers retained Defendant Stein and his then-law firm in or about October 2012 concerning certain guardianship properties in New York. (DE 58, and DE 59-80). Again, according to the Amended Complaint, Rogers retained the CLO Firm in November 2012. (DE 57). On April 23, 2014, Kelly was appointed successor guardian. (DE 83, 108). The administration of the guardianship and its properties is set forth in more detail in section III below.

The Ward passed away on March 2, 2015. (DE 1). Plaintiff is the Ward's son by the Ward's first marriage. (DE 29). The Plaintiff alleges that he "is the Personal Representative of the ancillary Estate of the deceased Ward in Palm Beach, County, Florida." (DE 2).⁴ On July 8, 2015 and July 9, 2015, guardians Rogers and Kelly filed and served their respective final accountings and reports of guardianship property with the Florida State Probate/Guardianship Court. On August 7 and 10, 2015, Plaintiff filed his Objections with the Florida State Probate/Guardianship Court. Copies of Plaintiff's Objections to Rogers' and Kelly's accountings/reports are attached as "Exhibits "A" and "B," respectively.⁵

² See DE 18, Amended Complaint, ¶ 41, and DE 18-1 (caption indicating court).

³ The Florida State Probate/Guardianship Court appointed Defendant Kelly as emergency temporary guardian on January 5, 2011. (DE 41). Kelly's actions prior to the appointment of Rogers are not at issue. (See DE 1, *passim*).

⁴ That appointment is subject to an action to revoke the appointment and the letters of administration issued to Plaintiff. (See Exhibit 6, Verified Petition for Revocation of Probate).

⁵ In determining a motion based on Colorado River doctrine, the court may consider matters outside the pleadings. E.g., First Keystone Consultants, Inc. v. Schlesinger Electrical Contractors, Inc., 862 F. Supp. 2d 170, 181, 181 n.11 (E.D.N.Y. 2012).

Plaintiff's objections concern property that is the *res* of the guardianship. He contests the guardians' actions concerning that property, and alleges the same or directly related allegations that he alleges in this Court. (See Exhibits 1 & 2, ¶¶ 1-3, 5-6, 8). The Plaintiff also alleges that the CLO Firm⁶ breached its fiduciary duty to the ward and failed to benefit the ward, and, accordingly, should not be paid. The Plaintiff has been actively litigating his Objections in the Florida State Probate/Guardianship Court guardianship proceeding, which are currently pending and have not been ruled upon.

On September 17, 2015, Plaintiff filed his Complaint with this federal court. (DE 1). The allegations raised the same issues as Plaintiff's Objections filed in Florida State Probate/Guardianship Court, and closely derivative or related issues--all challenging the guardians and their attorneys' actions concerning the property of the guardianship. (DE 1, *passim*). Plaintiff then waited more than two months to apply for summonses (see DE 5, 7), and did not serve the first of the summonses until the evening of December 3, 2015, when he served Defendants Crispin and Stein.

Defendants had no prior notice that Plaintiff would attempt to bypass the ongoing guardianship proceedings and obtain review of the actions of the guardians and their attorneys by this federal court. Accordingly, on December 4, 2015, the Moving Defendants herein (and Defendant Rogers) filed and served an Adversarial Proceeding for Declaratory Judgment ("Adversarial Proceeding Complaint") directly raising all of the Plaintiff's issues in the appropriate court; the Florida State Probate/Guardianship Court, where the guardianship

⁶ Defendants O'Connell and Crispin were the only active agents of the CLO Firm. Defendants O'Connell, Crispin, Stein, the CLO Firm, and the Stein Firm shall be hereinafter collectively referred to as "the lawyer Defendants."

proceeding had been pending and litigated for more than five years. A copy of the Adversarial Proceeding Complaint with exhibits thereto is attached as Exhibit "C."⁷

Plaintiff served the remaining Defendants after December 4, 2015. Plaintiff filed and served his Amended Complaint on January 8, 2016. Like the original, the Amended Complaint alleged that the guardians and their attorneys acted inappropriately regarding guardianship assets. (See DE 18).

III. APPLICATION OF COLORADO RIVER DOCTRINE

In Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court held that abstention may be appropriate where there are parallel state-court proceedings and principles of wise judicial administration warrant a decision to abstain from exercising jurisdiction. Colorado River, 424 U.S. at 818-20. “Wise judicial administration [gives] regard to conservation of judicial resources and comprehensive disposition of litigation.” Id. at 817. The doctrine concerns the situation when one proceeding suddenly becomes two. See D.A. Osguthorpe Family Partnership v. ASC Utah, Inc., 705 F.3d 1223, 1233 (10th Cir. 2013). Under certain “exceptional circumstances” identified by the Colorado River Court, a district court may decline to exercise jurisdiction over a parallel state proceeding. Moorer v. Demopolis Waterworks and Sewer Board, 374 F.3d 994, 997 (11th Cir. 2004).

