

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE WILLIAMS,

Plaintiff,

v.

NOTICE OF MOTION TO
CONTINUE THE STAY OF
CIVIL PROCEEDINGS

KEITH SWACK, SEAN WARNER,
MATTHEW RADDEMACHER and
ERIK HIBSCH,

13-CV-00974

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of Cheryl Meyers Buth, Esq., Defendant Sean Warner will move this Court at a date and time to be set by the Court for:

- 1) An Order denying Plaintiff's motion to lift the stay of discovery in this case and;
- 2) An Order holding in abeyance the parties' obligation to

participate in mandatory mediation pending the lifting of the stay.

DATED: Orchard Park, New York
April 13, 2015

Yours, etc.

/s/Cheryl Meyers Buth
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE WILLIAMS,

Plaintiff,

v.

ATTORNEY'S AFFIDAVIT

KEITH SWACK, SEAN WARNER,
MATTHEW RADDEMACHER and
ERIK HIBSCH,

13-CV-00974

Defendants.

State of New York)
County of Erie)
Town of Orchard Park) ss.:

CHERYL MEYERS BUTH, being duly sworn, deposes and says:

1. Deponent is an attorney at law duly admitted to practice before the United States District Court for the Western District of New York and is a partner in the law firm MURPHY MEYERS LLP, located at 6506 East Quaker Street, Suite 200, Orchard Park, New York 14127.

2. Deponent represents Defendant Sean Warner.

3. Joel Daniels represents Defendant Keith Swack.

4. Norman Effman represents Defendant Matthew Raddemacher.

5. Joseph LaTona represents Defendant Erik Hibsich.

6. The Defendants jointly request that the Court extend the temporary stay in this case. The Department of Justice is investigating a possible violation of inmate civil rights at the Attica State Correctional Facility. The DOJ criminal investigation arises from the same facts that are in dispute in this case, although not be limited to the alleged assault of Plaintiff George Williams. Our clients have a constitutional right against self-incrimination and no meaningful discovery can take place until the parties are more fully apprised of the nature and scope of the federal criminal investigation. Despite Plaintiff's counsel's recent objection, the Court has discretion to continue the stay that had been previously imposed with counsel's consent while state criminal charges were pending against the Defendants. For the reasons that follow, the limited relief sought by Defendants in extending the stay does not prejudice the Plaintiff and is necessary to protect the rights of the Defendants.

PROCEDURAL HISTORY

7. This 42 USC §1983 action was originally filed by the Plaintiff in Kings County, New York, Supreme Court. Defendants were served through their attorneys when they made their initial appearance in Wyoming County Court for arraignment on criminal charges relating to the alleged assault of Mr. Williams.

8. The Defendants then removed the case to the United States District Court for the Eastern District of New York (Dkt #1). Once the lawsuit filed in Kings County was removed to federal court, Defendants requested a stay of discovery because of the felony criminal charges then pending before Wyoming Court Judge Michael F. Griffith.

9. At a conference held on June 5, 2012, Magistrate Judge Joan M. Azrack (EDNY) ordered a stay pending resolution of the state criminal case. (Dkt. #10) On July 16, 2012, the defense filed a motion for a change of venue to the United States District Court for the Western District of New York in Buffalo (Dkt. #13).

10. On June 13, 2013 (Dkt. #31) Magistrate Judge Azrak recommended that the Defendants' motion to transfer venue be granted and the Report and Recommendation was subsequently affirmed by United States District Court Judge Carol Bagley Amon on September 24, 2013. (Dkt. #38).

11. This court, on stipulation by the parties, continued the stay previously imposed in the United States District Court for the Eastern District of New York.

12. Plaintiff also filed a civil suit against the State of New York in the Court of Claims. The Defendants were not given notice of this lawsuit by the Plaintiff. The State is represented by Rochester Assistant Attorney General

Tamara Christie. The Plaintiff has agreed to a conditional dismissal of that case while he pursues the 1983 action in federal court.

