

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Winfrey Penix, as Administrator of the Estate)	CASE NO. 19 CV 1138
of Melissa Ann Penix,)	
)	JUDGE JENNIFER A. FRENCH
Plaintiff,)	
)	
vs.)	
)	
Mount Carmel Health System d/b/a Mount)	
Carmel West, et al.,)	
)	
Defendants.)	

MOUNT CARMEL’S REPLY IN SUPPORT OF MOTION TO STAY

I. INTRODUCTION

This is a unique set of cases, without the benefit of prior decisions on similar matters. Indeed, more than 20 civil cases are pending, each lodging similar accusations against the Defendants. However, the cases are before different benches, and involve different families represented by a handful of plaintiff’s counsel. Parties have retained criminal counsel, as well as various defense counsel. Currently pending in Franklin County Court are Motions to Consolidate, Motions for Protective Order,¹ and the instant Motion to Stay. It is undisputed that there is a pending criminal investigation against Dr. Husel, who has had his license summarily suspended by the Ohio Board of Medicine. Moreover, the Ohio State Board of Nursing has issued notices of hearing to 25 nurses, the outcome of which could be revocation of state licenses. The Ohio Board of Pharmacy has also issued notices of hearing and begun interviewing pharmacists. Due to this

¹ For now, only one Motion for Protective Order is pending in *Penix v. Mount Carmel Health System, et al.*, Case No. 19-CV-001138 (French, J.).

unusual set of unresolved issues, justice requires a temporary stay of proceedings. Accordingly, the Motion should be granted.

II. THE MOTION TO STAY SHOULD BE GRANTED.

As more fully explained in Mount Carmel's Motion to Stay, the interests of justice favor granting a stay in this case. Civ.R. 26(C); *see also*, 6 Moore's Fed. Practice § 26.105(3)(c) (setting forth five generally accepted factors outside of a defendant's Fifth Amendment Rights to consider when deciding whether to stay discovery while parallel criminal and civil cases are pending).

A stay will not significantly delay the resolution of these cases, to the prejudice of the parties, but will ensure a more efficient, manageable, and just means of dealing with a complex situation. The requested stay is not "indefinite," as Plaintiff complains. Instead, Mount Carmel only requests a stay while the Motions for consolidation are pending, and there are ongoing, external investigations. Obviously the propriety of the Stay can be revisited by the Court or any party as deemed appropriate.

Further, a stay acts in favor of the interests of judicial economy. There is a high likelihood of inconsistent decisions, both substantive and procedural. Proceeding with discovery at this time is sure to cause the courts – and the parties – considerable time and expense that could be avoided once procedural handling is set and external investigations continue.

A stay is also necessary to allow ongoing administrative, state licensure, and criminal investigations to proceed fairly and justly, without interference from this civil litigation. Before any criminal charges have been filed, and while the licenses of dozens of nurses and pharmacists are under review by the State, it is in the public's interest to proceed with a temporary stay of this litigation. Otherwise, the risk of adverse impact to open investigations is significant. Indeed, the attorney for Plaintiff in this case, Gerald Leeseberg, reports every one-sided thought, theory, and

document directly to the media in an effort to color public opinion. For example, Mr. Leeseberg provided the press with a complete copy of Plaintiff's requests for discovery, at the same time he sent a copy to the defense. This document would not ordinarily be listed in a public record at the time of service. By trying this case in the media, the fair process guaranteed to Defendants not only in this matter but also in ongoing investigations is seriously tainted. Additionally, public information in this lawsuit could similarly impact ongoing investigations. A stay is warranted so that this case will not further impede on-going investigations. Last, the public interest is not harmed by a short delay of discovery in these cases. Thus, an order staying proceedings should issue.

III. PLAINTIFF'S INAPPOSITE AUTHORITY.

Opposing Defendants' Motion to Stay, Plaintiff relies on authority that is readily distinguishable, but if applied, supports staying this case. To this end, Plaintiff cites to *United States v. Ogbazion*, which arose from litigation initiated by the United States to obtain a permanent injunction against defendants' alleged pervasive selling of deceptive loan products, unauthorized filing of tax returns, and filing of false and fraudulent tax documents, at the expense of the U.S. Treasury Department and low-income taxpayers. 2012 U.S. Dist. LEXIS 136016, at *1-2 (S.D. Ohio Sept. 24, 2012). The defendant moved to stay the case because "the tone and specific allegations of the complaint, combined with the Government's refusal to acknowledge whether Defendants are under criminal investigation, unfairly hinders the Defendants' abilities to mount a defense in this civil action." *Id.*, at *2.

Unlike *Ogbazion*, there is no imminent threat of ongoing harm to taxpayers or the United States Government here. Instead, the Husel Cases are civil cases brought by individual Plaintiffs seeking damages in connection with the loss of their decedent. Further, it is well-known that a criminal investigation into Dr. Husel's conduct is ongoing, as are state licensure board

investigations – these matters are not theoretical or unknown. The factual bases and procedural posture of *Ogbazion* and the Husel Cases are not alike.