A. Parallel State Proceedings

“The court must decide whether the [state proceedings] and the ... federal action are ... ‘parallel.’” Amazon & Assocs., Inc. v. Columbus Land Dev., LLC, 2014 WL 467509, at *10 (N.D. Ala. Feb. 5, 2014). “Proceedings need not involve exactly identical parties, issues, and

⁷ In determining a motion based on Colorado River doctrine, the court may consider matters outside the pleadings. E.g., First Keystone, 862 F. Supp. 2d at 181, 181 n.11..

requests for relief to be deemed parallel.” *Id.* (citing Ambrosia Coal and Constr. Co. v. Morales, 368 F.3d 320, 1329 (11th Cir. 2004)). “Rather, the Colorado River analysis applies when state and federal proceedings involve *substantially* the same parties and *substantially* the same issues.” *Id.* (citing Ambrosia Coal and Constr. Co. v. Morales, 368 F.3d 320, 1330 (11th Cir. 2004)).

Here, the proceedings are parallel. Both involve the same property—the property of the guardianship and actions taken therein. Both fully address—as the primary issues--the Plaintiff’s allegations of breaches of the duties owed to the ward by the guardians and by the lawyer Defendants. (See DE 18, Amended Complaint *passim*, and Ex. 3; Moving Defendants’ Adversary Proceeding for Declaratory Relief, *passim*). Even in specific sub-issues, the proceedings are parallel. For example, failure to properly manage the property known as “808 Lexington” is a sub-issue of the Amended Complaint and Plaintiff’s Objections. (See DE 18, Amended Complaint, ¶¶ 104-05, 112-13, 119, 124 and Exhibits 1 & 2, Plaintiff Objections filed in the Florida State Probate/Guardianship Court, ¶ 1). Plaintiff has been litigating this sub-issue in the Florida State Probate/Guardianship Court since at least February 2015. (See Ex. 5, Objection to Petition for Order, ¶¶ 6-8).⁸

The parties are substantially the same in both proceedings. The Plaintiff was an “interested person” in the Florida State Probate/Guardianship Court and participated in those proceedings. (See Ex. 5, Objection, pg 1, alleging an objection to payment of guardian fees as an “interested person”). He participates now in the Florida State Probate/Guardianship Court proceedings as now as the purported “ancillary representative of the Estate of [the former

⁸ For another example, of parallel sub-issues, the Plaintiff alleges breach of fiduciary duty to the ward and failure to benefit the ward on the part of the CLO Law Firm in both proceedings. (See Amended Complaint ¶¶ 101-03, 105 and Ex. 1, Plaintiff’s Objection to Rogers’ Final Accounting, ¶ 7).

ward].” (See Ex. 1, Objection, pg 1). Defendant Kelly, a one of the guardians, was a formal party in the guardianship. The lawyer Defendants, as agents of the guardians, cannot be considered strangers to the guardianship proceeding. Here, the parties are substantially similar in both proceedings.

According to the Court in Sini v. Citibank, N.A., 990 F. Supp. 2d 1370 (S.D. Fla. 2014), “[t]he crucial question [regarding whether there a parallel state proceeding for Colorado River Doctrine purposes] is whether the ‘similarity between the two cases is sufficient to justify the conclusion that the state court litigation will be an adequate vehicle for the complete and prompt resolution of the issue[s] between the parties.’” Sini v. Citibank, N.A., 990 F. Supp. 2d 1370, 1376 (S.D. Fla. 2014) (citing and quoting Brown v. Blue Cross and Blue Shield of Fla, Inc., 2011 WL 11532078, at *8 (S.D. Fla. Aug. 8, 2011)). Here, the Florida State Probate/Guardianship Court is already intimately familiar with all of the facts, the properties, the actions taken by the guardians, the actions taken by the lawyer Defendants, as well as the orders issued and settlements entered into. The Plaintiff’s Amended Complaint invites this federal court to assume jurisdiction over a dispute that will entail review of years of probate proceedings, and the actions taken therein by the guardians and the guardians’ attorneys’. The Florida State Probate/Guardianship Court is a more than “adequate vehicle for the complete and prompt resolution of the issue[s] between the parties.”

Because here, the state and federal proceedings are parallel, the Court should next consider the factors set forth by the Supreme Court to determine whether abstention from the Court’s exercise of jurisdiction is appropriate. Sini, 990 F. Supp. 2d at 1376, 1377.

B. Jurisdiction Over the Property at Issue

“The first Colorado River factor concerns whether one of the courts has assumed jurisdiction over the property at issue.” Amazon, 2014 WL 467509 at *10. Here, although the allegations concern the Moving Defendants actions vis-à-vis property of the guardianship, the Plaintiff does not seek relief against that property, accordingly, the first factor is neutral. See id. (where neither proceeding was *in rem*, “the first factor is neutral”.).

C. Relative Inconvenience of the Fora

This factor concerns the physical proximity of the federal forum to the evidence and witnesses. Id. Here, both courts are located within one-half mile of each other, according this factor is also neutral.