13. It is Deponent's understanding, based on my conversations with the AAG that, since the negligence case against the State was voluntarily dismissed, the parties have not engaged in any discovery in the Court of Claims case. There has not been any impediment to the Plaintiff proceeding with discovery; he simply made a strategic choice to forego pursuing that case.

14. The Wyoming County criminal indictment against the Defendants was dismissed without prejudice by Judge Griffith on August 25, 2012 and Defendants Swack, Raddemacher and Warner were subsequently re-indicted in January 2013. The Plaintiff did not oppose the defense motion to continue the stay of the 1983 action during the period of re-presentation to a second grand jury and the resolution of the second indictment.

15. On March 2, 2015, the three criminal Defendants, Keith Swack, Matthew Raddemacher and Sean Warner, pled guilty to Official Misconduct, a class A misdemeanor, pursuant to New York State Penal Law Sec. 195.00(1)¹. Wyoming County Court Judge Michael Mohun accepted their pleas and proceeded immediately to sentencing, imposing a conditional discharge. As a result of the

¹ Penal Law section 195.00(1): "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit (1) he commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized".

plea, all three resigned their positions as correctional officers with the New York State Department of Corrections.

16. Erik Hibsich, the fourth defendant named in this civil lawsuit, was awarded back-pay and was reinstated to his job after a labor arbitration hearing and continues to work as a correctional officer at Attica.

17. On March 31, 2015 this Court conducted a scheduling conference because the state criminal proceedings were concluded. Plaintiff's counsel requested that the Court issue a case management order.

18. After confirming earlier that day there was an open federal criminal investigation, the Defendants opposed lifting the stay.

19. Beginning on February 28, 2015, the weekend before jury selection was scheduled in the Wyoming County criminal case, the *New York Times*, and other national media outlets, published a week-long series of articles about the alleged history of brutality and civil rights violations at Attica. The articles focused on Defendants' criminal case and the resulting plea deal.

20. The Plaintiff himself has maintained a public presence since being released from prison. He gave an in-person interview to *New York Times* reporter Tom Robbins in November 2014 and made public comments critical of the plea deal offered by the Wyoming County District Attorney. In addition to the *New York Times*, his quotes have appeared in news outlets from the *Buffalo News* to the

Huffington Post. Upon information and belief he has also appeared at a public event held by the Correctional Association, a vocal prisoners rights group in New York City which has called on the Governor to close down Attica.

21. The *New York Times* publically urged the United States Department of Justice to investigate the claimed civil rights violations at Attica. *See eg "Abuse at Attica Calls for Federal Scrutiny" 3/4/15 NY Times Editorial* ("Mr. Williams, who was preparing testimony for trial, referred to the plea agreement as "crazy". The Justice Department should examine the case to determine whether federal civil rights charges would be appropriate"). There were hundreds of comments to the on-line version of the news articles, in many cases calling for a federal civil rights investigation.

22. Deponent subsequently contacted federal authorities and learned that an AUSA has been assigned to the case and a criminal investigation has been opened. Deponent, however, was unable to obtain any information about the time frame or scope of the investigation or likelihood that federal criminal charges would be brought against these defendants. Upon information and belief, federal investigators have begun to collect evidence in the possession of state law enforcement authorities.

23. This affidavit is submitted in support of Defendants' joint motion to temporarily continue the stay in this case.

LEGAL STANDARD

24. Magistrate Judge Foschio recently summarized the legal standard to be applied to a defendant's request for a stay where he faces parallel criminal and civil proceedings.