Regardless, even if *Ogbazion* did apply, the factors² set forth by the Southern District of Ohio favor a stay of this case. First, the subject criminal, civil, and administrative cases not only overlap, but they arise from the exact same set of circumstances, which favors a stay. Next, it is public knowledge that a criminal indictment is imminent, and that state licensing board investigations of nurses and pharmacists are already underway. *Ogbazion*, 2012 U.S. Dist. LEXIS 136016, at *3-4 (Courts ordinarily enter a stay only “when related criminal proceedings are imminent or pending.”). Third, the private interests of the plaintiffs in proceeding expeditiously are minimal, as explained above. Fourth, the private interests of and burden on defendants, again, is significant. Fifth, the interests of judicial economy and consolidation clearly favor a stay of discovery. Finally, the public interest favors a stay in this case. Unlike in *Ogbazion*, there are no ongoing crimes against taxpayers, or debts owed to the public. There is minimal public interest in a short delay of discovery in these cases. Even if the Court relied on *Ogbazion*, a stay should issue.

Plaintiff also relies on *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980)³ for the proposition that “the constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.” (Pl. Br., p. 5). But Plaintiff’s reliance of *Dresser* fails to present the complete picture. As *Dresser* continued, “a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the

² These factors include: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *Ogbazion*, 2012 U.S. Dist. LEXIS 136016, at *2-3

³ Unlike this case, which raises the issue of a brief stay in discovery, the Court in *Dresser* considered whether the defendant was entitled to special protection from an SEC subpoena because of a parallel investigation into the same questionable foreign payments also being conducted by a federal grand jury.

interests of justice seem to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.” *Dresser Industries, Inc.*, 628 F.2d at 1375 (internal quotations omitted). “The court must make such determinations in the light of particular circumstances of the case.” *Id.*

The *Dresser* decision actually supports a stay of this case. The Court held, “the strongest case for deferring civil proceedings [other than in the case of bad faith or malicious governmental tactics] is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.” *Id.*, at 1375-76. “The noncriminal proceeding, if not deferred, might undermine the party’s Fifth Amendment privilege against self-incrimination, expand the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.” *Id.*, at 1376. “If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.” *Id.*

Here, Dr. Husel’s license has already been suspended, and is scheduled for an administrative hearing this summer. Further, the Ohio State Nursing Board issued notices of hearing to 25 nurses, the outcome of which could be revocation of state licenses. The Ohio Board of Pharmacy has also issued notices of hearing and started interviewing pharmacists. A criminal indictment is anticipated shortly against Dr. Husel, and the potential charges are expected to be serious. Thus, under the reasoning of *Dresser*, a stay is warranted.

Next, Plaintiff relies on an Eight District Court of Appeals divorce case that reviewed the trial court’s decision not to stay proceedings and continue trial due to the husband’s unrelated criminal charges in federal court. *O’Brien v. O’Brien*, 2008-Ohio-1098 (8th Dist. 2008). Reviewing the decision under an abuse of discretion standard, the Eighth District considered the

following factors: the length of the stay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory purposeful, or contrived; and whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and “other relevant factors.” *Id.*, ¶15.

The Court found no error in denying the request for stay and continuance because the continuance/stay would have resulted in a lengthy delay of proceedings since the divorce case had already been pending for three years, and the criminal trial was not scheduled until a year after that. *O’Brien*, 2008-Ohio-1098, ¶17. Moreover, the Court did not find that the requested continuance was based on a legitimate reason since the federal criminal case was completely unrelated to the divorce proceeding, and the husband had competent counsel to appropriately advise him of his Fifth Amendment rights. *Id.*

Here, unlike in *O’Brien*, this case is just starting discovery, and trial is not imminent. The criminal case and licensure investigations are proceeding on a parallel track, thus, the lengthy delay found in *O’Brien* is not present here. The criminal case and civil case are based on exactly the same set of circumstances, unlike in *O’Brien*. Further, as more fully explained in the Motion to Stay and above, the request is based on legitimate reasons, including judicial economy, fairness to ongoing investigations, and to encourage an orderly and just resolution of this case. Additionally, the stay is only for a short time, while procedural matters in this case are sorted out, and investigations by the State and County proceed. The inconvenience to the Court and parties is significant should the case proceed before ongoing investigations, and the motion to consolidate is decided. Additionally, a short delay in proceedings is not due to the lack of diligence or delay

on the part of any defendant. On the contrary, the parties have been working carefully to efficiently manage the cases, and to reach out of court resolutions on several of the Husel Cases.

In sum, Plaintiff identifies no law or argument that could overcome the persuasive arguments favoring a stay. Therefore, Mount Carmel respectfully requests this Court stay all proceedings in this case while the procedural handling of these cases is settled and licensing and/or criminal matters are pending.

Respectfully submitted,

/s/ John H. Burtch

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been submitted for e-Filing on this 23rd day of May, 2019, and will be served on all counsel of record.

Dated: May 23, 2019

/s/ John Burtch

John Burtch