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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE)
COMMISSION,)
)
Plaintiff,)
)
v.)
)
SECURE INVESTMENT SERVICES, INC.;)
AMERICAN FINANCIAL SERVICES, INC.;)
LYNDON GROUP, INC.; KIMBERLY)
SNOWDEN; and LINDA NEUHAUS, in her)
capacity as the administrator and)
personal representative of the)
estate of Donald Neuhaus,)
)
Defendants.)
_____)

2:07-cv-01724-GEB-CMK

TENTATIVE RULING ISSUED IN
ADVANCE OF APRIL 6, 2009
HEARING

On March 4, 2009, Defendant Kimberly Snowden ("Snowden") filed a motion to stay the pending civil action against her until resolution of a parallel criminal action, arguing she cannot respond to Plaintiff's pending motion for summary judgment without waiving her Fifth Amendment privilege against self-incrimination. Plaintiff opposes the motion, arguing Snowden's delay in filing the motion shows her Fifth Amendment rights are only marginally implicated in the civil case; and that the other factors considered in determining whether

1 this action should be stayed also weigh against granting Snowden's
2 motion.

3 When deciding a motion to "stay civil proceedings in the
4 face of a parallel criminal proceeding,"¹

5 the decisionmaker should consider the extent to
6 which the defendant's [F]ifth [A]mendment rights
7 are implicated. In addition, the decisionmaker
8 should generally consider the following factors:
9 (1) the interest of the plaintiffs in proceeding
10 expeditiously with this litigation or any
11 particular aspect of it, and the potential
12 prejudice to plaintiffs of a delay; (2) the burden
13 which any particular aspect of the proceedings may
14 impose on defendants; (3) the convenience of the
15 court in the management of its cases, and the
16 efficient use of judicial resources; (4) the
17 interests of persons not parties to the civil
18 litigation; and (5) the interest of the public in
19 the pending civil and criminal litigation.

20 Keating, 45 F.3d at 324-5 (internal quotations and citations omitted).

21 Extent to Which Snowden's Fifth Amendment Rights are Implicated

22 Snowden contends since the civil complaint and criminal
23 indictment are based on "substantially similar, if not identical,"
24 factual circumstances, she cannot respond to Plaintiff's summary
25 judgment motion without waiving her Fifth Amendment rights. (D. Mot.
26 at 4:11.) Plaintiff counters Snowden's delay in filing the motion
27 shows her "Fifth Amendment rights are only marginally implicated" and
28 that her motion is a disingenuous attempt to "head off a summary
judgment motion at the eleventh hour." (Pl. Opp'n at 4:21-23.)
Plaintiff contends the "stated basis for [Snowden's 'highly untimely'

1 "The Constitution does not ordinarily require a stay of civil
proceedings pending the outcome of criminal proceedings. In the absence
of substantial prejudice to the rights of the parties involved,
simultaneous parallel civil and criminal proceedings are unobjectionable
under [Ninth Circuit] jurisprudence." Keating v. Office of Thrift
Supervision, 45 F.3d 322, 324 (9th Cir. 1995) (internal quotations and
citations omitted).

1 stay] motion . . . has been apparent and available to her since August
2 2007.” (Id. at 1:24; 2:13-15.) Snowden rejoins her delay was based
3 on “ongoing attempts” at settlement with Plaintiff, which Snowden
4 contends were unsuccessful because the terms were unfavorable to her
5 Fifth Amendment rights. (D. Reply at 1:26-27.)

