

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

**Estate of ROBERT E. WONE, by
KATHERINE E. WONE,**

Plaintiff,

v.

JOSEPH R. PRICE,

VICTOR ZABORSKY,

and

DYLAN WARD,

Defendants

**Civil Action No. 0008315-08
The Honorable Brook Hedge
Next Event: Initial Conference
February 27, 2009**

**DEFENDANTS' JOINT CONSOLIDATED REPLY TO PLAINTIFF'S OPPOSITION
TO MOTION TO STAY AND FOR A PROTECTIVE ORDER**

This civil action should be stayed, in its entirety, until the conclusion of the pending parallel criminal prosecution. An analysis of the factors to be considered in determining such a request weighs heavily in favor of granting a complete stay, and the Plaintiff's Opposition utterly fails to upset that balance. Notably absent in the Plaintiff's response is any evidence that the Plaintiff will suffer actual prejudice if this action were to be stayed. That lies in stark contrast to the likely significant and irreparable harm that will befall the Defendants if this action is allowed to proceed while the Defendants face criminal charges. For the reasons set forth below, the Court should grant a complete stay.

As the Plaintiff readily concedes, the Defendants' Fifth Amendment rights should be of paramount concern in deciding whether to stay the civil action. This is especially true here where the claims in the civil action are identical to those in the criminal indictments. However,

the Defendants' rights against self-incrimination are only one of the factors the Court must consider.

When considering a motion to stay a civil proceeding during the pendency of a criminal matter, courts have properly considered several key factors. Specifically,

[W]hether the issues in the civil action are related to the issues in the criminal investigation; the convenience of the courts in the civil and criminal matters; what hardship or inequality the parties would face if required to move forward on the civil case while the criminal case was proceeding; and whether the duration of the requested stay is within reasonable limits.¹

United States ex rel. Westrick v. Second Chance, 2007 U.S. Dist. LEXIS 23917, 8-9 (D.D.C. Mar. 31, 2007) (internal citations set forth in footnote).

Rather than address these factors, the Plaintiff suggests that a protective order is sufficient to safeguard those interests. Cloaked in language of cooperation, Plaintiff "consents" to a protective order that actually fails to protect Defendants' interests in any meaningful way and prevents Defendants from pursuing evidence necessary to their defense. In this way, Plaintiff's proposed protective order actually imposes an undue burden on the party seeking protection and only further illustrates why a complete stay is necessary.

¹ See, e.g., *Barry Farm Resident Council, Inc. v. U.S. Dept. of Navy*, Nos. 96-1450, 96-1700, 1997 U.S. Dist. LEXIS 2754, 1997 WL 118412, at *1 (D.D.C. Feb. 18, 1997) (citing *Molinaro*, 889 F.2d at 903) (listing "the interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to them if it is delayed; the public interest in the pending civil and criminal litigation; the interests of and burdens on the defendant; . . . and the convenience of the court in the management of its cases and the efficient use of judicial resources"); *Birge v. Dollar Gen. Corp.*, Civil Action No. 04-2531, 2005 U.S. Dist. LEXIS 36835, 2005 WL 3448044, at *2 (W.D. Tenn. Dec. 14, 2005) (listing as factors "(1) the extent to which the issues in the civil and criminal proceedings overlap; (2) the status of the criminal proceedings; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the hardship on the defendant; [and] (5) the convenience of both the civil and criminal courts").

Addressing the relevant factors in this case, as outlined in *Second Chance*, the Court first considers the relationship between the civil and criminal actions. Here, the civil complaint is based entirely on the allegations in the criminal case. The Plaintiff admits as much. Thus, the factual issues in the criminal and civil matters are indistinguishable and were first alleged in the criminal action.

Next, there is no doubt that the convenience of the courts is best served by a complete stay of this action until the prosecution is concluded. The evidence sought by the parties in this civil action is largely in the hands of the government. It is unlikely that either party here will be able to obtain the necessary evidence and have access to the necessary government witnesses until the conclusion of the criminal proceeding. If a complete stay is not granted, the parties will be before this Court on a regular basis trying to address on-going discovery disputes and potential protective orders which may implicate the pending criminal matter and the defense.

The hardship or inequalities the parties will endure if this civil action is not stayed weighs in favor of a complete stay. Plaintiff concedes that Defendants' Fifth Amendment interests demand due consideration, but that is not the only component considered in this prong. Defendants would suffer a significant burden by defending both the criminal and civil actions at the same time. The discovery phase alone could cause substantial and irreparable harm to the Defendants. Every pleading, every document, and every shred of evidence compelled from the Defendants in the civil action might serve to reveal their defense strategy in the criminal action. This threat is particularly significant because of the continuous and on-going communication between Plaintiff's counsel and government counsel.

Plaintiff suggests that it must be allowed to take discovery now before "evidence is destroyed and memories fade further," but this suggestion fails in light of the ongoing criminal

action. The government has been collecting and preserving evidence on this investigation for two and a-half years. Numerous witnesses have their memories preserved in grand jury testimony. The government will surely continue to preserve its evidence through the course of its prosecution. Contrary to the Plaintiff's unsubstantiated claim, there is absolutely no risk that evidence will dissipate during the pendency of a stay in this civil action, and the Plaintiff has not identified a single piece of evidence that would be placed in peril during the pendency of the criminal prosecution.

In no more than a passing footnote, Plaintiff attempts to distinguish the cases discussing the standard by which this request for a stay should be measured. Without discussing the facts of the cases or any principles set forth therein, Plaintiff dismisses them as failing to support Defendants' request simply because a complete stay of the civil proceedings was not granted in those cases.² The significant difference, however, is that in those cases the courts found that a stay was not needed because the parallel criminal investigations had not yet yielded indictments; thus, in those cases, unlike this one, the movants were not yet facing criminal charges.

In *United States v. Kordel*, 397 U.S. 1 (1970), the request that the civil action be stayed came during a criminal investigation which had not yet yielded any indictments or charges. Likewise in *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980), the court found that the movants' request to stay the administrative investigation was appropriately declined because "no indictment has been returned; no Fifth Amendment privilege is threatened, Rule 16(b) has not come into effect and the SEC subpoena does not require Dresser to reveal the basis for its defense." *Id.*, at 1367. Similarly, in *United States ex rel. Westrick v. Second Chance*,

² It might be no surprise to find such a dearth of published opinions addressing a request for a stay of civil proceedings during the pendency of a parallel criminal action when one considers that an order granting a stay of civil proceedings would not likely constitute an appealable order.

2007 U.S. Dist. LEXIS 23917 (D.D.C. Mar. 31, 2007), the request to stay the civil action came when the civil action had been pending for three years, and although those movants were under criminal investigation, they had not yet been indicted. *Id.*, at *9-13. That Opinion expressly states that the absence of a criminal indictment was the deciding factor in declining to stay the civil proceeding. *Id.*, at *15. Unlike those cases where the courts found that no stay was required because the movants had not been indicted, here the Defendants have each been indicted on charges which are substantively indistinguishable from the claims in the civil complaint. Indeed, the Defendants were each indicted *before* Plaintiff filed the civil action. These cases would suggest, therefore, that given the pending indictment, and given the overlapping facts, a complete stay *would be* appropriate.

In each of the cases described above, there was also an identifiable public interest in the civil proceedings. In *Kordel*, both the civil action and criminal investigation addressed charges that a company was misbranding drugs that placed the public at risk. *Kordel*, 397 U.S. at 11. In *Westrick v. Second Chance*, the claims raised and pursued were, in substantial part, based upon the defendants' false claims in selling defective body armor which could have put both military and law enforcement in danger. 2007 U.S. Dist. LEXIS 23917, at *4. In *Dresser*, the public interest in the effective enforcement of securities laws was expressly considered to weigh in favor of allowing the action at issue to proceed swiftly to avoid negative impact upon investors and the markets. *Dresser Industries, Inc.*, 628 F.2d at 1377. Here, there is no comparable public interest. The civil action runs to the Plaintiff and not to the public.

As explained in both of Defendants' Joint Motions, no protective order can be sufficient here. The allegations at the heart of each action are too completely intertwined to accomplish any discovery in the civil matter that will not interfere with the criminal action. If, as the

Complaint states, the Plaintiff's claims rest upon the government's allegations in the criminal action, it is difficult to imagine what relevant discovery can be had that would not be material to the criminal case.

If this Court concludes that this action is to proceed simultaneously with the pending parallel criminal prosecution, the Defendants must be permitted to pursue discovery from the government. The Plaintiff's claims are founded upon the government's criminal investigation, and upon law enforcement descriptions of evidence collected by the Metropolitan Police Department, FBI, the District of Columbia Fire and Emergency Medical Services, and the District of Columbia Office of the Chief Medical Examiner, among others. The Defendants cannot defend this civil action without taking discovery from government witnesses, including dozens of police officers who were involved in the criminal investigation, forensic experts retained by the government, and others. It is eminently unjust to permit this action to proceed without allowing Defendants to pursue this critical information.

The Plaintiff inconsistently posits that it should be permitted to conduct discovery that does not impact upon the criminal prosecution, but then asks this Court to compel Defendants to produce discovery exchanged in that very proceeding. These positions cannot be reconciled. Plaintiff betrays the very idea that it could conduct discovery that would not impact upon the criminal prosecution by requesting the Court to compel Defendants' to produce discovery exchanged in that very same criminal prosecution. It is simply not possible for the Plaintiff to pursue discovery of information relevant to its claims without compromising the defense of the criminal prosecution.

It is true that the Plaintiff offered to agree to a partial stay of the present action, but under onerous and disingenuous conditions. While Plaintiff gives lip service to the Defendants'

legitimate Fifth Amendment rights, their actions and proposals are wholly at odds with that position. For example, the Plaintiff proposed that any agreement to stay expressly include a condition that “Defendants agree to produce to Mrs. Wone (1) copies of discovery already produced by government or Defendants in the criminal case, and (2) copies of all such discovery produced in the future within 15 days after receipt/production.” In effect, the Plaintiff persists in an attempt to use civil discovery procedures to gain access to criminal discovery materials exchanged between Defendants and the government all the while claiming to avoid disrupting the criminal prosecution.³

This attempt might not seem so brazenly inappropriate if it did not stand in sharp contrast with Plaintiff’s proposal that no party to this action should be permitted to seek discovery from the government. The facts most material to the defense are closely held by the government. Under the Plaintiff’s proposal, the Defendants are effectively foreclosed from conducting any meaningful discovery of information purportedly supporting Plaintiff’s allegations if they are not permitted to pursue discovery from the government. This is particularly true because the parties would be entitled to much broader discovery in the civil action than the government is required to provide in the criminal action.

The Plaintiff’s offer to stay all discovery *from the government* while the criminal case is pending clearly demonstrates that there would be little harm to the Plaintiff if the entire civil matter was stayed. The Plaintiff’s case rests almost entirely on the government’s evidence. The Plaintiff admits that it can wait to seek discovery from the government until the end of the

³ For example, although the government has produced to the Defendants their own statements to the police, they are subject to suppression on constitutional grounds. Under the Plaintiff’s proposal, the Defendants would be required to turn them over to the Plaintiff even though (1) such statements are not publicly available through the criminal case; (2) the constitutional issues relating to suppression—including voluntariness—have not been litigated in the criminal case; and (3) public disclosure could compromise the defense.

criminal matter. Therefore, by definition, the Plaintiff can wait – without suffering identifiable harm – for *all* discovery until the conclusion of the criminal matter.

The Defendants face criminal prosecution for felony charges that carry a maximum possible sentence of more than 30 years. They do not seek to avoid the ‘day of reckoning’ that Plaintiff presumptuously implies can only be met in this civil litigation. Rather, Defendants seek only to ensure that the criminal prosecution now underway is conducted in a fair and just manner with the procedural protections due to all criminal defendants, so they can finally be exonerated. Ongoing civil discovery jeopardizes those very protections. For all of these reasons, the matter should be stayed.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants’ Motion to Stay, pending resolution of the related criminal proceedings.

Respectfully submitted,

/s/ Craig D. Roswell

Craig D. Roswell (DC Bar # 433406)

Niles, Barton & Wilmer, LLP

111 S. Calvert Street, Suite 1400

Baltimore, Maryland 21202

(410) 783-6341

(410) 783-6486 (facsimile)

cdroswell@nilesbarton.com

Counsel for Defendant Joseph Price

/s/ David Schertler

David Schertler (DC Bar # 367203)
Robert Spagnoletti (DC Bar # 446462)
(Signed on behalf of Craig D. Roswell
With permission from David Schertler)

SCHERTLER & ONORATO LLP

601 Pennsylvania Ave., N.W.

North Building, 9th Floor

Washington, D.C. 20004

Telephone: 202-628-4199

Facsimile: 202-628-4177

Email: dschertler@schertlerlaw.com

Counsel for Defendant Dylan M. Ward

/s/ Larissa N. Byers

Larissa N. Byers (DC Bar # 472431)

(Signed on behalf of Craig D. Roswell

With Permission from Larissa N. Byers)

The Law Offices of Frank F. Daily, P.A.

11350 McCormick Road

Executive Plaza III, Suite 704

Hunt Valley, MD 21031

Telephone: 410-584-9443

Facsimile: 410-584-9619

Counsel for Defendant Victor Zaborsky