

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 06-21748-CIV-MARTINEZ-BANDSTRA

MARK J. GAINOR and ELYSE GAINOR,

Plaintiffs,

vs.

SIDLEY, AUSTIN, BROWN & WOOD, LLP
et al.,

Defendants.

**CORRECTED¹ ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT
R. J. RUBLE'S MOTION TO STAY**

This CAUSE came before the Court upon Defendant R. J. Ruble's Motion to Stay - Pending his October 16 Criminal Trial (**D.E. No. 166**), filed on August 27, 2007. Defendant Ruble informs this Court that the U.S. Court for the Southern District of New York will try him on criminal charges relating to the same sort of tax evasion scheme alleged here. The district court for the Southern District of New York has scheduled Defendant Ruble's criminal trial for October 16, 2007. It is anticipated that the trial will continue for two months thereafter.

Defendant Ruble requests that this Court stay the civil proceedings against him lest discovery disclosures in the civil case compromise his defense in the criminal case and undermine his Fifth Amendment right against self-incrimination. Because the Plaintiffs in the instant case seek purely monetary relief for Defendant Ruble's part in an alleged tax shelter conspiracy, the

¹This Order corrects a typographic error in the Court's original Order of October 4, 2007 (D.E. No. 190), which appeared on the final page of the Order in a sentence that begins "[i]f this case is reopened, the Court will rest the trial date..." The word "rest" should have read "reset."

Defendant maintains that the proposed stay would not adversely impact the Plaintiff's claim for relief. Additionally, Defendant Ruble argues that discovery as to the other Defendants can proceed apace. The Defendant requests a stay through January 31, 2008.

The other Defendant who could be impacted by a stay in the proceedings against Defendant Ruble is Defendant Sidley Austin, Brown & Wood, LLP ("Sidley Austin"), Mr. Ruble's former employer. Defendant Sidley Austin has filed a Response to R. J. Ruble's Motion to Stay (D.E. No. 184). In its Response, Sidley Austin advises the Court that it does not oppose Defendant Ruble's motion provided that the stay does not affect the discovery cut-off date established by the Court. *See* (D.E. No. 184 at 2).

The Plaintiffs have also filed a Response to Defendant R. J. Ruble's Motion to Stay (D.E. No. 185) and they indicate that they do not oppose the proposed stay as long as they are not prejudiced by a postponement of discovery with respect to Defendant Ruble. The Plaintiffs assert that they need to obtain critical discovery from Defendant Ruble before they can try the case against Sidley Austin, who served as Defendant Ruble's employer at the time this dispute arose. Indeed, the Plaintiff's note that Sidley Austin denies knowledge of many of the Plaintiffs' allegations, insisting that Defendant Ruble has exclusive knowledge of such claims. Therefore, to avoid unfair prejudice, the Plaintiffs request that the Court continue the trial and extend the discovery cutoff date by two months — the period of time that Defendant Ruble anticipates his criminal trial will last.

Legal Standards

Federal courts have the discretion to stay civil proceedings pending the resolution of parallel criminal proceedings and have granted stays where the interests of justice seem to require

it. See *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970). Nevertheless, a stay in a civil case is an "extraordinary remedy." *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987). Thus, the Eleventh Circuit has mandated that a court must stay a civil proceeding pending resolution of a parallel criminal proceeding only where "special circumstances" require a stay "in the interests of justice." *United States v. Lot 5, Fox Grove, Alachua County*, 23 F.3d 359, 364 (11th Cir. 1994).

In deciding whether to stay civil proceedings against a defendant pending the resolution of his criminal trial, courts have considered the following factors: 1) the extent to which the issues in the criminal case overlap with those in the civil; 2) the status of the defendant's criminal case, particularly if he has been indicted; 3) the plaintiff's interests in an expeditious resolution of his case weighed against the prejudice that would result from further delay; 4) the burden on the defendant of having to mount two separate defenses; 5) the interests of the court in speedy resolution of disputes and in managing its calendar and 6) the interests of the public. *Trustees of Plumbers Pension Fund v. Transworld Mechanical, Inc.* 886 F. Supp 1134, 1139 (S.D.N.Y. 1995); *Walsh Sec. v. Cristo Prop. Mgmt.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998); *In re Adelphia Communs. Secs. Litig.*, No. 02-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 14, 2003); *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 74 (W.D.N.Y. 2003); *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003); *Ventura v. Brosky*, No. 06-22026, 2006 WL 3392207, at *1 (S.D. Fla. November 21, 2006).

The most compelling argument for a stay arises where a party under indictment faces a civil or administrative proceeding on the same matter. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368,1376-77 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). The rationale cited by courts in such cases is that:

[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.

Id. at 1377. Additionally, the risk of prejudice to the plaintiffs in the civil case is mitigated somewhat by the considerations of the Speedy Trial Act, which make it likely that a criminal case will be resolved without too much delay. *Transworld Mechanical*, 886 F. Supp. at 1339. By the same token, courts generally do not grant pre-indictment requests for a stay because the risk of self-incrimination is lower and uncertainty over the duration of a criminal proceeding is greater.

Id.