25. In *State Farm v. Epps*, 2014 WL 2047596 (W.D.N.Y. 2014), the issue was whether the defendant or alternate beneficiaries were entitled to life insurance proceeds of the deceased. Although the defendant was charged in federal court with mail fraud in relation to his submission of an application for the insurance proceeds, the alternate distributees asserted their own entitlement to the proceeds based on defendant's alleged murder of decedent. While noting that the defendant had not yet been charged with homicide, the Court declined to reach the issue of whether a stay of the civil case should be granted; rather, the Court held that the only issue before it was the motion by certain defendants for default judgment, the response to which neither implicated defendant's constitutional rights nor prejudiced him.²

² Subsequently, after denying the motion for default judgment as to Defendant Epps, the Court granted a motion to stay proceedings pending the outcome of the mail fraud case. The motion was made on consent of the parties (See 1:12-cv-00380, dkt #60, 10/23/14).

26. In reaching its decision the Court outlined the legal standard for determining whether to grant or deny a stay application:

“Whether to stay civil proceedings where parallel criminal proceedings against a party are pending requires consideration of several factors including

- the extent of overlapping issues in the two cases
- the status, i.e. imminence of prosecution, of the parallel criminal case
- plaintiff’s interest in an expedited disposition when weighed against any prejudice to plaintiff’s interest from delay resulting from the requested stay
- the private interests of and burden on a defendant
- the Court’s interest in the subject matter and a fair disposition. *State Farm v. Epps*, __cv__ (November 14, 2013) citing *Louis Vuitton Malletier SA v. LY USA, Inc.*, 676 F.3d 83, 99 (2d Cir. 2012) (“*Vuitton*”) (citing *Trs. of Plumbers and Pipefitters Nat’l Pension Fund*, 886 FSupp 1134, 1139 (SDNY 1995).

The decision to grant or deny a stay in these circumstances is addressed to the discretion of the court. *Id.* at 97 (*internal citations omitted*) and the requesting party has the burden to establish the need for the delay. *Id.* (*quoting Clinton v. Jones*, 520 US 681, 708 (1997)

“[A]bsent a showing of undue prejudice upon the defendant or interference with his constitutional rights, there is no reason why plaintiff should be delayed in its efforts to diligently proceed to sustain its claim”. *Id.* (*quoting Hicks v. City of NY*, 268 FSupp2d 238, 241 (SDNY 2003)

In applying the relevant factors approved in *Vuitton* to an application to stay a parallel civil action, the court is required to engage in “a particularized inquiry into the circumstances and competing interests in the case” *Id.* (*quoting Banks v. Yokemick*, 144 FSupp2d 272, 275 (SDNY

2001) (citing Keating v. Office of Theft Supervision, 45 F3d 322, 325 (9th Cir. 1995).

27. In deciding whether to exercise its discretion in granting a stay, the Court must balance the competing interests of the parties and the particular circumstances of the case. *See Sterling Natl Bank v. A-1 Hotels Int'l Inc., 175 F.Supp.2d 573 (SDNY 2001).*

APPLICATION OF LEGAL STANDARD TO FACTS OF THIS CASE

The extent of overlapping issues in the two cases

28. Plaintiff George Williams asserts causes of action for excessive force and violation of civil rights arising out of his alleged assault at the hands of the defendant correctional officers. Since the issues of the federal criminal investigation are identical to the theories of liability in the civil lawsuit, and may even be broader in scope, this factor weighs heavily in favor of continuing the stay.

The status of the parallel criminal case & imminence of prosecution

29. This is a unique situation. The defendants have not yet been charged with federal crimes but are targets of an ongoing federal investigation. There is no hard and fast rule that requires a defendant to be under indictment before the Court may consider imposing a stay.

30. Although they have not been indicted, they are faced with an actual and articulable 5th Amendment issue based on the open criminal investigation. Although lawyers may often have theoretical concerns that a client's answers in civil litigation may be incriminatory, in the absence of a likely criminal charge, those concerns are mostly academic. Here, despite the resolution of the state court criminal case, the Defendants are in no better position *vis-à-vis* their 5th Amendment problem.

