CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA v. SERVIN et al Doc. 22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 09-CV-02014-RWR
JACQUES SERVIN, et al.	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR STAY OF DISCOVERY AND RULE 26 DISCLOSURES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE RELIEF SOUGHT BY DEFENDANTS IS APPROPRIATE GIVEN THE FIRST AMENDMENT INTERESTS AT STAKE. 1

  A. Courts Often Limit Or Stay Discovery To Avoid Undue Burdens On Free Speech. 2

  B. There Is No Ongoing Harm To The Plaintiff. 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bon Air Hotel, Inc. v. Time, Inc.,
426 F.2d 858 (5th Cir. 1970) 3

Herbert v. Lando,
441 U.S. 153 (1979) 2

Institut Pasteur v. Chiron Corp.,
315 F.Supp.2d 33 (D.D.C. 2004) 2

McBride v. Merrell Dow & Pharm. Inc.,
717 F.2d 1460 (D.C. Cir. 1983) 3

Moldea v. New York Times Co.,
137 F.R.D. 1 (D.D.C. 1990)..3, 4

PCH Mut. Ins. Co., Inc. v. Casualty & Sur., Inc.,
569 F.Supp.2d 67 (D.D.C. 2008) 2

Washington Post Co. v. Keogh,
365 F.2d 965 (1966) 3

White v. Fraternal Order of Police,
909 F.2d 512 (D.C. Cir. 1990) 2, 3, 4

Zubulake v. UBS Warburg LLC,
229 F.R.D. 422 (S.D.N.Y. 2004) 4

STATE CASES

Maressa v. New Jersey Monthly,
89 N.J. 176, 445 A.2d 376 (1982)...3

Thomas v. Quintero,
126 Cal. App. 4th 635 (Cal. App. 1st Dist. 2005)..3

RULES

Fed. R. Civ. P. 26 1

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. 1 .... *passim*

ARGUMENT

I. THE RELIEF SOUGHT BY DEFENDANTS IS APPROPRIATE GIVEN THE FIRST AMENDMENT INTERESTS AT STAKE.

Defendants Jacques Servin, Igor Vamos, Support and Commitment, Inc., David Seivers, Morgan Goodwin, Sarah Murphy, and John and Jane Does Nos. 1-20 (collectively "Defendants") hereby reply to Plaintiff Chamber of Commerce of the United States of America's ("Plaintiff" or the "Chamber") opposition to Defendants' January 5, 2010 Motion for a Stay of Discovery and a Stay of the Parties' Obligations under Fed. R. Civ. P. 26, pending the Court's ruling on Defendants' Motion to Dismiss.

Plaintiff's principal argument against a stay of discovery is that it does not believe Defendants' Motion to Dismiss will succeed. That argument is, of course, inapposite – the question at hand is whether a stay is appropriate while the Court considers whether Plaintiff has stated a cause of action. To avoid burdening the Court with duplicative papers, Defendants will not argue the merits of the dismissal motion here, but respectfully refers the Court to their memorandum and forthcoming reply in support of that motion. [1]

Setting aside its high-flown rhetoric against dismissal, Plaintiff's Opposition does little to rebut the actual motion at hand – a simple request to stay discovery and Rule 26 disclosures in order to protect Defendants' free speech rights and avoid the waste of party resources. Such a stay is neither unusual under the circumstances nor will it prejudice the Plaintiff. The discretionary procedural relief Defendants seek here is limited in nature and entirely appropriate in light of the constitutional interests at issue. The stay requested likely would be relatively brief, as Defendants have only requested that discovery and Rule 26 disclosures be stayed

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[1] If Plaintiff's reasoning is correct and this procedural motion rises or falls on the merits of Defendants' Motion to Dismiss, then this procedural motion effectively becomes a litmus test for the dispositive motion, burdening the Court with deciding the merits before they have been fully briefed and argued.

pending the motion to dismiss. Given that Plaintiff has offered no reasonable basis to conclude that a short delay would prejudice its case, the Constitution and common sense support a short delay in discovery.

A. Courts Often Limit Or Stay Discovery To Avoid Undue Burdens On Free Speech.

"[T]he Court has extremely broad discretion in controlling discovery, and the decision on whether to stay discovery is within the sound discretion of the district court." *PCH Mut. Ins. Co., Inc. v. Casualty & Sur., Inc.*, 569 F.Supp.2d 67, 78 (D.D.C. 2008); *see also Institut Pasteur v. Chiron Corp.*, 315 F.Supp.2d 33, 37 (D.D.C. 2004) (internal citations omitted) ("'It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.'"). Of course, "a pending motion to dismiss," by itself, does not automatically "warrant a stay of discovery." Plaintiff's Opposition to Defendants' Motion for a Stay of Discovery ("Opp. Mem.") at ¶ 13. Such a stay *is* warranted, however, when the litigation targets political speech and discovery would necessarily exacerbate the potential free speech harms.

In supervising discovery, "a district court has a duty to consider First Amendment interests as well as the private interests of the Plaintiff." *Herbert v. Lando*, 441 U.S. 153, 178 (1979) (Powell, J., concurring). In particular, it is appropriate for courts to defer discovery issues to reduce First Amendment concerns where the resolution of issues by motion "might reduce the need for the material demanded." *Id.* at 180 n.4. *See also, e.g., White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (affirming order staying discovery in libel case pending resolution of summary judgment motion). The discovery process necessarily burdens defendants by forcing them to disclose otherwise private facts and devote time and energy to responding to invasive questions. Where, as here, there is no legitimate basis for the underlying

lawsuit, discovery is necessarily harassing. And as the D.C. Circuit noted in *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (1966), "[u]nless persons … desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors [a]nd to this extent debate on public issues will become less uninhibited, less robust, and less wide-open." *See also Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 864 (5th Cir. 1970) (quoting same).