Applying these considerations to the case at bar, the Court finds that a stay is warranted here. In the instant case, Plaintiffs allege that Defendant Ruble, a former partner in the tax planning department at Sidley Austin, was involved in a conspiracy to market fraudulent tax shelter schemes as a legitimate, complex investment strategies, bilking the Plaintiffs out of more than 2 million, one hundred thousand dollars in fees. (D.E. No. 37-2 at 5, ¶¶ 22-24). More specifically, the Plaintiffs allege that the Defendants designed a "tax strategy" that Plaintiff Mark Gainor could employ to minimize the profits he earned through the sale of one of his companies. The strategy called for a complex series of transactions to generate apparent capital losses. (*Id.* at 5, ¶ 24). The Plaintiffs assert that Defendant Ruble drafted a legal opinion that touted the scheme as legitimate, despite notices from the Internal Service ("IRS") which advised that such schemes would be deemed abusive. (*Id.* at 7, ¶ 37; 8, ¶ 40). As a result, the Plaintiffs allege that the IRS later held them accountable for an additional 17 million dollars in taxes and interest. (*Id.* at 5, ¶ 24; *Id.* at 13, ¶ 64).

On August 24, 2005, federal prosecutors in New York indicted Defendant Ruble and 18 other persons with participating in a conspiracy to defraud the IRS through the marketing and implementation of fraudulent tax shelters. See *United States v. Stein, et al.*, (D.E. No. 1), Case No. 05-cr-00888 (LAK)-8 (S.D.N.Y., August 24, 2005). The case is scheduled for trial on October 16, 2007. See *id.*, at (D.E. No. 1172). Although the Government filed the Indictment against Defendant Ruble under seal, this Court has examined the charges contained therein, and is satisfied that they raise similar issues to those presented here. Moreover, because Defendant Ruble is under indictment for conspiracy involving fraudulent tax shelters, he faces the risk of self-incrimination if he has to participate in civil discovery by responding to interrogatories and appearing for depositions. See *Walsh Securities*, 7 F. Supp. 2d at 527 (noting that interrogatory and deposition discovery in a civil case exposed a defendant facing simultaneous criminal proceedings to a substantial risk of self-incrimination, even though the defendant had yet to be indicted).

Additionally, because the district court that will be presiding over Defendant Ruble's upcoming criminal trial has recently denied a motion to continue the trial, see (D.E. No. 166 at 16), the Court is confident that Defendant Ruble's criminal trial will proceed as scheduled on October 16, 2007. In view of this fact, it is unlikely that a stay would unduly prejudice the Plaintiffs by forcing them to defer their interests for an overly lengthy or indeterminate period of time.² Indeed, the Plaintiffs have indicated that they are not opposed to a stay provided that the

²The record indicates that the Plaintiffs only effected service of process upon Defendant Ruble on August 7, 2007. (D.E. No. 138). Defendant was served by means of an alias summons through the Office of the Secretary of State for the State of Florida. *Id.* Accordingly, the Plaintiffs have not had much opportunity to conduct discovery of Defendant Ruble to date.

Court extends the discovery deadline and continues the trial an appropriate period of time.

Similarly, because it is unlikely that the stay will need to be extended over an indeterminate or overly lengthy period, the Court finds that a stay would not undermine the Court's efforts to manage its caseload. Absent a stay, Defendant Ruble might have to assert his Fifth Amendment privileges in response to interrogatory requests and depositions, slowing the pace of discovery. Additionally, if a defendant in a civil suit is convicted of related charges in while the civil suit is stayed, that can provide a powerful incentive for the defendant to settle his civil suit, eliminating the need to litigate certain issues. *In re Adelpia*, 2003 WL 22358819, at *5. This can streamline litigation, offering obvious advantages for case management.

Finally, the Court finds that a stay poses no threat to the public interest. Courts have denied stays in civil cases that focus on regulatory efforts to halt the distribution of mislabeled drugs, *see Kordel*, 397 U.S. at 1, or to halt companies from disseminating misleading information to investors, *see Dresser*, 628 F.2d at 1377. However, this case does not involve these sorts of concerns. This case was filed by private parties who seek monetary relief for the damages incurred as a result of the Defendants' alleged conspiracy.

On balance, the Court finds that the facts of this case weigh in favor of a stay. To avoid piecemeal litigation of Plaintiffs' claims, the Court finds that the stay should apply to all the parties and not just to discovery involving Defendant Ruble. Accordingly, it is:

ORDERED and ADJUDGED that

1. Defendant R. J. Ruble's Motion to Stay - Pending his October 16 Criminal Trial (D.E. No. 166) is **GRANTED in part** and **DENIED in part**. It is GRANTED to the extent that Defendant Ruble requests a stay pending the resolution of his criminal trial. It is DENIED to the


extent that he requests the Court stay the case solely with respect to him and that the stay only be imposed through January 31, 2008.

2. This case is **STAYED until the conclusion of Defendant R. J. Ruble's October 16, 2007 criminal trial** before the federal district court in the Southern District of New York. The Plaintiffs are responsible for filing a motion to reopen this case at the appropriate time. Additionally, any party may petition the Court to lift or modify this stay if there is a change in the factors which the Court analyzed in granting Defendant Ruble's motion. If this case is reopened, the Court will reset the trial date and any pretrial deadlines that have not expired as of the date this Order is entered.

3. Plaintiffs' motion to extend discovery proceedings for 4 months as to Defendant Ruble alone and to continue trial (D.E. No. 185) is **DENIED as moot**.

4. The Clerk of the Court is **DIRECTED to CLOSE** this case for administrative purposes only.

DONE AND ORDERED in Chambers at Miami, Florida, October 9, 2007.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Bandstra
All Counsel of Record