



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: April 23, 2004
Decided: August 20, 2004

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Re: *Advanced Litigation, LLC v. Herzka, et al.*,
Civil Action No. 19789-NC

Dear Counsel:

Before the Court is a motion by Herzka and Poland (“Defendants”), submitted in a letter dated April 23, 2004, to reconsider an order staying this litigation entered on April 6, 2004.

Lieutenant Scott Christensen (“Christensen”), a counterclaim defendant and the former “sole member and manager”¹ of Advanced Litigation, LLC (the “Company”), in a

¹ Plaintiff’s Answering Brief in Opposition to Defendants’ Motion for Summary Judgment (“PAB”) at 3.

letter to the Court dated March 12, 2004, sought a stay of the proceedings in this case based on his having entered active duty for Operation Iraqi Freedom on January 16, 2004. The Court wrote to counsel for the parties inquiring whether anyone opposed the motion. When no opposition was filed by the date specified in the letter to counsel, the Court entered an order granting the requested stay. Thereafter, Defendants filed their request that the Court reconsider its prior order and vacate the stay.

The law governing whether a stay would be appropriate under these circumstances is the Servicemembers Civil Relief Act (“SCRA”).² Section 522(b)(1) of the SCRA provides:

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a)³ is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days

Section 522(b)(2) specifies the requirements for such an application by a servicemember.

An application for a stay under paragraph (1) shall include the following:

- (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's

² 50 U.S.C. app. §§ 501-596.

³ 50 U.S.C. app. § 522(a) provides: “Applicability of section. This section applies to any civil action or proceeding in which the defendant at the time of filing an application under this section -- (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding.”

ability to appear and stating a date when the servicemember will be available to appear.

- (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

Christensen stated that he entered active duty on January 16, 2004 for Operation Iraqi Freedom and noted his expected return date as July 2005. Obviously, his attention is demanded elsewhere, and that fact will materially affect communication with regard to this litigation. Christensen's service in Iraq impedes his ability to effectively conduct his defense to the counterclaims filed by Herzka. Furthermore, the Court notes that at the time he began active duty in Iraq, Christensen was engaged in a fee dispute with his former counsel and had not yet obtained new representation. Consequently, if the stay were to be lifted, his absence and likely inattention would materially affect his ability to defend against the counterclaims.

Because Christensen did not submit a letter from a commanding officer reporting that his current military duty prevents his appearance in this case, his application is technically deficient under § 522(b)(2)(B). The Court, however, may on its own motion grant a stay so long as the servicemember is a party to the proceeding.⁴ In view of the

⁴ 50 U.S.C. app. § 522(b)(1).

circumstances described above, the Court concludes that the stay should remain in effect with respect to the counterclaim.

Notwithstanding that ruling, the Court arguably could proceed with the motion for summary judgment on the original claim. Christensen is not a party to the dispute between the Company and Defendants,⁵ and the motion for summary judgment was fully briefed before he was deployed on January 16. To proceed with the summary judgment piecemeal, however, would be inefficient because the counterclaim to which Christensen is a defendant and other pending motions in which he is likely to have an interest would remain stayed, and there is likely to be significant overlap among the issues related to the claims subject to the motion for summary judgment and the counterclaims against Christensen. Moreover, it is reasonable to expect that Christensen's presence might assist the Company of which he is the former sole member and manager in preparing for oral argument on Defendants' motion for summary judgment.

Therefore, although it may not be required to do so under the SCRA, the Court will maintain the stay with respect to the entire action, rather than decide the original claim separately, when a person significantly interested in this litigation is not present or represented due to military service.

⁵ Although the SCRA provides for a stay of proceedings to which an overseas servicemember is a party, it does not require a stay when a servicemember who is a witness is stationed overseas. *Moulder v. Steele*, 162 S.E.2d 785, 786 (Ga. Ct. App. 1968); *Welsh v. Mercy Hospital*, 151 P.2d 17, 22 (Cal. Ct. App. 1944).

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Defendant's motion to lift the stay ordered on April 6, 2004 is DENIED. The parties shall promptly notify the Court when Lieutenant Christensen returns from his military service.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

lef

cc: LT Scott Christensen
2654 Bellows Drive
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