Indeed, courts have recognized the potential chilling effects of discovery in free speech cases. *See, e.g., McBride v. Merrell Dow & Pharm. Inc.,* 717 F.2d 1460, 1466 (D.C. Cir. 1983) ("Even if many actions [involving speech] fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship . . . . [Such] suits . . . should be controlled so as to minimize their adverse impact on" First Amendment freedoms); *Moldea v. New York Times Co.*, 137 F.R.D. 1, 2 (D.D.C. 1990) (in light of "significant First Amendment issues" raised, court granted stay of discovery pending ruling on summary judgment motion brought early in the litigation); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 188, 445 A.2d 376 (1982) (in the press context, "[d]iscovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas . . ."); *White*, 909 F.2d at 517.[2]

Plaintiff offers little against the numerous cases supporting a stay. Plaintiff's mischaracterizes this Court's decision in *Moldea* by obscuring the result. While it is true that the *Moldea* Court noted that "significant First Amendment issues raised in [that] case . . . standing alone would not automatically entitle defendant to a stay of discovery," 137 F.R.D. at 1, the various factors at play in that case, as here, supported a stay in light of the constitutional interests

[2] In addition to case law, this principle is also embodied in some states' anti-SLAPP (strategic lawsuit against public participation) statutes. *See*, *e.g.*, *Thomas v. Quintero*, 126 Cal. App. 4th 635, 650 (Cal. App. 1st Dist. 2005) (citing Cal. Code Civ. Proc. § 425.16(g)).

involved. There, "[t]he gravamen of the" defendant's dispositive motion was "its argument that the Court must determine as a matter of law whether the words or phrases contained in the book review are sufficiently factual to be susceptible of being proved true or false." *Id.* The Court found that the plaintiff had "not persuasively shown in its opposition to this motion that such a determination requires scrutiny beyond the challenged publication." *Id.* Here, as in *Moldea*, the majority of the facts are undisputed, and the Court must determine, as a matter of law, if Defendants' statements and actions are actionable. Plaintiff also argues incorrectly that in *White*, "the Court did not even raise the First Amendment or freedom of speech in upholding the stay of discovery." Opp. Mem. ¶ 10. But in that case, the causes of action were defamation and invasion of privacy, which have been governed by strict First Amendment limitations for 46 years. Therefore, the court's stay of discovery cannot be divorced from the essence of the case.

B. There Is No Ongoing Harm To The Plaintiff.

Plaintiff has offered no credible basis for its claim that a delay would prejudice its case. Plaintiff charges that "Defendants have expressly refused to cease their wrongful conduct," Opp. Mem. at ¶ 6, but declines to explain what such conduct might be. The satirical press conference is long over, and the domain noted in Plaintiff's complaint, www.chamber-of-commerce.us, is no longer registered to any Defendant or any entity or person related to any Defendant.

As for Plaintiff's purported concerns about preservation, Defendants and Defendants' counsel are well aware that "[t]he authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004). It would, of course, be both unethical and illegal for either Defendants or Defendants' counsel to knowingly allow the spoliation of relevant evidence. Thus, Plaintiff need not "specifically request[] assurances that Defendants would preserve evidence" – and Defendants need not respond to such insulting requests. Opp.

Mem. ¶ 20. Defendants and Defendants' counsel are properly abiding by all legal and ethical guidelines and preserving all relevant evidence to the best of their knowledge and ability.

CONCLUSION

This case presents exactly the circumstance in which a stay of discovery is necessary and appropriate. Like many artists, writers and activists before them, Defendants used parody and satire to spark debate and engage in important political discourse. The cases cited *supra* and in Defendants' initial moving papers make clear that discovery in a case where such elemental First Amendment rights are at stake is not to be undertaken lightly and requires judicial supervision. Plaintiff can identify no prejudice that would result from holding off the disclosure procedures until Defendants' Motion to Dismiss is decided. Given the substantial arguments Defendants have set forth in those proceedings and the significant harm to First Amendment freedoms that discovery would impose, Defendants respectfully request that the limited stay they request be granted.

Dated this 1st day of February, 2010.

Respectfully submitted,

/s/ Robert Corn-Revere

Robert Corn-Revere (D.C. Bar No. 375415)
bobcornrevere@dwt.com
Lisa B. Zycherman (D.C. Bar No. 495277)
lisazycherman@dwt.com
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, D.C. 20006
(202) 973-4225
(202) 973-4499 fax

Bruce E. H. Johnson (*admitted pro hac vice)*
brucejohnson@dwt.com
Ambika Doran (*admitted pro hac vice)*
ambikedoran@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200

Seattle, WA 98101-3045
(206) 622-3150
(206) 757-7700 fax

Thomas R. Burke (*admitted pro hac vice)*
thomasburke@dwt.com
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
(415) 276-6500
(415) 276-6599 fax

Matthew Zimmerman (*pro hac vice pending)*
mattz@eff.org
Corynne McSherry (*pro hac vice pending*)
corynne@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 fax

CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that, on February 1, 2010, I electronically filed with the Clerk of the Court the foregoing Reply Memorandum using the CM/ECF system, and service was effected electronically pursuant to LCvR 5.4(d) on the parties listed below.

Michael John Mueller
Hunton & Williams LLP
1900 K Street, NW, Suite 1200
Washington, DC 20006
Email: mmueller@hunton.com

Gregory A. Beck
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Email: gbeck@citizen.org

Deepak Gupta
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Email: dgupta@citizen.org

/s/ Robert Corn-Revere
Robert Corn-Revere (D.C. Bar No. 375415)