

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

SEP 21 2009

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ARTHUR ALAN WOLK, ESQUIRE

Plaintiff,

v.

WALTER K. OLSON,
THEODORE H. FRANK, ESQUIRE,
DAVID M. NIEPARENT, ESQUIRE,
THE OVERLAWYERED GROUP And
OVERLAWYERED.COM

Defendants.

NO. 09-CV-04001-MAM

CIVIL ACTION

JURY TRIAL DEMANDED

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO STAY DISCOVERY

Defendants Walter K. Olson, Theodore H. Frank, Esquire, David M. Nieparent, Esquire, The Overlawyered Group and Overlawyered.com, (collectively "Defendants"), by and through their attorneys, White and Williams LLP, hereby move, pursuant to Federal Rule of Civil Procedure 26(c), for a Protective Order to Stay Discovery pending this Court's resolution of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), and in support thereof, Defendants state as follows:

BACKGROUND

1. Despite the fact that all claims alleged in connection with this lawsuit are barred by time and the First Amendment, Plaintiff, Arthur Alan Wolk ("Plaintiff" or "Wolk"), commenced the above-captioned action by Writ of Summons in the Court of Common Pleas of the First Judicial District of the Commonwealth of Pennsylvania, Philadelphia County, on May 13, 2009. A copy of the Writ of Summons is attached hereto as Exhibit "A."

2. Immediately after filing his Praecipe for a Writ of Summons, Plaintiff served Defendants with wholly unnecessary, improper and overly burdensome requests for pre-complaint discovery, to which Defendants objected. A copy of Plaintiff's Notice of Pre-Complaint Discovery is attached hereto as Exhibit "B."

3. On June 12, 2009, Plaintiff filed a Motion to Compel Pre-Complaint Discovery with the Court of Common Pleas. A Copy of the Motion to Compel is attached hereto as Exhibit "C."

4. On July 2, 2009, the Court of Common Pleas denied Plaintiff's Motion to Compel Pre-Complaint Discovery. A copy of the Court's Order denying Plaintiff's Motion to Compel is attached hereto as Exhibit "D."

5. Plaintiff subsequently filed the Complaint in this matter on August 17, 2009. A copy of the Complaint is attached hereto as Exhibit "E."

6. Plaintiff's Complaint alleges that, as the result of an April 8, 2007 internet posting of a three-paragraph opinion statement authored by Defendant Frank (the "Frank Article"), attached hereto as Exhibit "F", Defendants both defamed Wolk and intentionally interfered with his prospective contractual relations. (Complaint at ¶¶40-45, 54, 58, 62, 73-76).

7. Pursuant to 42 Pa.C.S.A. § 5523(1), Wolk's claims are barred by Pennsylvania's one-year statute of limitations for defamation suits, which expired in April, 2008.

8. Wolk's claims are further barred by the First Amendment because the Frank Article is neither false nor defamatory.

THE INSTANT MOTION TO STAY DISCOVERY

9. Plaintiff is represented by sophisticated counsel and Plaintiff himself is a nationally known, licensed attorney.
10. Plaintiff either knows or should know that his claims are inescapably time-barred pursuant to Pennsylvania's one-year statute of limitations for defamation claims.
11. Plaintiff either knows or should know that his claims are barred by the First Amendment because the Frank Article is neither false nor defamatory.
12. Defendants can only assume that Plaintiff initiated this action for the improper purpose of subjecting Defendants to embarrassment, burden and expense.
13. On September 2, 2009, Defendants timely removed the action to this Court.
14. Also on September 2, 2009, before conducting a Rule 26(f) conference or serving Defendants with Rule 26(a) disclosures, Plaintiff again served Defendants with overly burdensome discovery requests, copies of which are attached hereto as Exhibit "G."
15. On September 9, 2009, Defendants moved to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Rule 12(b)(6) because Plaintiff's claims are time and Constitutionally barred.
16. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is currently pending before this Court.
17. With the instant Motion, Defendants request that this Court issue a Protective Order staying discovery so that Defendants may be spared the undue burden, expense and annoyance of responding to Plaintiff's improper, overbroad and unnecessarily costly discovery

requests, the need for which may be wholly eliminated by this Court's ruling on Defendants' Motion to Dismiss.

