MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 214

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, *et al.*,
Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*,
Defendants.

1:07-CV-953

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

NOW COME the Plaintiffs in the above-captioned matter, Ryan McFadyen, Matthew Wilson, and Breck Archer, and submit this Response in Opposition to Defendant City of Durham and all individual City Defendants'[1] Motion and Supporting Brief to Stay Proceedings [Documents #205 and 206].[2] Defendant City of Durham and all individual City Defendants are herein collectively referred to as the "Appealing Defendants." On May

[1] The individual City Defendants are Defendants Patrick Baker, Steven Chalmers, Ronald Hodge, Lee Russ, Beverly Council, Jeff Lamb, Michael Ripberger, David W. Addison, Mark D. Gottlieb, Benjamin W. Himan, and the City of Durham.

[2] Defendants Richard Clark, DNA Security, Inc., and Brian Meehan joined the City of Durham and all individual City Defendants' Motion to Stay Proceedings through its joinder filing on May 17, 2011 [Document #211]. Defendant Linwood Wilson also joined the filed Motion to Stay Proceedings filed by the City of Durham and all individual City Defendants' in his joinder filing on May 18, 2011 [Document #212]. This filing is to serve as Plaintiffs' response to these joinder Defendants as well as all of the non-City codefendants referred to as consenting to the stay of proceedings in the City of Durham and all individual City Defendants' Brief supporting their Motion to Stay Proceedings. Defs.' Br. Mot. to Stay 3.

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13, 2011, the Appealing Defendants moved for an indefinite stay of discovery and other proceedings for all Defendants pending the outcome of the Appealing Defendants' appeals. For the reasons outlined below, Defendants' Motion to Stay pending appeal should be denied.

BACKGROUND

Plaintiffs filed this action on December 18, 2007, against the City of Durham, Duke University, DNASI and employees and agents of those entities seeking damages for violations of federal and state law arising out of their attempt to frame Plaintiffs for a crime they knew did not occur [Document # 1]. Plaintiffs filed an Amended Complaint on April 17, 2008 [Documents #33 and 34].[3] Plaintiffs filed a Second Amended Complaint pursuant to the Court's Order on February 23, 2010 [Document #136]. Before filing an Answer, the Appealing Defendants filed Motions to Dismiss pursuant to Rule 12(b)(6). While the Rule 12(b)(6) Motions for both the Appealing Defendants and other Defendants were pending, discovery had been stayed by virtue of the Court's decision not to enter a scheduling order pursuant to L.R. 16.1 before resolving Defendants' Rule 12(b)(6) Motions. While those motions were pending, the City of Durham moved for partial summary judgment on Plaintiffs' state law causes of action. There was extensive briefing submitted by both Plaintiffs and Defendants.

[3] Pursuant to a request from this Court regarding the location of the audio and video exhibits embedded within the First Amended Complaint ("AC"), Plaintiffs re-filed the AC on April 18, 2008 with those embedded exhibits as separate documents. Except for the location of the exhibits, the two "First Amended Complaints" are identical.

On March 31, 2011, the Court in its Memorandum Opinion [Document # 186] and Order [Document # 187], ruled on all Defendants' Rule 12(b)(6) Motions and the City's Motion for Partial Summary Judgment. In its March 31, 2011, Memorandum Opinion and Order, the Court denied the City's Motion for Partial Summary Judgment and authorized Plaintiffs to go forward on their federal claims under 42 U.S.C. § 1983, for violations of Plaintiffs' Fourth and Fourteenth Amendment rights, their claims for supervisory liability and *Monell* liability, as well as several state common law and constitutional claims. The Court noted the "significant abuses of government power" alleged, and stated that "there can be no question that the Constitution is violated when government officials deliberately fabricate evidence and use that evidence against a citizen, in this case by allegedly making false and misleading representations and creating false and misleading evidence in order to obtain an NTO against all of the lacrosse team members and obtain a search warrant." Memorandum Opinion 222 (March 31, 2011). The Court added, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Id.* (citing Washington v. Wilmore, 407 F.3d 274, 285 (4th Cir. 2005)(Shedd, J. concurring)).

