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| Phan v City of New York |
| 2012 NY Slip Op 30530(U) |
| March 2, 2012 |
| Supreme Court, New York County |
| Docket Number: 100139/11 |
| Judge: Barbara Jaffe |
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JAFFE
BARBARA JAFFE
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 100139/2011

PHAN, STEVEN

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

STAY PROCEEDINGS

CAL #148

PART 5

stice

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED | |
|-----------------|---|
| _____ | 1 |
| _____ | 2 |
| _____ | 3 |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAR 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/2/12
MAR 02 2012

BARBARA JAFFE
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
STEVEN PHAN a/k/a LAT TAI PHAN,

Plaintiff,

Index No. 100139/11

Motion Subm.: 11/29/11
Motion Seq. No.: 001

-against-

DECISION & ORDER

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, IESHEAL ARNOLD, WILLIAM
ROBBINS and DYSON WILLIAMS,

Defendants.

FILED

MAR 06 2012

-----X
BARBARA JAFFE, JSC:

NEW YORK
COUNTY CLERK'S OFFICE

For plaintiff:
Steven E. Millon, Esq.
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For City defendants:
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Corporation Counsel
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For Arnold/Robbins:
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Montfort, Healy *et al.*
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By notice of motion dated May 16, 2011, defendants City of New York and the New York City Police Department (City, collectively) move pursuant to CPLR 2201 and 3101 for an order staying the trial of the instant action pending the trial of a criminal action against defendants Robbins and Williams. Plaintiff and defendants Arnold and Robbins oppose.

I. PERTINENT BACKGROUND

On June 22, 2010, plaintiff was allegedly injured when a motor vehicle owned by Abraham Feinberg and operated by Amy Feinberg collided with a vehicle owned by defendant Arnold and driven by either Robbins or Williams, who were then allegedly attempting to escape arrest for armed robberies they had committed hours before the accident. Plaintiff was a pedestrian; another pedestrian was killed. Following the accident, Robbins and Williams were

indicted on charges related to the accident, including vehicular homicide. (Affirmation of John R. Urban, ACC, dated May 13, 2011 [Urban Aff.], Exh. A). At oral argument, the parties disclosed that the next appearance date for the criminal trial is September 14, 2012, when a trial date will be set.

II. CONTENTIONS

City argues that permitting the civil action to proceed with discovery and a trial will interfere with and likely jeopardize the criminal prosecution as both arise from the same events, that discovery in the civil action may compromise the criminal case, and that Robbins and Williams may assert their fifth amendment rights against self-incrimination and thereby prejudice City's defense. City also contends that evidence in the criminal prosecution is not available to it while the prosecution pends, thereby depriving them of a competent and complete defense. (Urban Aff.).

Plaintiff asserts that City's claim that the criminal prosecution will be jeopardized by permitting the civil action to go forward is fatally conclusory, and that a stay need not be granted even if a defendant is likely to exercise his fifth amendment right. (Affirmation of Steven E. Millon, Esq., dated June 8, 2011).

Robbins and Williams do not object to staying the trial in this action until the criminal trial has ended, but object to staying discovery to the extent of any documents that have already been produced in the criminal action or any other discovery which will not jeopardize the criminal action. Robbins's counsel avers that Robbins will assert his fifth amendment right during his deposition while the criminal action is pending. (Affirmation of James Michael Murphy, Esq., dated June 14, 2011).

III. ANALYSIS

Pursuant to CPLR 2201, a court may grant a stay of a proceeding in a proper case and upon such terms as may be just. The factors to be considered in determining whether to grant a stay of a civil action pending a criminal proceeding include: (1) avoiding the risk of inconsistent adjudications; (2) duplication of proof; and (3) potential waste of judicial resources. (*Britt v Intl. Bus Svces., Inc.*, 255 AD2d 143 [1st Dept 1998]).

While an additional and compelling factor is whether a defendant intends to invoke his or her right against self-incrimination (*Britt*, 255 AD2d at 143), it is nonetheless well-settled that a party's invocation of the right against self-incrimination is generally an insufficient basis upon which to stay discovery in a civil action. (*Fortress Credit Opportunities I LP v Netschi*, 59 AD3d 250 [1st Dept 2009]; *Access Capital, Inc. v DeCicco*, 302 AD2d 48 [1st Dept 2002]; *Stuart v Tomasino*, 148 AD2d 370 [1st Dept 1989]). The determination whether to stay a civil action pending resolution of a related criminal action is directed to the court's sound discretion. (*Id.*; *Britt, Inc.*, 255 AD2d at 144).

Here, City fails to specify how proceeding with discovery and a trial in the civil action will result in inconsistent adjudications, duplication of proof, or a potential waste of judicial resources. (*See Matter of Kopf*, 169 AD2d 428 [1st Dept 1991] [court properly denied stay as government and corporate respondents failed to establish that permitting hearing and arbitration to proceed would jeopardize criminal investigation]).

Nor has City demonstrated how Robbins's assertion of his privilege against self-incrimination will prejudice its defense here, having failed to show that Robbins's testimony is critical and necessary to its defense. (*Compare Britt*, 255 AD2d at 143 [where negligence action

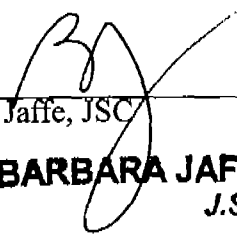
brought against defendants bus owner and driver, and driver faced criminal charges, action stayed pending resolution of criminal action as owner established that driver would invoke fifth amendment right and that driver's testimony was critical and necessary to owner's defense)).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants City of New York and New York City Police Department's motion for a stay is denied.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 2, 2012
New York, New York

MAR 02 2012

FILED

MAR 06 2012

NEW YORK
COUNTY CLERK'S OFFICE