6 Snowden was indicted in the criminal matter on August 22,
7 2007, and Plaintiff filed its complaint in this civil action on August
8 23, 2007. However, Snowden delayed filing her stay motion until March
9 4, 2009, and noticed it for hearing on April 6, 2009, which is after
10 the March 9, 2009 last law and motion hearing date prescribed in the
11 Scheduling Order filed on June 6, 2008. Plaintiff’s summary judgment
12 motion sub judice was timely noticed for hearing on March 9, 2009.
13 Snowden failed to timely oppose the motion and indicates that her stay
14 motion is her untimely response to Plaintiff’s summary judgment
15 motion. However, Snowden concurred in a Joint Status Report filed on
16 May 21, 2008, in which the parties represented that they anticipated
17 being prepared for trial in March 2009; the June 6, 2008 Scheduling
18 Order issued in accordance with this Joint Status Report. Therefore,
19 Snowden should have been prepared for Plaintiff to file and notice a
20 summary judgment motion before that trial date.

21 At [the] time [the Scheduling Order issued,
22 Snowden] had been under indictment for more than
23 nine months and should have been aware of the
24 Fifth Amendment dilemma [s]he might face. Yet,
25 rather than seek a stay of the [civil action] at
26 that time, [Snowden] waited more than [eight]
27 months after issuance of the [S]cheduling Order
28 and [more than eighteen months] after [her]
indictment before doing so. In the end, [Snowden]
waited until only [one] week[] before the
scheduled [summary judgment] hearing to raise
[her] concerns about the parallel proceedings and
[her] Fifth Amendment privilege. Given
Plaintiff’s dilatory behavior, [it is reasonable
to believe she] intentionally delayed filing [her]
motion to stay for strategic reasons.

1
2 In re Anderson, 349 B.R. 448, 459 (E.D. Va. 2006) (denying a motion to
3 stay as untimely, *inter alia*, when the defendant delayed more than
4 three months after issuance of the Scheduling Order and almost one
5 year after indictment to seek a stay in the civil action).

6 Plaintiff argues a stay in the civil action will not assist
7 Snowden in effectively opposing the summary judgment motion as she
8 contends because Snowden should be barred from presenting certain
9 evidence in opposition to this motion. Plaintiff contends Snowden is
10 barred from presenting testimonial evidence in opposition to the
11 motion because Snowden's invocation of her Fifth Amendment at her
12 December 11, 2008 deposition precludes her from presenting this
13 evidence. (Pl. Summary Judgment Motion at 2-3:25-1.)

14 Trial courts generally will not permit a party to
15 invoke the privilege against self-incrimination
16 with respect to deposition questions and then
17 later testify about the same subject matter at
18 trial [or in presenting evidence in opposition to
19 a summary judgment motion]. The Federal Rules of
20 Civil Procedure contemplate full and equal
21 discovery so as to prevent surprise, prejudice and
22 perjury []. Because the privilege may be
23 initially invoked and later waived at a time when
24 an adverse party can no longer secure the benefits
25 of discovery, the potential for exploitation is
26 apparent. The rights of the other litigant must
27 be taken into consideration when one party invokes
28 the Fifth Amendment during discovery, but on the
29 eve of trial [or a summary judgment hearing]
30 changes his mind and decides to waive the
31 privilege. At that stage, the adverse party --
32 having conducted discovery and prepared the case
33 without the benefit of knowing the content of the
34 privileged matter -- would be placed at a
35 disadvantage. The opportunity to combat the newly
36 available testimony might no longer exist, a new
37 investigation could be required, and orderly trial
38 preparation could be disrupted.

27 Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910 (9th Cir.
28 2008). Discovery in this action closed on January 9, 2009. "By

1 hiding behind the protection of the Fifth Amendment as to [her]
2 contentions [during discovery], [Snowden] gives up the right to prove
3 them. By [her] initial obstruction of discovery and [] subsequent
4 assertion of the privilege, [Snowden] has forfeited the right to offer
5 evidence disputing the [P]laintiff's evidence or supporting [her] own
6 denials." SEC v. Benson, 657 F. Supp. 1122, 1129 (S.D.N.Y.
7 1987) (barring a defendant from presenting evidence in opposition to a
8 summary judgment motion when he had previously invoked his Fifth
9 Amendment rights) (cited in SEC v. Colello, 139 F.3d 674, 677-8 (9th
10 Cir. 1998)).

11 Another factor considered in determining the extent to which
12 a defendant's Fifth Amendment rights are implicated is whether the
13 defendant has already provided sworn testimony which is relied upon by
14 the plaintiff. See Federal Sav. & Loan Ins. Corp. v. Molinaro, 889
15 F.2d 899, 903 (9th Cir. 1989) (concluding, *inter alia*, that because a
16 defendant had already provided sworn testimony which was the basis for
17 plaintiff's summary judgment motion, the burden on defendant's Fifth
18 Amendment rights was "negligible"). During Plaintiff's investigation
19 of this action, and preceding its filing of the instant action, it
20 issued a subpoena for Snowden to appear at an investigatory
21 examination. On May 14, 2007, Snowden testified under oath before
22 Plaintiff and did not invoke her Fifth Amendment rights. (Eme Decl. ¶
23 4, Ex. 3) Plaintiff relies on this testimony in support of its
24 summary judgment motion.

25 Plaintiff further argues that the other factors in
26 considering a stay motion weigh against granting Snowden's motion.²

27
28 ²The other factors considered, including the burden on the defendant
(continued...)

1 Potential Prejudice to Plaintiff

2 Plaintiff argues it has a "strong interest in promptly
3 obtaining" the equitable relief it seeks in its summary judgment
4 motion, which includes a permanent injunction enjoining Snowden from
5 committing future violations of the Securities and Exchange Act and an
6 order requiring Snowden to disgorge the profits she made in violation
7 of these laws. (Pl. Opp'n at 4:26.) Plaintiff argues it would be
8 "unnecessarily prejudice[d]" in obtaining this relief if a stay were
9 to be granted. (Id. at 5:2.)

10 Interests of Non-Parties and the Public at Large

11 Plaintiff also argues a stay is counter to the public
12 interest as hundreds of non-parties invested millions of dollars into
13 the Ponzi scheme involved in this matter. (Id. at 5:19-20.) The
14 public at large also has an interest in prompt resolution of cases
15 involving violations of the Securities and Exchange Act. See Keating,
16 45 F.3d at 326 (stating that granting a stay, and thus delaying
17 resolution of a case which was a matter of public interest, "would
18 have been detrimental to public confidence").

19 [T]he Supreme Court[, in holding that the 'federal
20 government may pursue civil and criminal actions
21 [] simultaneously,'] observed that prompt
22 investigation and enforcement both civilly and
23 criminally [is] sometimes necessary in order to
24 protect the public interest and that deferring or
25 foregoing either civil or criminal prosecutions
26 could jeopardize that interest . . . This
27 principle is fully applicable when [Plaintiff] and
28 Justice Department each seek to enforce the
federal securities laws through separate civil and
criminal actions."

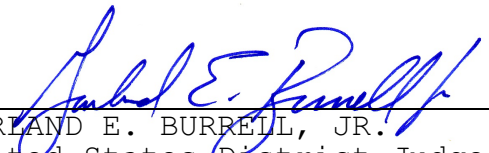
27 ²(...continued)

28 and the convenience to the court, have previously been addressed in
discussing the burden on Snowden's Fifth Amendment rights and the
untimeliness of her stay motion.

1 SEC v. First Financial Group, Inc., 659 F.2d 660, 667 (5th Cir. 1981).

2 The foregoing discussion reveals that Snowden has not
3 sustained her burden of showing that her Fifth Amendment rights
4 outweigh the other factors involved with determination of whether to
5 grant a stay motion. See Molinaro, 889 F.2d at 903 (concluding the
6 burden on defendant's fifth amendment rights was outweighed by the
7 other factors considered in determining whether to grant a stay).
8 Therefore, Snowden's motion to stay is denied.

9 Dated: April 3, 2009

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13 GARLAND E. BURRELL, JR.
14 United States District Judge
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