IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GREGORY HALPRIN, et al., Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Defendants.	§ § § § § § § § § §	5:13-CV-1042-RP

ORDER

Before the Court in the above-entitled matter is Plaintiffs' Motion to Stay Pending Appeal and Motion for Severance of Dismissed Claims. (Dkt. 233). Having considered the motion and responsive filings thereto, applicable law, and the entire case file, the Court finds Plaintiffs' motion should be and is hereby **DENIED**.

I. Background

Plaintiffs initiated the instant action in state court in 2009. When the case was removed to federal court in 2013, Plaintiffs had already filed five versions of their petition. After Plaintiffs were ordered to amend their petition to conform to the pleading requirements of the Federal Rules of Civil Procedure, Plaintiffs filed a sixth amended complaint, (Dkt. 90), containing fewer plaintiffs and claims than the state court petition. Despite the general rule that amended complaints supersede prior filings, the parties expressed significant confusion as to which parties and claims remained. Accordingly, the Court ordered Plaintiffs to file a notice regarding the plaintiffs and causes of action that remained live in light of the sixth amended complaint. (Dkt. 109). Two sets of plaintiffs filed notices in response. (Dkts. 116, 117). Because three plaintiffs who responded to the Order were not included in the sixth amended complaint, the Court ordered Plaintiffs to file a seventh amended

complaint. (Dkt. 118). That complaint was filed in November 2015, (Dkt. 124), two years after the case was removed and more than six years after Plaintiffs initiated the action.

In July 2016, Plaintiffs filed an opposed motion to amend their complaint. (Dkt. 192). After reviewing the pleadings, the relevant law, and the case file, this Court denied Plaintiffs' motion. (Dkt. 214). The Court then considered several defendants' motions to dismiss, granting those filed by Mike Maldonado, (Dkt. 220); Robert Gandy, (*id.*); David Rogers, (*id.*); Michael McCarthy, (*id.*); Eric Sherer, (Dkt. 223); American Title Group, Inc. ("Land America"), (Dkt. 227); Dan Brown, (*id.*); and the Federal Deposit Insurance Corporation ("FDIC"), (Dkt. 228) (collectively, "the Dismissed Defendants"). Claims remain pending against Defendants Maria De Rosario Padilla, Carlos Miguel Padilla, Mauro Joe Padilla, Mario Padilla, the Padilla Property Corporation, and HTG Real Property Management (collectively, "the Padilla Defendants"). (Seventh Am. Compl., Dkt. 124, at 5–6).

Plaintiffs initiated an appeal of the orders described above, but sought a voluntary dismissal of that appeal shortly thereafter. (Dkts. 231, 232). They then filed the instant motion, which asks this Court to (1) sever the claims against the Padilla Defendants so the orders involving the Dismissed Defendants will become appealable; and (2) stay this case pending Plaintiffs' appeal of the Court's orders. (Mot. Stay, Dkt. 233). Several of the Dismissed Defendants oppose Plaintiffs' request. (Maldonado Resp., Dkt. 234; FDIC Resp., Dkt. 235; LandAmerica Resp., Dkt. 236). The Padilla Defendants did not respond.

II. Motion to Sever

The decision to grant a severance is subject to the discretion of the district court. *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 520–22 (5th Cir. 2010).

Here, Plaintiffs seek to sever their claims against the Padilla Defendants so they may pursue an appeal of the orders dismissing the other defendants. (Mot. Stay, Dkt. 233, at 4). Several of the Dismissed Defendants object, arguing that (1) the pending claims against the Padilla Defendants,

LandAmerica's counterclaims against Plaintiffs, and the dismissed claims "all arise out of the same series of transactions and present common questions of law and fact," (LandAmerica Resp., Dkt. 236, at 8); (2) "Plaintiffs have failed to state a viable claim against the [D]ismissed Defendants" and thus "will suffer no irreparable injury and no prejudice if severance is denied," (*id.*); and (3) the presence of the FDIC in this action provides the sole basis for subject matter jurisdiction in this Court, (FDIC Resp., Dkt. 235).

The Court agrees with the first two points raised by the Dismissed Defendants. The dismissed claims, pending claims against the Padilla Defendants, and counterclaims against Plaintiffs arise out of the same transactions. Severance would therefore be inappropriate, especially because the relief Plaintiffs seek—the ability to pursue an appeal of the Courts' orders dismissing claims against certain Defendants—would more appropriately be accomplished by requesting a Rule 54(b) certification. Plaintiffs seem to acknowledge this fact, as they represent they "will seek consolidation of all the remaining claims for trial" should they prevail on appeal. (Reply, Dkt. 237, at 3). Plaintiffs' request to sever the claims against the Padilla Defendants is therefore **DENIED**.

