

Boos v Mitchell

2012 NY Slip Op 33777(U)

July 17, 2012

Supreme Court, Niagara County

Docket Number: 143621

Judge: Catherine Nugent Panepinto

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STATE OF NEW YORK : COUNTY OF NIAGARA
SUPREME COURT

CHARLES BOOS and
STEPHANIE BOOS

Plaintiffs

vs.

Index #143621
MEMORANDUM
DECISION

BERGAL MITCHELL, III, RACHEL MITCHELL
MICHAEL J. DOWD and TIMOTHY J. TOOHEY,

Defendants.

MEMORANDUM AND DECISION/PANEPINTO
Wayne F. Jagow, Niagara County Clerk
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Hon. Catherine Nugent Panepinto, J.S.C.

Defendants Bergal and Rachel Mitchell brought a motion for a protective order, pursuant to CPLR § 3103, protecting them from testifying at a deposition with respect to matters that are the subject of a pending criminal prosecution. Defendants submitted an Attorney Affirmation with exhibits and a Memorandum of Law, as well as a Reply Affirmation with Exhibit. Defendant, Michael J. Dowd submitted an Affidavit in Support of co-defendants' motion. In opposition, Plaintiffs submitted an Attorney Affirmation and, with this Court's permission, a Memorandum of Law. Counsel appeared for oral argument February, 21, 2013, and this Court

reserved decision.

Defendants argue that if required to submit to depositions in this matter, they intend to invoke their constitutional rights against self incrimination and will not answer questions regarding the subject matter of this suit. In partial support of their argument, Defendants rely upon the decision of the Honorable Richard C. Kloch, Sr. , who issued an Order in July, 2011, staying depositions, "pending the conclusion of the criminal prosecution of defendant Bergal Mitchell in the United States District Court for the Western District of New York". Further, Defendants argue that to "require the formality of conducting depositions with non -answered questions...is not only impractical, but also costly and would place undue burdens on the Defendants."

Co-Defendant Dowd argues in favor of a stay because when his co-defendants likely invoke their rights against self incrimination, a disjointed and prejudicial discovery process will result. Further,

"all original documents and files maintained by me regarding the underlying transaction are in the possession of the United States Attorney's Office and/or Federal Bureau of Investigation".

Defendant Dowd asserts that without said documents and files his ability to provide a full response to discovery demands will be severely disabled,

Plaintiffs respond that a previous Order of this Court ordered that Defendants' depositions be completed within two weeks of those of Plaintiffs which were set for September 27, 2012. (Order signed on July 30, 2012) Further, Plaintiffs argue that a protective order and stay will create undue delay and cause prejudice to Plaintiffs. The prejudice is particularly sustained by Plaintiffs because both are over eighty years old, qualifying their action for a preference on the Court's trial calendar.

"Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as **may be just.**" (Emphasis added)

CPLR § 2201.

Plaintiffs and Defendants cite to several cases in support of their respective positions as to what terms may be just in this particular case. Supporting defendants' argument, in part: *Trustees of Plumbers and Pipefitters National Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134, 1140 (SDNY, 1995) [New York courts often grant stays because resolution of the criminal case, "may reduce the scope of discovery in the civil case and the evidence gathered during the criminal prosecution can later be used in the civil action."]; *David Peyser Sportswear, Inc. V. Quality Payroll Systems, Inc.*, 2008 WL 4185704 (EDNY, 2008), ["the weight of

authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment.”], quoting *In re Par Pharmaceutical, Inc., Securities Litigation*, 133 FRD 12, 13 (SDNY, 1990); and *Brock v. Tolow*, 109 FRD 116, 119 (EDNY, 1985) [“A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter.”]

In opposition, Plaintiffs rely in part, on: *Arden Way Associates v. Boesky*, 660 F.Supp. 1494, 1497 (SDNY, 1987) [Courts are mindful that a policy of issuing stays, “solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration.”], quoting *Paine, Webber v. Andrus*, 486 F.Supp. 1118; (SDNY, 1980) [“that defendant’s conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiffs from expeditiously advancing their claim.”] *Paine, Webber, Id.*


This Court has spent a considerable amount of time and applied the various factors and concerns expressed within the cited decisions, as well as other cases and arguments submitted by the parties. In the final analysis, this Court is compelled to deny Defendants’ motion. It is now July 17, 2013; over twenty seven months since this action was commenced on April 4, 2011. There is no mention as to any date when the criminal prosecution against defendant, Bergal Mitchell will proceed in any manner whatsoever. To direct that plaintiffs/octogenarians continue to patiently wait for whatever that undefined period of time may be, after having already waited over two years, would be an injustice.

As remarked upon by Plaintiffs, the herein ongoing extended delay significantly distinguishes the facts of this case from those within the cases cited by defendants. Notably in the *Pipefitters v. Transworld* case, the criminal matter was to be quickly resolved due to its Speedy Trial Act considerations, with the defendants expected to face trial within six months. See, *Transworld*, Supra. at 1140. Similarly, in *Britt v. International*, the First Department Justices relied, at least in part, on the belief that the trial of that criminal action was scheduled to commence in the month following their decision. Further, as an apparent safeguard, the Judges concluded their decision, “Plaintiff retains the right to move to vacate the stay in the event the criminal proceeding is not commenced within a reasonable period of time.” See, *Britt v. International Bus Servs.*, 255 AD2d 143 (1st Dept., 1998).

Defendant Mitchell was indicted in February, 2011 for actions alleged to have been conducted from approximately 2000 through 2009. It is this Court’s finding that the criminal proceeding herein is not progressing “within

a reasonable period of time". I am cognizant that this denial of a stay potentially conflicts with the stay granted by my esteemed colleague, Justice Richard C. Kloch, Sr. in a similar matter. However, that conflict may disappear given the avenue open to Plaintiffs and suggested by the First Department, as referenced above; that Plaintiffs retain the right to move to vacate the stay, given the lengthy delay of the criminal proceeding. I think it significant the Judge Kloch granted the stay in July, 2011, when the indictment was merely five months old. He may think differently in July, 2013.

Accordingly, Defendants motion for a protective order is hereby denied in its entirety. Plaintiffs are hereby directed to submit the appropriate order on notice.

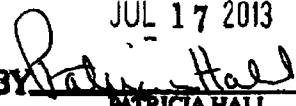


Hon. Catherine Nugent Panepinto
Supreme Court Justice

Dated: July 17, 2012
Niagara Falls, New York

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