18. Courts are empowered under the Federal Rules of Civil Procedure to impose a stay of discovery "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Pearson v. Miller, 211 F.3d 57, 72 (3d Cir. 2000); Weisman v. Mediq, Inc., 1995 WL 273678 at *1 (E.D. Pa. 1995); Fed. R. Civ. P. 26(c).

19. A stay of discovery is proper when the likelihood that a pending motion to dismiss will result in the outright elimination of discovery outweighs the likely harm to be produced by the delay. Weisman at *2 (citing Coca-Cola Bottling Co. v. Grol, 1993 WL 13139559 (E.D.Pa. 1993)).

20. When, as here, the pending motion is a challenge as a matter of law, which may dispose of the entire action, and discovery is not needed to rule on that motion, the balance favors granting a motion to stay. Norfolk v. Power Source Supply, Inc., 2007 WL 709312 at *1 (W.D.Pa. 2007) (citing Weisman at *2).

21. In support of his frivolous claims, Plaintiff now seeks, prior to making any of the disclosures required by Fed. R. Civ. P. 26, to take the depositions of Defendants Olson, a resident of the state of New York, Frank, a resident of the state of Virginia, and Nieporent, a resident of the state of New Jersey.

22. In an effort to force Defendants to incur as much expense and suffer as much annoyance as possible, Plaintiff seeks the production of the following documents:

- “All documents and communications, including but not limited to searches on the internet, that You initiated to any third party, or that You reviewed or relied upon in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article.”¹
- “All documents and communications, including but not limited to searches on the internet, that evidence, refer to or relate to any investigation performed by You, or that you initiated to any third-party, with respect to the subjects covered in the April 7, 2008 [sic] Frank Article, in drafting, editing and disseminating the April 7, 2008 [sic] Frank Article, including but not limited to notes and drafts.”
- “All documents and communications that evidence, refer or relate to the Frank Article, including, but not limited to statistics, input and/or information relating to or from any person(s) who accessed the Frank Article.”
- “All communications with any server, browser or search facility that would connect to a dissemination of the article on the Internet or to Wolk.”

23. Overlawyered.com is an internet weblog with numerous readers.

24. Defendants Olson, Frank and Nieporent access and contribute to Overlawyered.com through multiple servers, and from multiple computers, located in multiple states.

25. Complying with Plaintiff’s over-broad, unnecessary and improper requests for documents evidencing: all communications, statistics, input or information, accessed or

¹ The Frank Article was published to the legal weblog Overlawyered.com on April 8, 2007. Throughout his Requests for Production, Plaintiff refers to the Article as the “April 7, 2008 Frank Article.” Defendants believe that Plaintiff’s error is simply typographical, however, Defendants wish to make clear the fact that the only article authored by Defendant Frank that is relevant to this lawsuit was published on April 8, 2007.

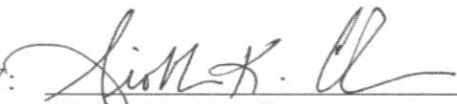
transmitted through any server, browser or search facility, by not only the Defendants, but also any person who ever accessed the Frank Article, if even technologically possible, would be enormously and unduly expensive.

26. Furthermore, Plaintiff initiated a frivolous lawsuit for an improper purpose and therefore, any amount of discovery will subject Defendants to undue annoyance, embarrassment, oppression, burden and expense.

27. Finally, because a favorable decision by this Court on Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) would dispose of Plaintiff's entire claim, and because no discovery is required for the decision of that Motion, a stay pending its decision will not prejudice Plaintiff or cause undue delay.

WHEREFORE, Defendants seek a Protective Order Pursuant to Fed. R. Civ. P. 26(c) staying discovery in this action while Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is pending.

WHITE AND WILLIAMS LLP

BY: 
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Dated: September 18, 2009