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

RYAN MCFADYEN, MATTHEW WILSON and BRECK ARCHER	)	
Plaintiffs,	)	
v.	)	1:07CV953
DUKE UNIVERSITY, et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on Motions to Stay [Doc. # 205, 211, 212] by the City of Durham and individual Defendants Patrick Baker, Steven Chalmers, Beverly Council, Ronald Hodge, Jeff Lamb, Lee Russ, Michael Ripberger, David Addison, Mark Gottlieb, and Benjamin Himan (collectively, the "City Defendants"), joined by Defendants DNA Security, Inc., Richard Clark, and Brian Meehan (the "DSI Defendants") and by Defendant Linwood Wilson, seeking to stay discovery in this case while the case is before the Court of Appeals for the Fourth Circuit on an interlocutory appeal. Plaintiffs object to the proposed stay, and contend that discovery should proceed. However, in response, the City Defendants note that all of the claims against all of the City Defendants are potentially included in the appeal or are inextricably intertwined in the issues on appeal, and that a complete stay of discovery is therefore appropriate. Specifically with respect to the scope of the appeal, the City Defendants contend that the interlocutory appeal includes an appeal of this Court's denial of qualified immunity and public

official immunity as to the individual City Defendants.[1] The City Defendants also contend that the appeal includes the Court's denial of the City's motion for partial summary judgment on governmental immunity grounds prior to discovery. Finally, the City Defendants contend that they are also seeking to appeal the denial of their Motion to Dismiss as to the other remaining claims, including the claims against the City under Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), under the doctrine of pendent appellate jurisdiction.

A notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal" because "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 2d 225 (1982). In applying this rule in cases involving interlocutory appeals on qualified immunity grounds, courts have concluded that at least as to those claims for which qualified immunity has been claimed, the district court may not proceed to trial while the

[1] In denying in part the Defendants' Motions to Dismiss, the Court concluded that, taking the allegations as true, the individual City Defendants did not have qualified immunity with respect to the claims asserted under 42 U.S.C. § 1983. With respect to the state law claims, the Court noted that public official immunity would preclude any claims against the individual officers for negligence in the performance of their governmental or discretionary duties, but would not apply to conduct that is "malicious, corrupt, or outside the scope of [their] official authority." With respect to the state law obstruction of justice claim, the Court concluded that any claim for obstruction of justice under state law would require proof of intent to obstruct justice, in this case by the alleged creation of false evidence or destruction of evidence for the purpose of impeding the justice system. Thus, under the Court's analysis, public official immunity would not apply to this intentional tort claim. Moreover, Plaintiffs have alleged that these Defendants were motivated by malice in order to overcome any public official immunity that might otherwise apply. The Court will not undertake any further analysis of the parties' immunity issues, since those matters have now been raised as part of the appeal in this case.

interlocutory appeal is pending. See Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989) (noting that in an interlocutory appeal on qualified immunity grounds, "[w]hether there shall be a trial is precisely the 'aspect[] of the case involved in the appeal,'" and such an appeal "divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial"); Stewart v. Donges, 915 F.2d 572, 574 (10th Cir. 1990) (holding that "the defendant's interlocutory appeal . . . based on qualified immunity divested the district court of jurisdiction to conduct a trial"); Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006) (holding that during an interlocutory appeal of a motion to dismiss on qualified immunity grounds, the district court was divested of jurisdiction to proceed even as to summary judgment determinations); see also Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985) (noting that where a qualified immunity defense is raised, defendants have an "entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law"); Gray-Hopkins v. Prince George's County, 309 F.3d 224, 229 (4th Cir. 2002) (noting that "qualified immunity is an immunity from having to litigate, as contrasted with an immunity from liability"); Cloaninger v. McDevitt, 555 F.3d 324, 330 (4th Cir. 2009).[2]

[2] A potential exception to this rule applies where the district court certifies to the court of appeals that the interlocutory appeal is frivolous or has been forfeited. See, e.g., Apostol, 870 F.2d at 1339. However, "[i]n order for an interlocutory appeal to be deemed frivolous, it must be both meritless and substantively inappropriate." Eckert International, Inc. v. Sovereign Democratic Republic of Fiji, 834 F. Supp. 167 (E.D. Va. 1993) (applying the Fourth Circuit's standard for interlocutory appeals on double jeopardy grounds to interlocutory appeals on qualified immunity grounds). In the present case, Plaintiffs do not contend that the interlocutory appeal is frivolous, and the Court notes that the City Defendants are entitled to an interlocutory appeal of the denial of their qualified immunity defense under established Supreme Court precedent. See Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985);