The Court concluded its Memorandum Opinion by stating that "[t]his case will therefore proceed to discovery on the claims" permitted to go forward. Memorandum Opinion 222 (March 31, 2011). The Appealing Defendants have since filed notices of Appeal to the Fourth Circuit and a Motion to Stay Proceedings pending these appeals.

ARGUMENT

The Appealing Defendants assert that discovery and all other proceedings on Plaintiffs' surviving claims should be stayed because, they contend, 1) the appeal divests this Court of jurisdiction over the claims on appeal, and because those claims constitute "the core" of Plaintiffs' Complaint, further proceedings on all claims should be barred; 2) permitting discovery would undermine the Appealing Defendants' immunity; 3) a stay would conserve the Court's and the Appealing Defendants resources; and 4) a stay would provide more time for the Appealing Defendants to resolve an arbitration demand lodged against its insurance carriers.

The Appealing Defendants misconstrue the nature of the Order at issue. The Court's March 31, 2011 Memorandum Opinion and Order did not deny their immunities, nor did it even opine on the nature of the asserted immunities. Rather, the Court dismissed the claims of immunity without prejudice to their right to reassert them at summary judgment, after discovery has been completed. *See, e.g.,* Memorandum Opinion 54, 82, 114-15, 214-15, and 223 (March 31, 2011).

Furthermore, the pending appeals which have been submitted by the Appealing Defendants do not constitute "good cause" to stay discovery. *See Kron Med. Corp. v. Groth,* 119 F.R.D. 636, 637 (M.D.N.C. 1988). First, the City of Durham, regardless of the outcome of its appeal, will return to this case as a Defendant because governmental immunity does not bar Plaintiffs' cause of action against the City for violations of the North Carolina Constitution. *See* Memorandum Opinion 211-215 (March 31, 2011).

Likewise, the individual Appealing Defendants will remain subject to state-law causes of action that are not subject to their immunity defenses. Thus, they, too, will remain in this case as defendants regardless of the outcome of their appeal. Further, as the Court noted in its Memorandum Opinion, "it is apparent that these Supervisors will necessarily be involved in the discovery process in this case in any event, given their direct involvement in the alleged events and the ongoing claims against the City and other City employees." *Id.* at 127, n. 55. At this stage of the proceedings, the only interest that a further stay of discovery in this action would serve is the Defendants' interest in delay, and it is for that reason that courts routinely decline invitations to stay discovery beyond the preliminary stage of the proceedings.[4]

Whether the Appealing Defendants' immunity defenses will dispose of some of Plaintiffs' claims against them, is simply irrelevant. Plaintiffs believe the Appealing Defendants will be required to participate in the discovery process as either parties to claims in which their immunity defenses are not a bar or as witnesses. Thus, the delay will only prolong the length of time and irreparably harm the Plaintiffs with the discovery process by permitting memories to fade, witnesses to move away or die, and relevant evidence to be destroyed.

Perhaps the most striking illustration of the prejudice caused by the stay up to this point in this action is Duke University's demolition of the home on 610 N. Buchanan Blvd.

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[4] *See Seeds of Peace Collective v. City of Pittsburgh,* No. 09-1275, 2010 WL 2990734, at *1 (W.D. Pa. July 28, 2010); *S.D. v. St. John's Cnty. Sch. Dist.,* No. 3:09-cv-250-J-20TEM, 2009 WL 4349878, at *4 (M.D. Fla. Nov. 24, 2009); and *Rome v. Romero,* 255 F.R.D. 640, 645 (D. Colo. 2004); *see also Kron Med. Corp. v. Groth,* 119 F.R.D. 636, 637 (M.D.N.C. 1988); *Simpson v. Specialty Retail Concepts, Inc.,* 121 F.R.D. 261, 263 (M.D.N.C. 1988); and *Smith v. Waverly Partners, LLC,* 3:10-CV-28, 2010 WL 3943933, at *1 (W.D.N.C. Oct. 6, 2010).

