



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERISOURCEBERGEN	§
CORPORATION,	§ No. 60, 2020
	§
Defendant Below,	§
Appellant,	§
	§ Court Below—Court of Chancery
v.	§ of the State of Delaware
	§
LEBANON COUNTY	§ C.A. No. 2019-0527-JTL
EMPLOYEES’ RETIREMENT	§
FUND and TEAMSTERS LOCAL	§
443 HEALTH SERVICES &	§
INSURANCE PLAN,	§
	§
Plaintiffs Below,	§
Appellees.	§

Submitted: April 23, 2020

Decided: April 29, 2020

ORDER

This 29th day of April 2020, upon consideration of the appellant’s motion to stay pending appeal (“the Motion to Stay”), the appellee’s opposition to the Motion to Stay, and the appellant’s reply in support of the Motion to Stay, it appears to the Court that:

(1) On March 5, 2020, we accepted this interlocutory appeal filed by the appellant, AmerisourceBergen Corporation (“ABC”), from the Court of Chancery’s January 13, 2020 Opinion (“the Opinion”) in a books-and-records action brought under 8 *Del. C.* § 220 (“Section 220”). In the Opinion, the Court of Chancery (i) ordered ABC to produce books and records falling within the

category of “Formal Board Materials” and (ii) granted the appellees, Lebanon County Employees’ Retirement Fund and Teamsters Local 443 Health Services & Insurance Plan (“the Appellees”), leave to take a deposition under Court of Chancery Rule 30(b)(6) to determine what other types of books and records may exist and who may possess them.

(2) While the petition for interlocutory review remained pending, ABC petitioned the Court of Chancery to issue a stay of the Opinion pending appeal. After ABC moved to stay, new public records revealed that ABC had produced a subset of the Formal Board Materials (“the Subset Materials”) to another stockholder (“the Federal Plaintiff”), the production of which generated derivative litigation now pending in the United States District Court for the District of Delaware. The Appellees then filed their opposition to ABC’s request for a stay as it related to the production of the Formal Board Materials.

(3) On March 26, 2020, the Court of Chancery entered an order granting a limited stay pending appeal (“the Limited Stay Order”). Because the Appellees opposed the stay only as it pertained to the production of the Formal Board Materials, the Court of Chancery granted the request for a stay as to the other aspects of the relief granted in the Opinion. Finding that the request for a stay of the production of Formal Board Materials was complicated by the fact that ABC had provided the Subset Materials to the Federal Plaintiff, the Court of Chancery denied the motion to stay with respect to the Subset Materials. Recognizing that

this Court may have a different view regarding the propriety or scope of a stay, the trial court granted a limited stay of ten days as to all relief granted in the Opinion, permitting ABC to move for a broader stay in this Court. The stay of all relief remains in effect until this Court renders a decision on the Motion to Stay.

(4) On April 6, 2020, ABC filed the Motion to Stay in this Court. The Appellees oppose the Motion to Stay and argue that the Court of Chancery did not abuse its discretion in denying the stay of the production of the Subset Materials.

(5) In considering whether to grant a stay, a court must: (i) make a preliminary assessment of the movant’s likelihood of success on appeal; (ii) assess whether the movant will suffer irreparable harm if the stay is not granted; (iii) assess whether any other interested party will suffer substantial harm if the stay is granted; and (iv) consider whether the public interest will be served if the stay is granted (“the *Kirpat* factors”).¹ These factors are not considered in isolation, but as part of a balancing of “all of the equities involved in the case together.”² After the Court of Chancery considered the *Kirpat* factors, it entered the Limited Stay Order that denied ABC’s request for a stay only as it related to the Subset Materials.

¹ *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm’n*, 741 A.2d 356, 357 (Del. 1998).

² *Id.* at 358 (citations omitted).

(6) Under Supreme Court Rule 32(a), we review the Court of Chancery’s decision on a motion for stay for abuse of discretion.³ Generally, an abuse of discretion can occur in one of “three principle ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; [or] when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.”⁴

(7) In this Court, the parties agree that the first *Kirpat* factor favors a stay because we have acknowledged the importance of the issue by accepting this interlocutory appeal.⁵ Although loss of the meaningful right to appellate review can satisfy the second *Kirpat* factor—whether the movant will suffer irreparable harm in the absence of a stay—in a books-and-records action, ABC’s argument that this factor favors a stay is undermined because (i) it has already produced the Subset Materials to the Federal Plaintiff and (ii) the production of the Subset Materials in this case would likewise be subject to a mutually agreeable

³ *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005).

⁴ *Id.* (citing *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

⁵ *Kirpat*, 741 A.2d at 358 (concluding that, because the trial court would first have to find error in its own ruling under a literal reading of the first prong—the likelihood of the movant’s success on appeal—the more relevant inquiry is whether “the petitioner has presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation”) (citation and internal quotation marks omitted).

confidentiality order.⁶ Accordingly, we agree with the Court of Chancery that this factor does not favor a stay of the Subset Materials. With respect to the third and fourth *Kirpat* factors, an action brought under Section 220 is intended to be an expedited proceeding⁷ and staying the production of the Subset Materials substantially harms the Appellees' interest in that review. We therefore conclude that the Court of Chancery properly exercised its discretion in granting a limited motion to stay in this matter.

NOW, THEREFORE, IT IS ORDERED that the Court of Chancery's Limited Stay Order is hereby AFFIRMED. The case is REMANDED to the Court of Chancery to address the terms of the supersedeas bond.⁸ Jurisdiction is retained.

BY THE COURT:

/s/ Karen L. Valihura
Justice

⁶ *Lebanon County Employees' Retirement Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *29 (Del. Ch. Jan. 13, 2020).

⁷ See *KT4 Partners LLC v. Palantir Technologies, Inc.*, 203 A.3d 738, 755 & n. 84 (Del. 2019) ("Books and records actions are not supposed to be sprawling, oxymoronic lawsuits with extensive discovery.").

⁸ Section 24 of Article IV of the Constitution of the State of Delaware requires adequate security for a stay pending appeal. The Court of Chancery states in the Limited Stay Order that the Appellees did not request any security and, therefore, the Limited Stay Order was not conditioned on any. Given that the stay hereby ordered will be in effect until this Court rules on the merits, we do not presume that the Appellees' position on the security is the same.