In addition, the Supreme Court has held that where qualified immunity has been raised as a defense, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); Crawford-El v. Britton, 523 U.S. 574, 598, 118 S. Ct. 1584, 1597, 140 L. Ed. 2d 759 (1998) (noting that threshold immunity questions should be resolved "before permitting discovery"); see also Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994) ("[A] denial of qualified immunity is entitled to immediate appellate review . . . [and] the stay of discovery, of necessity, ordinarily must carry over through the appellate court's resolution of that question."); K.M. v. Alabama Dep't. of Youth Services, 209 F.R.D. 493, 495 (M.D. Ala 2002) ("Once a non-frivolous appeal of a denial of immunity has been filed, a stay of discovery is obviously appropriate until the appellate court resolves the immunity issue."). Thus, in the present case, this Court concludes that with respect to all aspects of this case that are involved in the interlocutory appeal, no trial or other proceedings toward trial should be conducted while the interlocutory appeal is pending, and discovery is properly stayed with respect to those

---

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). In addition, the Court notes that the City Defendants have raised immunity issues, particularly as to the City Supervisors, that involve evolving legal rules and that cannot be characterized as "frivolous." It will be for the Fourth Circuit to further consider the proper scope of the appeal and the merit of the issues raised. In these circumstances, this Court cannot find that the interlocutory appeal is "meritless and substantively inappropriate" and therefore the Court will not certify that the appeal is frivolous.

aspects of the case that are involved in the interlocutory appeal.[3]

Finally, in considering whether there are claims that are not included in the appeal for which discovery could proceed while the appeal is pending, the Court notes that "[a] notice of appeal from an interlocutory order does not produce a complete divestiture of the district court's jurisdiction over the case; rather, it only divests the district court of jurisdiction over those aspects of the case on appeal. . . . How broadly a court defines the aspects of the case on appeal depends on the nature of the appeal." Alice L. v. Dusek, 492 F.3d 563, 564-65 (5th Cir. 2007). Thus, discovery could potentially proceed as to the claims that are "legally distinct." Id. However, in Ashcroft v. Iqbal, the Supreme Court reiterated that the defense of qualified immunity, if it applies, includes protection from the burdens of discovery. In that case, the Supreme Court specifically noted that "[i]t is no answer to these concerns to say that discovery for petitioners [who claim qualified immunity] can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners [who claim qualified immunity] are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery." Ashcroft v.

[3] In this Court's March 31, 2011 Order and Memorandum Opinion, the Court concluded that qualified immunity would not apply based on the facts as alleged, but that discovery should be conducted in a manner that was not unduly burdensome, so that further analysis of the qualified immunity issue could be made at summary judgment based on the evidence presented. However, the City Defendants have elected to file an interlocutory appeal of this determination at the Motion to Dismiss stage, and therefore the limited discovery outlined by the Court would not be appropriate until after the preliminary immunity issue is resolved on appeal.

Iqbal, 129 S. Ct. at 1953. Thus, in order to comport with the Supreme Court's concerns regarding discovery burdens on those claiming the defense of qualified immunity, this Court, in the present case, will potentially allow discovery to proceed as to non-appealed aspects of the case to the extent that there are "legally distinct" claims, but the Court will not allow discovery to proceed as to any non-appealed aspects of the case to the extent that such discovery would impose undue burdens on the City Defendants who are claiming immunity defenses, until the immunity defense issues have been resolved on appeal. Cf. K.M. v. Alabama Dep't of Youth Services, 209 F.R.D. 493 (M.D. Ala. 2002) (concluding that a complete stay of proceedings was appropriate as to those defendants who had appealed the denial of immunity, but that limited discovery could be allowed as to non-appealing defendants).

Turning now to the scope of the appeal in the present case, the Court notes that it is for the Court of Appeals to determine which issues may properly be raised as part of the interlocutory appeal. At this time, however, any claims that have been included in the Notice of Appeal are now before the Court of Appeals, and this Court has been divested of control "over those aspects of the case involved in the appeal." That would, at this point, appear to include all of Plaintiffs' claims against all of the City Defendants. Therefore, the Court concludes that all of the claims against the City Defendants are potentially included in the "aspects of the case involved in the appeal." Therefore, a stay of further proceedings and stay of discovery is appropriate with respect to all of the claims asserted against the City Defendants, as set out in Counts 1, 2, 5, 12, 13, 14, 18, 25, 26 and 41, since those claims are subject to the pending appeal.