31. Deponent does not know DOJ's time frame for deciding whether or not to charge these Defendants. Although Magistrate Judge Foschio did not specifically define the term "imminent" in the *Epps* decision, *supra*, the statute of limitations period for the federal civil rights case started running on the date of the alleged assault, August 9, 2011. Approximately 16 months now remain on the 5-year statute of limitations. Therefore, the possible imposition of criminal charges can be considered "imminent" because the stay of civil proceedings has been in place for close to four years and just over one year remains to bring federal charges.

32. Even if the parties proceeded with discovery now, it is unlikely that the civil case would be trial ready before the criminal statute of limitations expired based upon the number of witnesses to be deposed, expert depositions and expected motion practice.

33. In the Defense's view, this factor weighs in favor of continuing the stay.

Plaintiff's interest in an expedited disposition when weighed against any prejudice to plaintiff's interest from delay resulting from the requested stay

34. There has been a stay of civil proceedings in this Court since November 2013 when venue was transferred from the Eastern District of New York (*see 1:13-cv-974, dkt #45*)

35. Judge Azrak in the United States District Court for the Eastern District of New York previously imposed a stay in the civil case pending the outcome of the state criminal charges. None of the delay in resolving the criminal charges is attributable to the defendants.

36. The first indictment was dismissed in August 2012 shortly before the trial based on Kastigar violations that occurred during the grand jury presentation. The Wyoming County District Attorney decided to re-present the case to a second grand jury and an indictment was voted out in January 2013. Between August 2012 and January 2013, the Plaintiff did not move the lift the stay of civil proceedings. The criminal trial, expected to last over a month, was scheduled to begin March 2, 2015. The plaintiff was not prejudiced by the delay but, in fact, benefitted from the criminal proceedings in several important ways.

37. Firstly, the district attorney investigated the case and interviewed witnesses that might not otherwise have been available to the Plaintiff. The Plaintiff has benefitted from having access to this information.

38. Secondly, three of the defendants in the civil lawsuit entered guilty pleas in the criminal case.

39. Thirdly, Defendants turned over all of the material obtained through criminal discovery to the Plaintiff as part of its Rule 26 initial voluntary disclosures on December 3, 2012 (*See Exhibit A*, Defendants' voluntary disclosures).

40. Fed.R.Civ.P. 26 does not require counsel to provide copies of documents to Plaintiff's counsel. Nevertheless, defense counsel, being in possession of the material from the state criminal case, turned over the documents in good faith. The Defendants' Fifth Amendment rights were not directly implicated by making the required disclosures because the Defendants themselves are not required to sign the pleading. Therefore, Plaintiff's counsel has almost all documents that defense counsel received from the prosecution.

41. Plaintiff cannot now claim that he was prejudiced—in any way-- by the delay caused by the criminal case.

42. While the state criminal case was pending and his client was expected to testify, Plaintiff's counsel had an interest in not allowing the defense attorneys

to depose his client, just as we had an interest in not allowing our clients to be deposed.

43. Now that it is no longer an issue for his client to be deposed, he seeks to have the stay lifted without regard to the continued Fifth Amendment issues faced by our clients because of the federal criminal investigation. However, if DOJ brings criminal charges, it is unlikely the US Attorney's Office would take a favorable view of having the Plaintiff deposed in a civil case prior to giving testimony in a grand jury or at a federal criminal trial.

The private interests of and burden on a defendant

44. The defendants are potential targets of a federal investigation which we believe was initiated, in part, because of Plaintiff's cooperation with the press and his comments about the subject matter of this lawsuit.

45. The Plaintiff gave an in-person interview to reporter Tom Robbins who wrote several articles, the publication of which was timed for the beginning of jury selection in the state criminal case . Upon information and belief, the US Attorney's Office had absolutely no involvement in this case until after the media coverage and public calls for the Office of Civil Rights to investigate.

46. The Defendants have had to defend themselves simultaneously on four fronts: in the media, the state court criminal case, the federal civil case and

now the DOJ investigation. The burden placed on the defendants is significant. This factor weighs in favor of continuing the stay.

