IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

CZ-USA, INC.,

Plaintiff,

vs. **Case No. 12-2173-RDR**

TIMBER VALLEY ASSOCIATES, INC.,

Defendant.

MEMORANDUM AND ORDER

This is a declaratory judgment action brought by CZ-USA, Inc. against Timber Valley Associates(TVA), Inc. This matter is presently before the court upon TVA's motion to dismiss plaintiff's complaint or stay the action. Having carefully reviewed the arguments of the parties, the court is now prepared to rule.

I.

Some background is necessary to understand the arguments in this case. CZ-USA is a Nevada corporation with its principal place of business in Kansas City, Kansas. CZ-USA is an importer and seller of firearms and firearms accessories. TVA is a Minnesota corporation with its principal place of business in Champlain, Minnesota. TVA is a multi-line, independent sales agency, working on a commission basis, in marketing and selling the products of manufacturers and importers of firearms and outdoor sporting goods.

In December 2009, CZ-USA retained TVA to work as its independent sales representative, selling its firearms products to retail store accounts located in North Dakota, South Dakota,

Minnesota and Wisconsin. On approximately January 12, 2010, the parties entered into a written sales representative agreement. The written agreement provided that CZ-USA would pay TVA a commission of 4% on sales in TVA's territory, except for sales to certain clients reserved as CZ-USA house accounts. The agreement provided that it would be "governed and construed" under Kansas law. The agreement further provided that it would terminate "automatically" on November 30, 2010 unless a new contract was executed.

The parties never entered into another agreement after the January 12th agreement. TVA, however, continued to work as CZ-USA's independent sales representative after the contract's termination. In January 2011, CZ-USA announced that it was modifying the structure and terms of how commissions were to be paid. TVA apparently sought a new written agreement, but no such agreement was ever made.

On or about September 15, 2011, CZ-USA terminated TVA as its Upper Midwest independent sales representative. TVA believed that such action violated several provisions of the Minnesota Termination of Sales Representative Act (MTSRA), Minn. Stat. 325E.37. TVA further believed that CZ-USA owed them approximately $7,500.00 in commissions for business booked prior to termination.

On or about November 28, 2011, counsel for TVA sent a demand package to CZ-USA outlining its claims under MTSRA, and indicating its intent to commence litigation or arbitration under the MTSRA in

Minnesota in the event settlement could not be reached. Counsel for CZ-USA responded to this demand by denying liability under the MTSRA and indicating that he believed the expired contract governed the parties' business relationship. He indicated that CZ-USA intended to commence litigation in Kansas seeking a determination of this issue if TVA initiated litigation in Minnesota.

Over the next two months, efforts were made to resolve the issues in dispute and to wind up the parties' business relationship. The parties were apparently able to resolve some issues. However, on February 17, 2012, TVA initiated suit in a Minnesota state court asserting breach of contract and various claims under the MTSRA and seeking damages from CZ-USA exceeding $75,000.00. Twelve days later, CZ-USA commenced this action in Kansas state court. In its complaint, CZ-USA seeks to enjoin TVA's prosecution of the Minnesota action and obtain a determination of what amounts remain owing from CZ-USA to TVA. On March 22, 2012, TVA removed the Kansas case to this court. No discovery has been undertaken in either case.

II.

TVA now seeks dismissal or stay of this action. In its motion, TVA contends that this action is inconsistent with the purposes of the Declaratory Judgment Act. TVA suggests that the claims in this case can and will be resolved in the Minnesota action. TVA also argues that the Kansas action is barred by the

Anti-Injunction Act. TVA asserts that CZ-USA's request to enjoin the Minnesota action violates the provisions of the Anti-Injunction Act. Finally, TVA contends that the Minnesota action is entitled to priority based upon the application of the "first-filed rule." TVA suggests that under this rule the Minnesota action should proceed and this action should either be dismissed or stayed.

CZ-USA has responded that the parties' continued performance under the written contract formed a new contract with the same terms. CZ-USA further contends that TVA waived its rights under the MTSRA by signing the written agreement which required that the merits of any dispute be determined under Kansas law. Finally, CZ-USA argues that the "first-filed rule" does not apply here because it only applies to parallel cases that have been filed in federal district courts. Thus, CZ-USA contends that this court should exercise jurisdiction because the parties agreed to apply Kansas law, and this action would resolve all pending issues between the parties.

III.

The Declaratory Judgment Act provides that this court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The district court has discretion whether to issue a declaratory judgment. See MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007); State Farm Fire

& Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994). In evaluating whether to exercise jurisdiction over a declaratory judgment action, the court considers: (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata; (4) whether use of declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether an alternative remedy would be better or more effective. Mhoon, 31 F.3d at 983.