D. Avoidance of Piecemeal Litigation and Inconsistent Results

“The third Colorado River factor considers the potential for inconsistency and piecemeal litigation.” Amazon, 2014 WL 467509, at *11. Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results.” Id. The circumstances under which the parallel cases would lead to piecemeal litigation must be abnormally excessive and deleterious. Id. Where, as here, “identical litigation has been filed in both federal and state courts, duplicative proceedings would be unduly excessive.” Id. at *12. Here, the mammoth size of the guardianship proceeding indicates the distinct possibility of piecemeal litigation. During the five-plus years of proceedings, there have been four settlement agreements and orders, at least three appeals and 1,176 docket entries to date. (See Ex. 4, State Court Docket Sheet). Plaintiff’s Amended Complaint, in essence, will require that much of that litigation be revisited and the appropriateness of the moving Defendants’ actions taken therein reviewed by this Court, instead of the Court familiar with it. This case should live out the rest of its days in the place where it began years ago and where all

the actions at issue occurred: in the Florida State Probate/Guardianship Court. Accordingly, this factor—avoidance of piecemeal litigation--favors abstention.

Further there are concerns about collateral estoppel if the two cases continue. Because the Florida State Probate/Guardianship Court is intimately familiar with the factual underpinnings of the parties' actions, it will likely conclude first, with will moot the issues before this federal Court. As the Amazon Court said, “To continue this action knowing that such an outcome is likely, is an unnecessary waste of judicial resources.” Id.; see also, Sini, 990 F. Supp. 2d at 1379 (because one court’s rulings on similar or identical claims could have preclusive and binding effect on the other court, a party may try to accelerate or stall action in one case in an effort to win a ruling from the more favorable forum. Given the duplicative claims ... in the state action, the redundant proofs required by the respective claims, and the potential for conflicting rulings, the Court finds that the parallel cases present a serious danger of “abnormally excessive or deleterious” piecemeal litigation, and this factor weighs strongly in favor of abstention.”).

Accordingly, the factor of avoiding piecemeal litigation and inconsistent results favors abstention.

E. The Order in which Jurisdiction was obtained and the Relative Progress of the Two Actions

“The order in which jurisdiction was taken is not a mechanical concept automatically favoring the party who files first, but rather a concept that favors the case that is more advanced.” Kaplan v. Kaplan, 903 F. Supp. 2d 1304, 1309 (M.D. Fla. 2012), aff’d, 524 F. App’x 547 (11th Cir. 2013). A very similar case, the Kaplan Court explained:

Certainly “more advanced,” the probate administration was opened six years ago (four years before the federal action) and contains more than 1,020 docket entries, which include contests over a personal representative, over the settlements of

claims, and over interim accountings. Both from the administration of probate and from Alexander's many associated lawsuits, the state court has acquired a brutally intimate familiarity with the dispute surrounding Leon's administration of Mack's estate. Interference from parallel federal litigation squanders the state court's accumulated investment.

Kaplan, 903 F. Supp. 2d at 1309. This factor also favors abstention.

F. Whether Federal Law Provides the Rule of Decision

Here, all of the claims in the federal court are common law claims based on Florida law, accordingly, this factor favors abstention.

G. Whether the State Court will Adequately Protect the Rights of All Parties

Where as here, the guardian cannot be discharged without court approval and the opportunity for all interested parties to object, and possessing a singular expertise in Florida guardianship proceedings, all parties, including the Plaintiff, will have their rights adequately protected in the state court. State courts are assumed to have developed a proficiency in probate matters. Kaplan, 903 F. Supp. 2d at 1310. Accordingly, this factor favors abstention.

H. Forum Shopping

Having raised his objections and having participated for years in the guardianship proceeding, the Plaintiff is clearly forum shopping by bring his claims in the federal court.

I. Vexatious or Reactive Nature of the Second Suit

As clearly indicated by Plaintiff's lawsuit against the attorneys that represented the guardian and the ward, Plaintiff's suit is vexation and reactive.

Request for Relief

Based on the forgoing, the Moving Defendants respectfully request that this Court enter a stay of this federal action pending the conclusion of the proceedings in the Florida State

Probate/Guardianship Court. See Moorer, 374 F.3d at 998 (stay is preferred remedy for Colorado River abstention).

**CERTIFICATE OF GOOD FAITH CONFERENCE
CONFERRED AND UNABLE TO RESOLVE ALL ISSUES PRESENTED IN THE MOTION**

Pursuant to Local Rule 7.1(a)(3), I hereby certify that the undersigned counsel for the movants has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues. On or about December 22, 2015, counsel for the sole Plaintiff informed me that he opposes the relief sought in the foregoing motion.

Dated: January 19, 2016. Respectfully submitted,

/s/ Charles L. Pickett, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of notices of electronic filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically notices of electronic filing.

/s/ Charles L. Pickett, Jr.
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