The Court further notes that the remaining claims against Defendant Levicy in Counts 1 and 2, against Defendant Smith in Count 2, and against Defendant Wilson in Count 5, are all claims that are also asserted against at least some of the City Defendants, including the City and the City Supervisors as set out in Counts 12, 13, and 14.[4] Having considered these issues, the Court concludes that these claims against Defendants Levicy, Wilson, and Smith are so intertwined with the claims against the City Defendants that it would be almost impossible to proceed to discovery on those claims without overstepping into the claims against the City Defendants presently on appeal. Similarly, the claims in Count 18 are asserted against Defendant Levicy, Defendant Duke, Duke Health, and other Duke employees (referred to collectively as the "Duke Defendants"), as well as Defendant Wilson and the DSI Defendants, but those claims are inextricably intertwined with the claims in Count 18 asserted against the City Defendants.[5] Thus, in the present case, the Court finds that, as a practical matter, these claims could not realistically proceed independent of the claims on appeal. Moreover, the Court further

[4] Specifically, Counts 1 and 2 are asserted against Defendant Levicy and City Defendants Gottlieb and Himan based on their joint conduct, and Count 2 is asserted against Defendant Smith as a bystander to the alleged conduct by City Defendants Gottlieb and Himan. In addition, those claims in Counts 1 and 2 form the basis of the claims asserted against the City in Counts 12 and 14 and against the City Supervisors (Defendants Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger) in Count 13. Likewise, Count 5 is asserted against Defendant Wilson and against City Defendants Gottlieb, Hodge and Addison, and that claim also forms the basis of the claims asserted against the City in Counts 12 and 14 and the City Supervisors in Count 13.

[5] The state law obstruction of justice claim in Count 18 is asserted against Defendant Wilson, the DSI Defendants, and Duke Defendants Levicy, Steel, Brodhead, Dzau, Burness, Duke, and Duke Health, and is also asserted against the City and City Defendants Gottlieb, Himan, and Lamb, all based on related conduct in the alleged falsification of evidence and reports. The claims in Count 18 also form the basis for the claim of negligent supervision against Duke and Duke Health in Count 32 and against DSI in Count 35.

concludes that in these circumstances, proceeding with discovery as to these claims against Defendant Wilson, the DSI Defendants, Defendant Levicy, or the other Duke Defendants would indeed impose undue burdens on the City Defendants while their qualified immunity defense is still pending on appeal, contrary to the Supreme Court's concerns in Ashcroft v. Iqbal as set out above. Therefore, the Court concludes that all further proceedings in this case with respect to all of the claims asserted in Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35, and 41, including discovery, should be stayed pending the resolution of the interlocutory appeal in this case.

However, there are two legally distinct claims in this case that remain only as to Defendant Duke and its employees. Specifically, Count 21 alleges a claim against Duke for breach of contract, limited to the allegation that Duke imposed disciplinary measures against Plaintiffs, specifically suspension, without providing them the process that was promised. In addition, Count 24 alleges a claim against Defendant Duke and against Duke Defendants Smith, Graves, Dean, and Drummond for fraud based on alleged fraudulent misrepresentations in letters to Plaintiffs regarding Plaintiffs' Duke Card information. Thus, Counts 21 and 24 remain only as to the Duke Defendants, and do not include any of the City Defendants. The Duke Defendants have not filed an interlocutory appeal and have not filed a motion to stay further proceedings, and the Court concludes that there is no need to stay discovery as to these two claims, since they are not aspects of the case involved in the appeal and since they do not implicate the City Defendants who are pursuing the appeal on immunity issues. Therefore,

discovery will proceed only as to these two claims.[6] However, the Court further notes that even as to these two claims, discovery should not be directed to any of the City Defendants, even as fact witnesses, in light of the concerns set out above. If discovery is needed from a City Defendant as a fact witness as to Counts 21 or 24, such discovery can be undertaken after the conclusion of the interlocutory appeal.[7]

IT IS THEREFORE ORDERED that the Motions to Stay [Doc. # 205, 211, 212] are GRANTED and all proceedings in this case with respect to Counts 1, 2, 5, 12, 13, 14, 18, 25, 26, 32, 35, and 41, including discovery, are stayed pending the resolution of the interlocutory appeal in this case. HOWEVER, IT IS FURTHER ORDERED that discovery may proceed with respect to Counts 21 and 24, but discovery may not be directed to any of the City Defendants until the resolution of the interlocutory appeal unless otherwise ordered by the Court.

This, the 9th day of June, 2011.

United States District Judge

[6] The Court notes that two other cases in this District that have been identified by the parties and the Clerk's Office as "related" to the present case, Carrington, et al. v. Duke University, et al. (1:08CV119) and Evans, et al. v. City of Durham, et al. (1:07CV739). The Carrington case also involves separate claims asserted against Duke University for which limited discovery is possible, and the discovery may be coordinated between the cases at the election of the parties. The Court notes that no such claims were brought in the Evans case and there are no independent claims on which discovery could realistically proceed in that case.

[7] If either Plaintiffs or the Duke Defendants believe that they need discovery from a City Defendant specifically limited only to the issues raised in Counts 21 or 24 that cannot wait until the resolution of the interlocutory appeal, they should file a motion with the proposed discovery attached for prior review and consideration by the Court.