The Court's interest in the subject matter and a fair disposition

47. The Court's interest in a fair disposition weighs in favor of continuing the stay. If the defendants are forced to serve interrogatory responses and submit to depositions under oath, they will be forced to assert their Fifth Amendment privilege. This response, in and of itself, is harmful since it's admissible for a limited purpose in the civil trial. No meaningful discovery will be obtained by Plaintiff.

48. Within the next 16 months, if the Department of Justice decides to forego filing criminal charges, the Fifth Amendment concerns would be removed and the defendants could testify at trial. This circumstance may invite a request from plaintiff's counsel for a subsequent deposition which would actually prolong pretrial proceedings.

49. The Court has an interest not only in hearing cases in a timely fashion for plaintiffs, but also in preventing defendants from being subjected to overly burdensome and duplicative discovery.

50. Based on defendants' initial disclosures, the Plaintiff already is in possession of almost everything responsive to his First and Second Request for

Production of Documents. Therefore, counsel has the ability to investigate the case on his own even if he is precluded from obtaining further discovery directly from the Defendants.

51. Plaintiff entered a voluntary conditional dismissal of his lawsuit against the State in the Court of Claims. He had otherwise had an opportunity to engage in discovery proceedings in that venue. His claims of negligence on the part of the State would have entitled him to document discovery and to depositions of prison officials. He declined to pursue discovery in that forum.

52. While forgoing that opportunity for over three years, Plaintiff's counsel now wants to have his way in this case at the expense of the Defendants who have done nothing to delay or prevent Plaintiff's access to discovery.

53. Considerations of fairness and judicial economy weigh in favor of the Defendants' motion to continue the stay.

Other Motions

54. With respect to Defendants' motion extending the deadline to "opt out" of ADR, the local Alternative Dispute Resolution Plan governs mandatory pretrial mediation. Prisoner civil rights cases are "opt out" cases. Under the ADR plan, a motion seeking to "opt out" of mediation is filed with the assigned judge within 14 days of the first discovery conference (See ADR Plan Section 2.2.(A)-

(D)). Since the parties are seeking a stay and an adjournment of the discovery conference, they are also seeking to postpone any obligation to participate or “opt out” of mediation.

Conclusion

Based on an analysis of all factors which the Court should consider in determining whether to grant or deny a stay, the Court is respectfully requested to continue the stay of all civil proceedings currently in place. The referenced factors all either favor the Defendants or are neutral, not favoring one party or the other. If the Court lifts the stay the Defendants are faced with a classic Hobson’s choice: to either assert their Fifth Amendment privilege and have a negative inference drawn in the civil trial, or, provide answers in discovery proceedings and risk those responses being used to incriminate them in the pending federal criminal investigation. Upon fair consideration of all of the circumstances in this case, the Defense respectfully urges this Court to maintain the stay in place temporarily with the understanding that it will conduct further review of the issue as information about the federal criminal investigation becomes available.

In the alternative, the Defendants would not oppose a limited case management order calling for non-party discovery (eg. third party depositions, authorizations to obtain Plaintiff’s updated medical records, etc).

WHEREFORE, Deponent prays for the relief requested herein, together with such other and further relief as this Court may deem just and proper.

/s/Cheryl Meyers Buth
Cheryl Meyers Buth, Esq.
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Sworn to before me this
13th day of April, 2015

/s/Cindy M. Raab
Cindy M. Raab
Notary Public, State of New York
Qualified in Erie County
My Commission Expires May 31, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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Plaintiff,

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13-CV-00974(S)(M)

KEITH SWACK, SEAN WARNER,
MATTHEW RADDEMACHER and
ERIK HIBSCH,

Defendants.

CERTIFICATE OF SERVICE

I, CINDY M. RAAB, hereby certify that on April 13th 2015, I electronically filed the foregoing motion opposing lifting the stay on behalf of the defendant Sean Warner with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

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/s/Cindy M. Raab
Cindy M. Raab