The first factor weighs in favor of dismissal. The Minnesota complaint contains a claim for damages. This case may not entirely resolve that issue. The court finds that some of the arguments asserted by CZ-USA about the merits of TVA's claims in the Minnesota action have some persuasive value, but we are not inclined to resolve them at this time. The second factor is somewhat neutral, but the issue of monetary relief might remain unresolved.

The third factor is somewhat difficult to determine under the circumstances of this case. Both sides have accused the other side of procedural fencing. CZ-USA has suggested that TVA engaged in a race to the courthouse in its locale when it understood that Kansas law would control the contractual claims. TVA has indicated that

the "timing and circumstances of CZ-USA initiating this declaratory judgment action strongly suggests forum shopping and procedural fencing." Each party made its position clear to the other side prior to initiating litigation. The court believes this factor is neutral, with both sides attempting to seek a venue that would be more convenient.

The fourth factor also weighs in favor of dismissal. Denying this motion would indeed create unnecessary and unjustified tension between the state and federal courts. Allowing this action to proceed would encroach upon the Minnesota court's right to construe and apply a Minnesota statute. In making that statement, the court understands the arguments that CZ-USA has made about the viability of TVA's MTSRA claims. The court also recognizes CZ-USA's arguments about the application of Kansas law to some of the claims in these actions. The court, however, believes that the Minnesota court should have the first opportunity to consider the validity of the MTSRA claims. In addition, the court believes that the Minnesota court can adequately apply Kansas law if that is necessary. CZ-USA has suggested that the litigation should proceed here because the parties agreed to have Kansas law govern their written agreement. The court acknowledges that fact, but recognizes that the claims here are not based on the written contract. Moreover, the provisions of the contract did not restrict venue to Kansas. CZ-USA may ultimately prevail on its

contention that Kansas law should be applied to the claims that are asserted, but we believe that the Minnesota court can resolve that issue. CZ-USA has not suggested that it will not have a full opportunity to have its claims fairly considered and determined by the Minnesota court. While it may be more convenient for CZ-USA to have the dispute litigated here, there has been no showing that it would be unusually inconvenient to litigate the claims in Minnesota.

The parties have engaged in considerable discussion about the "first-filed rule." TVA has argued that it requires the court to allow the Minnesota action to proceed. CZ-USA has countered that the "first-filed rule" does not apply because the Minnesota state court is not a court of coordinate jurisdiction and equal rank. Both parties have made valid points.

The Tenth Circuit generally applies the first-to-file rule, which provides that when duplicative lawsuits are pending in separate federal courts, the entire action should be decided by the court in which the action was first filed. Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161, 1163 (10th Cir. 1982) (explaining "general rule that when two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case"); O'Hare Int'l Bank v. Lambert, 459 F.2d 328, 331 (10th Cir. 1972) ("It is well established in this Circuit that where the jurisdiction of a federal district court has first

attached, that right cannot be arrested or taken away by proceedings in another federal district court."). As suggested by CZ-USA, this rule has been applied to federal courts that have concurrent jurisdiction. The Tenth Circuit has indicated the "simultaneous prosecution in two different courts of cases relating to the same parties and issues leads to the wastefulness of time, energy and money." Cessna Aircraft Co. v. Brown, 348 F.2d 689, 692 (10th Cir. 1965). Although the rule applies to federal courts, the reasons for the rule apply in the same manner in this case. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1173-74 (11th Cir. 1982) ("[T]he court initially seized of a controversy should be the one to decide the case. . . . It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction."); Commercial Union Ins. Co. v. Torbaty, 955 F.Supp. 1162, 1163 n. 1 (E.D.Mo. 1997) ("Typically, the first filed rule is applied when an action is filed in two federal courts. However, the rule is applied with equal force when an action is filed in federal court and state court."). Given the issues and parties, the court believes that the Minnesota action can, and should, proceed. "The first-to-file rule normally serves the purpose of promoting efficiency well and should not be disregarded lightly." Wallace B. Roderick Revocable Living Trust v. XTO Energy, 679 F.Supp.2d 1287, 1297 (D.Kan. 2010) (internal

quotation omitted).

In considering the fifth factor, the court believes that the discussion of whether an alternative remedy would be better or more effective flows from our discussion of the fourth factor. The court believes that the Minnesota court is better situated to provide complete relief to all parties.

Thus, after balancing the pertinent factors under Mhoon, the court believes that dismissal of this action is appropriate. The most important factors, those involving comity, federalism and judicial economy, weigh in favor of dismissal. There has been no indication from CZ-USA that the Minnesota court cannot resolve all of the issues and claims presented in this case. Under these circumstances, the court sees no reason to stay the case.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss (Doc. # 9) be hereby granted. This action is hereby dismissed without prejudice.

IT IS SO ORDERED.

Dated this 14th day of August, 2012 at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge