UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB

JEREMY C. MYERS;
WESTERN SALVAGE LTD.,

Plaintiffs,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police Department in his official and individual capacity;
LUKE HECKER, Chief of Loveland Police Department, in his official and individual capacity;
DENNIS V. HARRISON, Chief of the Fort Collins Police Department, in his official and individual capacity;
JAMES A. ALDERDEN, Sheriff of Larimer County, Colorado, in his official and individual capacity;
CITY OF LOVELAND, a Colorado municipality;
CITY OF FORT COLLINS, Colorado, a municipality;
LARIMER COUNTY, a County, by and through the
LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS;
LARRY ABRAHAMSON, District Attorney of the Eighth Judicial District in his official capacity; and
EIGHTH JUDICIAL DISTRICT OF COLORADO, a political subdivision of the State of Colorado.

Defendants.

DEFENDANTS' UNOPPOSED JOINT OBJECTION TO MAGISTRATE HEGARTY'S ORDER ON DEFENDANTS' MOTION TO STAY

THE DEFENDANTS, by and through their attorneys of record, under Fed. R. Civ. P. Rule 72(a) and 28 U.S.C. § 636(b)(1), hereby jointly object to Magistrate Hegarty's Order on Defendants' Motion to Stay and ask this Court to reverse Magistrate Hegarty's ruling and enter an order staying the proceedings in this case pending determination of the motions to dismiss, and in support hereof state as follows:

D.C.COLO.LcivR 7.1A CERTIFICATE

1. Per D.C.COLO.LcivR 7.1A, Plaintiffs' counsel was contacted regarding this Joint Objection. Plaintiffs' counsel stated Plaintiffs do not oppose the relief requested in this Objection.

BACKGROUND

2. This case involves civil rights claims deriving from a search of Plaintiff's premises that occurred on September 7, 2007 and the prosecution of Plaintiff following the search. Defendants filed Motions to Dismiss based on several defenses including statute of limitations and inadequate pleading under the Supreme Court's recent decisions: Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

3. Defendants filed a Joint Motion on January 8, 2010 seeking an Order staying the proceedings, including vacating the Scheduling Conference, pending determination of the motions to dismiss. After the motion was referred to Magistrate Hegarty, on January 12, 2010, Magistrate Hegarty entered an Order denying the Motion without prejudice for insufficient cause and legal authority and directing Defendants to consider Judge Blackburn's Practice Standards – Civil Actions when re-filing the Motion. On January 13, 2010, Defendants filed a revised unopposed motion with additional cause and legal authority. (Docket #27.) This motion was also referred to Magistrate Hegarty. On January 19, 2010, Magistrate Hegarty entered an order denying Defendants' Motion to Stay. (Docket #29.)

STANDARD OF REVIEW

4. Under Fed. R. Civ. P. Rule 72(a):

> A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

See also 28 U.S.C. § 636(b)(1).

5. "A district judge reviewing a magistrate judge's order on a nondispositive matter must modify or set aside any portion of the order that is clearly erroneous or contrary to law." 14-72 Moore's Federal Practice - Civil § 72.11. "The clearly erroneous standard . . . requires that the reviewing court affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). Here, Defendants object to Magistrate Hegarty's ruling on their Motion to Stay. As this matter is "nondispositive," the clearly erroneous standard is the proper standard of review.

ARGUMENT

6. This Court has the authority to set the case schedule under Fed. R. Civ. P. Rule 16(b). Importantly, the United States Supreme Court holds that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (citing Wright & Miller § 1216, at 233-234 (quoting Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (Haw. 1953))). While a stay of proceedings is generally disfavored in this district, a stay may be appropriate if motions might eliminate the entire action. Chavez v. Young Am. Ins. Co., No. 06-2419, 2007 U.S. Dist. LEXIS 15054,

2007 WL 683973 (D. Colo. Mar. 2, 2007). A stay is required if the defendants are Government-officials entitled to assert the qualified immunity defense. Ashcroft, 129 S. Ct. at 1953. When considering a stay of discovery, the court may consider and weigh: (1) the plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. Adams v. Wiley, 2009 U.S. Dist. LEXIS 120185 (D. Colo. Dec. 2, 2009). With all due respect, Magistrate Hegarty's ruling was clearly erroneous in applying these factors to this case.

7. The first evaluative factor concerns the plaintiff's *interests*. Here, Plaintiffs do not oppose the Motion to Stay. Plaintiffs express no interest in proceeding expeditiously or concern respecting the potential prejudice associated with a delay. Magistrate Hegarty speculates that Plaintiffs "could" face adverse consequences including a decrease in evidentiary quality and witness availability. (Docket #29 at 2.) As Plaintiffs never express any interests regarding the potential impact of a stay, the concerns of Magistrate Hegarty are pure conjecture. Further, it is as possible that a stay fosters Plaintiffs' interests as much as threatens. This is because the stay request relates to what may well constitute a determinative motion to dismiss based on a pure legal question. If Plaintiffs are forced to proceed to develop their case while that question remains pending, the cost and effort of doing so may prove futile if this Court decides that question in the defense's favor. In this sense, it is in Plaintiffs' interest to stay this case until this Court can determine the motions to dismiss, rather than waste

resources or activity that may prove useless in the future. Rejecting the Motion to Stay is not justified on the basis of this factor in any respect.

8. The second factor concerns the burden on Defendants. Defendants advised Magistrate Hegarty respecting the significant time and money that will be needed to conduct unnecessary discovery, awaiting rulings on their motions to dismiss. (Docket #27, ¶6.) Magistrate Hegarty stated this was not a special burden and that these motions to dismiss are not primarily based on grounds typically warranting a stay.[1] (Docket #29 at 3.) To the contrary, when a defendant has a meritorious motion to dismiss, any discovery is an unnecessary expense and a "special burden" on the defendant. Here, Defendants' motions to dismiss are meritorious. Even if these motions are partially granted, the parties and claims will be substantially different. Thus, any discovery may prove an unnecessary expense to Defendants. Further, the increased financial burden is "special" in this case because Defendants are all public entities or public officials, such that any increased financial burden directly affects not only Defendants, but all taxpayers. Finally, the Supreme Court holds that Government-official defendants entitled to assert the qualified immunity defense should be spared the costs of litigation diversion:

> Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and

[1] Magistrate Hegarty cites Chavez v. Young Am. Ins. Co., 2007 U.S. Dist. LEXIS 15054 (D. Colo. March 2, 2007) in support of this proposition. (Docket #29, at 3.) Like in the present case, the magistrate in Chavez denied the Motion to Stay even though the plaintiffs did not oppose it. 2007 U.S. Dist. LEXIS at *7. On January 17, 2008, the District Court in Chavez entered summary judgment in the defendants' favor. Chavez v. Young Am. Ins. Co., 2008 U.S. Dist. LEXIS 3698 (D. Colo. Jan. 17, 2008). Hence, it seems reasonable to assume the defendants in Chavez incurred almost eleven months worth of unnecessary discovery time and expense.

> legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

Ashcroft; 129 S. Ct. at 1953 (citations omitted). Although the particular motions now pending are not based on qualified immunity, some of the defendants in this case are entitled to raise the qualified immunity defense and plan to file motions to dismiss based on that defense if the current motions are unsuccessful. Based on that fact alone, according to Ashcroft, the motion to stay should be granted to avoid the "heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." Magistrate Hegarty erred in determining the burden on defendants was not significant enough to support staying the proceedings. Therefore, this factor militates in favor of granting the Motion to Stay.

9. Concerning convenience to the Court, there will be absolutely no effect on the Court if the proceedings are stayed. In fact, a stay eliminates any chance the Court might be asked to get involved in a discovery dispute. Regardless of whether the proceedings are stayed, the Court must rule on the motions to dismiss. The only question is whether the parties are forced to spend time and money on unnecessary

discovery in the meantime.[2] Magistrate Hegarty erred by not specifically addressing this factor. Therefore, this factor favors granting the Motion to Stay.

10. Regarding the remaining two factors, the interests of non-parties and the public interest, Defendants assert no non-party or public organization has come forward expressing interest in the parties moving forward with discovery before the motions to dismiss are decided. In fact, it is more likely that a non-party or public organization would take the opposite position – save taxpayer dollars and stay discovery pending the motions to dismiss. Concerning these two factors, Magistrate Hegarty refers only to the District Court's policy not to stay discovery and the adverse effects on case management. It appears that the only basis for the policy against staying proceedings *is* an alleged adverse effect on case management, i.e., controlling the court's docket and the fair and speedy administration of justice. It is unclear why this is even a concern in this case. No parties or non-parties seem to think justice is being compromised. In any event, both fair and speedy administration of justice are better accomplished by determining the motions to dismiss *before* the parties embark on unnecessary discovery. "Fair" because Defendants will not have to incur the expenses involved with the unnecessary discovery and "speedy" because the motions to dismiss will, early in the proceedings, either eliminate the case or streamline it for a quicker resolution. Magistrate Hegarty erred in determining there is a public interest or non-party interest in moving this case forward before the motions to dismiss are determined. Thus, this factor also militates in favor of staying the proceedings.

[2] The Colorado Rules of Civil Procedure contemplate this problem and avoid it by requiring that all pre-Answer motions are ruled upon and all parties have filed their Answers before the case is "at issue." The discovery phase may not proceed until the case is "at issue." See C.R.C.P. Rules 12 and 16.

CONCLUSION

11. Magistrate Hegarty's ruling denying Defendants' Joint Motion to Stay is clearly erroneous and must be reversed. Defendants agree, and Plaintiffs do not oppose, that it is in their best interests to have the Court determine the motions to dismiss before beginning the proceedings in this case.

WHEREFORE, Defendants jointly object to Magistrate Hegarty's ruling denying Defendants' Joint Motion to Stay and request that this Court reverse Magistrate Hegarty's ruling and enter an Order staying the proceedings pending determination of the motions to dismiss.

DATED: February 2, 2010.

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CERTIFICATE OF MAILING

I hereby certify that on February 2, 2010, I electronically filed the foregoing **DEFENDANTS' UNOPPOSED JOINT OBJECTION TO MAGISTRATE HEGARTY'S ORDER ON DEFENDANTS' MOTION TO STAY** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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