III. Motion to Stay

A. Legal Standard

A court may stay an underlying proceeding during the pendency of an appeal. *Nken v. Holder*, 556 U.S. 418, 433 (2009); *United States v. Transocean Deepwater Drilling, Inc.*, 537 Fed. App'x 358, 360 (5th Cir. 2013). However, the movant bears the "burden of showing that a stay is justified." *Transocean*, 537 Fed. App'x at 360. Because "[a] stay is an intrusion into the ordinary processes of administration and justice," it "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. A stay is "an exercise of judicial discretion," and the propriety of whether it is granted is "dependent upon the circumstances of the particular case." *Id.* at 433.

In considering whether a stay is justified, courts apply a four-factor test. *Id.* at 434. Those factors include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* The first two of these factors "are the most critical" in determining whether a stay is justified. *Id.*

B. Discussion

As Plaintiffs acknowledge, the *Nken* factors described above guide a court's determination regarding whether it should stay a case pending appeal. *Nken*, 566 U.S. at 421; (Mot. Stay, Dkt. 233, at 1 ("Courts traditionally consider four factors when determining whether to stay a case pending an appeal")). Here, Plaintiffs voluntarily dismissed their appeal on December 1, 2016. (Dkt. 232). As there is currently no pending appeal in this matter, it is debatable whether an *Nken* analysis is even necessary. Out of an abundance of caution, however, the Court will address Plaintiffs' arguments regarding each of the factors.

Plaintiffs contend they meet each portion of *Nken*'s four-prong test, the first of which asks whether the stay applicant has made a strong showing that it is likely to succeed on the merits. (Mot. Stay, Dkt. 233, at 2–3). Plaintiffs cannot, however, prevail on this factor, as there is currently no pending appeal through which an appellate court could grant them relief. Moreover, for the reasons stated in the orders at issue—including the order denying Plaintiffs' Motion for Reconsideration—the Court is unpersuaded by Plaintiffs' arguments on the merits.

With respect to the second factor—whether the stay applicant will be irreparably injured absent a stay—Plaintiffs assert that they will be irreparably injured if the case is not stayed "because they will be required to expend valuable and limited resources to litigate this case against the remaining Padilla Defendants." (*Id.* at 3). "Further," they explain, "Plaintiffs will be put in a

Hobson's choice of focusing responsibility on the remaining Defendants or allocating fault to dismissed parties, who may be returned to the litigation on remand." (*Id.*). Such assertions are insufficient to demonstrate irreparable injury, as "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Moreover, Plaintiffs' "Hobson's choice" argument fails in light of the Court's previous findings that Plaintiffs' claims against the Dismissed Defendants are insufficient.

As to the third factor, which involves whether imposing a stay would substantially injure nonmoving parties, Plaintiffs state that the Padilla Defendants "cannot credibly claim to suffer any injury" from a stay. Because the Padilla Defendants failed to respond to the instant motion, the Court accepts Plaintiffs' argument regarding any injury to those defendants. Plaintiffs also argue, however, that "[t]he dismissed Defendants will obviously suffer no prejudice." (Mot. Stay, Dkt. 233, at 3–4). Describing Plaintiffs' arguments on this point as cursory would be generous. Granting a stay would indeed prejudice the Dismissed Defendants, who have been involved in this litigation for over seven years.[1] This is especially true given the fact that counterclaims brought against Plaintiffs by LandAmerica, a Dismissed Defendant, remain pending. (*See* LandAmerica Answer, Dkt. 125).

Plaintiffs finally contend that "[t]he public interest will be served by a stay because there is no public interest in litigating a case without all the necessary parties," "judicial and litigant economy will be served by waiting until the appeal is concluded," and "a jury trial on only part of a claim does not lie in the interest of those citizens on the jury or the public in general." (Mot. Stay, Dkt. 233, at 4). The Court heartily disagrees. Judicial and litigant economy would be best served by advancing this litigation—which was initiated in 2009—as expeditiously as possible. As to Plaintiffs' arguments regarding the possibility of "a jury trial on only part of a claim," the Court again notes its previous conclusions that Plaintiffs have no cognizable claims against the Dismissed Defendants.

[1] Plaintiffs state that "only the Padilla Defendants have standing to object to the claims against them being stayed," but offer no legal support for that proposition.

A stay is an "intrusion into the ordinary processes of administration and judicial review." *Nken*, 556 U.S. at 427. Here, having reviewed the filings and applicable law, the Court finds that a stay of this case is unwarranted. Plaintiffs' request for such relief is hereby **DENIED**.

IV. Conclusion

For the reasons stated herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Stay Pending Appeal and Motion for Severance of Dismissed Claims, (Dkt. 233), is **DENIED**.

IT IS FURTHER ORDERED that the parties remaining in this litigation consult the website for the U.S. District Court for the Western District of Texas (www.txwd.uscourts.gov), the "Judges' Info" tab, "Judges' Policies and Procedures," and submit a joint proposed scheduling order utilizing District Judge Robert Pitman's form on or before July 25, 2017.

SIGNED on July 17, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE