

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

SECURITIES AND EXCHANGE)
COMMISSION,)
)
Plaintiff,) 2:07-cv-01724-GEB-CMK
)
v.) ORDER¹
)
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.)
_____)

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

¹This matter was heard on April 6, 2009. This Order adopts the Tentative Ruling filed on April 3, 2009 with the following modification: footnote 2, at 2:4 of the Tentative Ruling, has been removed.

1 her Fifth Amendment rights are only marginally implicated in the civil
2 case; and that the other factors considered in determining whether
3 this action should be stayed also weigh against granting Snowden's
4 motion.

5 When deciding a motion to "stay civil proceedings in the
6 face of a parallel criminal proceeding,"

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

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

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

24 Snowden contends since the civil complaint and criminal
25 indictment are based on "substantially similar, if not identical,"
26 factual circumstances, she cannot respond to Plaintiff's summary
27 judgment motion without waiving her Fifth Amendment rights. (D. Mot.
28 at 4:11.) Plaintiff counters Snowden's delay in filing the motion
shows her "Fifth Amendment rights are only marginally implicated" and
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'
stay] motion . . . has been apparent and available to her since August
2007." (Id. at 1:24; 2:13-15.) Snowden rejoins her delay was based
on "ongoing attempts" at settlement with Plaintiff, which Snowden

1 contends were unsuccessful because the terms were unfavorable to her
2 Fifth Amendment rights. (D. Reply at 1:26-27.)

3 Snowden was indicted in the criminal matter on August 22,
4 2007, and Plaintiff filed its complaint in this civil action on August
5 23, 2007. However, Snowden delayed filing her stay motion until March
6 4, 2009, and noticed it for hearing on April 6, 2009, which is after
7 the March 9, 2009 last law and motion hearing date prescribed in the
8 Scheduling Order filed on June 6, 2008. Plaintiff's summary judgment
9 motion sub judice was timely noticed for hearing on March 9, 2009.
10 Snowden failed to timely oppose the motion and indicates that her stay
11 motion is her untimely response to Plaintiff's summary judgment
12 motion. However, Snowden concurred in a Joint Status Report filed on
13 May 21, 2008, in which the parties represented that they anticipated
14 being prepared for trial in March 2009; the June 6, 2008 Scheduling
15 Order issued in accordance with this Joint Status Report. Therefore,
16 Snowden should have been prepared for Plaintiff to file and notice a
17 summary judgment motion before that trial date.

18 At [the] time [the Scheduling Order issued,
19 Snowden] had been under indictment for more than
20 nine months and should have been aware of the
21 Fifth Amendment dilemma [s]he might face. Yet,
22 rather than seek a stay of the [civil action] at
23 that time, [Snowden] waited more than [eight]
24 months after issuance of the [S]cheduling Order
25 and [more than eighteen months] after [her]
26 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.

27 In re Anderson, 349 B.R. 448, 459 (E.D. Va. 2006) (denying a motion to
28 stay as untimely, *inter alia*, when the defendant delayed more than

1 three months after issuance of the Scheduling Order and almost one
2 year after indictment to seek a stay in the civil action).

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

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

24 Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910 (9th Cir.
25 2008). Discovery in this action closed on January 9, 2009. "By
26 hiding behind the protection of the Fifth Amendment as to [her]
27 contentions [during discovery], [Snowden] gives up the right to prove
28 them. By [her] initial obstruction of discovery and [] subsequent

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

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

22 Plaintiff further argues that the other factors in
23 considering a stay motion weigh against granting Snowden's motion.²
24
25

26
27 ²The other factors considered, including the burden on the defendant
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 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").

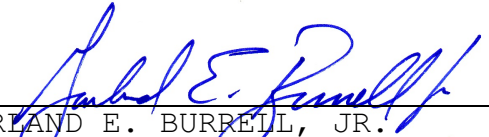
19 [T]he Supreme Court[, in holding that the 'federal
20 government may pursue civil and criminal actions
21 [] simultaneously,'] observed that prompt
22 investigation and enforcement both civilly and
23 criminally [is] sometimes necessary in order to
24 protect the public interest and that deferring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

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

27 The foregoing discussion reveals that Snowden has not
28 sustained her burden of showing that her Fifth Amendment rights
outweigh the other factors involved with determination of whether to

1 grant a stay motion. See Molinaro, 889 F.2d at 903 (concluding the
2 burden on defendant's fifth amendment rights was outweighed by the
3 other factors considered in determining whether to grant a stay).
4 Therefore, Snowden's motion to stay is denied.

5 Dated: April 9, 2009

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7 
8 GARLAND E. BURRELL, JR.
United States District Judge