(authorized by a permit Duke obtained from the City of Durham to do so) on July 12, 2010. The house itself, and the physical space of the bathroom in particular, was vital evidence that the alleged rape could not have occurred. The physical space within the house and the bathroom (or, more specifically, the lack thereof) played a significant role in Attorney General Roy Cooper's determination to publicly agree with Jim Coman and Mary Winstead's conclusion that, not only was Crystal Mangum unreliable, but also that he could say with certainty that her allegations were false. As the Attorney General explained to Leslie Stahl in her 60 Minutes interview:

STAHL:	Did [Mangum] just lie? …. Here's what she said
ATTORNEY GENERAL COOPER:	"She was suspended in midair, and she was being assaulted by all three of them in the bathroom, and, *I've been in that bathroom*, and it was very difficult for me to see how that could have occurred.
STAHL:	Because it was so small?
ATTORNEY GENERAL COOPER:	It was a small bathroom, yes. And you would have had to have four people in there, in the different positions that she was describing to us. Being attacked. …. It was just difficult for any of us to see how that *could have* occurred.

Finally, the rationale for the court's stay pending resolution of preliminary motions must give way to the interest in avoiding prejudice to Plaintiffs' ability to secure evidence to prove their claims to a jury. Discovery in this case has been stayed for more than three years. Delaying it further would only further prejudice Plaintiffs' ability to obtain and preserve evidence relevant to the claims that this Court has authorized to go forward. Those

claims include conspiracies against both the Appealing Defendants and others; as such, even if any pending appeal is successful, the Appealing Defendants will not be excused from participating in discovery or giving testimony in this case.

In deference to the local rules and practices of this Court, the Plaintiffs in this case have not sought to compel the Rule 26(f) conference or otherwise commence discovery until the Court resolved Defendants' preliminary motions to dismiss. As this Court explained in response to motions to compel the conference in the related cases, staying discovery until the motions to dismiss were resolved would prevent a number of inefficiencies, all of which relate to the possibility that many claims and parties stood to be removed from the action by the Court's resolution of the Defendants' motions to dismiss. But the rationale for the stay of discovery pending resolution of the motions to dismiss simply do not apply to certain defendants interlocutory appeal of certain federal claims, and to the extent that the rationale somehow applies to such interlocutory appeals, the rationale must give way to the far more compelling interest that Plaintiffs have in developing the testimony and evidence necessary to present their case to a jury.

CONCLUSION

For all of the foregoing reasons and the low likelihood of success in Defendants' respective appeals, Defendants' Motion to Stay Proceedings should be denied.

Dated: May 25, 2011

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

/s/ Stefanie A. Sparks

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Robert C. Ekstrand (NC Bar No. 26673)
Stefanie A. Sparks (NC Bar No. 42345)
811 Ninth Street
Durham, North Carolina 27705
E-mail: rce@ninthstreetlaw.com
E-mail: sas@ninthstreetlaw.com
Tel: (919) 416-4590
Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, May24, 2011, pursuant to Rule 5 of the Federal Rules of Civil Procedure and Local Rules 5.3 and 5.4, I electronically filed the foregoing Plaintiffs' Response in Opposition to Defendants' Motion to Stay Proceedings with the Clerk of the Court using the CM/ECF system, which will automatically generate and send notification of such filing to the undersigned and registered users of record. The Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the Notice of Electronic Filing will be sent.

Dated: May 25, 2011

Respectfully submitted by:

EKSTRAND & EKSTRAND LLP

/s/ Stefanie A. Sparks

Stefanie A. Sparks (NC Bar No. 42345)