

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02802-REB-MEH

JEREMY C. MYERS;

Plaintiff,

v.

BRIAN KOOPMAN, Detective in the Loveland, Colorado Police department, in his individual capacity;

Defendant.

**PLAINTIFFS' MOTION TO CERTIFY DEFENDANT'S APPEAL AS
FRIVOLOUS AND FORFEITED**

D.C. Colo.L.Civ.R.7.1A CERTIFICATE OF COMPLIANCE

Counsel for Plaintiff certifies that he has conferred with counsel for Defendant pursuant to D.C.Colo.L.Civ.R 7.1A. Defendant does object to this motion and states he will not answer any discovery requests.

Discussion

Plaintiff Jeremy Myers moves this Court to find that the appeal filed by Defendant as to this Court's denial of his Motion to Dismiss on the grounds of absolute immunity is frivolous and forfeited and as grounds therefore states as follows:

1. Defendant Koopman filed a Motion to Dismiss this action based on, among other things, an assertion that Koopman should be granted absolute immunity as to Plaintiff's claims. The Court granted in part and denied in part the Defendant's Motion (CM/ECF Docket # 140, filed 06/17/2011).

2. Specifically, the Court denied Defendant's claim for absolute immunity (para. D, page 11). The Court also lifted the stay of discovery. It is from this denial of absolute immunity that Defendant appeals (CM/ECF Docket # 147, filed 07/01/2011).

3. Thereafter, magistrate Judge Michael Hegarty held a status conference and established a schedule for discovery (CM/EFC Docket #142, filed 06/29/11) based on the Court's Order.

4. Defendant Koopman filed a Motion to Stay Discovery (CM/EFC Docket # 143, filed 06/29/11) and an Objection to the Magistrate's Order regarding the scope of discovery (CM/EFC Docket # 146, filed 07/01/2011). Neither of which have been ruled on by this Court.

5. Magistrate Michael Hegarty issued a Recommendation on Defendant Koopman's Motion for Stay on 07/26/2011(CM/EFC Docket #156). The Magistrate's Recommendation was to grant the requested stay based on the district court's lack of certification that the appeal was frivolous or forfeited (citing both *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1161 (10th Cir.2005) and *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990).

6. Pursuant to the Magistrate's Recommendation and the holding in both the *McCauley* and *Donges* cases, Plaintiff requests this Court certify the Defendant's

appeal as frivolous and forfeited and deny Defendant's Motion for a Stay of Discovery.

7. This Defendant, and previously the former Defendants, has repeatedly requested either a stay of the proceedings and/or a stay of discovery.

8. Defendant Koopman, who has been driving the Defendant bus from the onset, initially based his discovery stay on a claim of qualified immunity. As the case has progressed and Orders have been issued on the various claims and defenses it has become increasingly clear to Defendant Koopman that at least part of Plaintiff's claim(s) would survive.

9. Recognizing the diminishing value of his claim for qualified immunity (and the protective cloak of a mandated stay of discovery), Koopman switched gears by asserting a claim of absolute immunity in another Motion to Dismiss (CM/EFC Docket #136, filed 4/14/11). It is unmistakably clear that Defendant is a prolific filer of motions.

10. Defendant's basis for now claiming absolute immunity is little more than a request that the Court stretch absolute immunity, heretofore mostly a privilege granted to a prosecutor, to now include law enforcement. Defendant does this by admonishing the Court that "it would do well to heed Justice Ginsberg's *suggestion* that a claim that focuses on a police officer's role in initiating and pursuing a criminal prosecution entitles the police officer to share the prosecutor's absolute immunity from a claim of malicious prosecution". (emphasis supplied).

11. More importantly for Defendant, this new claim and the subsequent divestiture of jurisdiction that accompanies it lays the groundwork for Defendant to

extend the protective cloak that he now asserts entitles him to an additional stay of discovery.

12. Aside from the monumental shift in the law that Defendant proposes, Plaintiff has watched his claim(s) languish within the system for two years with the significant prospect that they will languish for two more, and this is all before he is even afforded an opportunity to obtain discovery. Although not noted in his Recommendation, Magistrate Judge Hegarty stressed these factors when he set a discovery schedule over the Defendant's objection.

13. In *McCauley*, the Court noted the troublesome aspect of a party's use of an appeal to create divestiture and abuse the interlocutory appeal process. Here, Defendant cites no significant authority for his assertion that a police officer is entitled to absolute immunity. Indeed, his greatest support is only the musings of an associate supreme court justice in a concurring opinion that was not even on point with the issue here. His success is unlikely.

14. As a practical matter, an argument such as Defendant's would essentially preclude any recourse against rogue conduct by police in the course of a criminal investigation. This argument would render §1983 a nullity insofar as it serves to protect an individual's constitutional rights.

15. Defendant should have raised his absolute immunity argument concurrent with his argument for qualified immunity. His failure to do so, in conjunction with his repetitive motions and requests to stay discovery leads a careful observer to conclude

only that Defendant has but one imminent purpose and that is to delay the proceedings by whatever means may be available.

16. Directly after Magistrate Judge Hegarty set a discovery schedule Plaintiff submitted his initial interrogatories, request for admission and request for production to Defendant Koopman. Those discovery requests are due and Defendant is now in noncompliance with F.R.C.P. 33, 34, and 36.

WHEREFORE, Plaintiff respectfully requests the Court certify Defendant's appeal and claim for absolute immunity as frivolous and forfeited and deny his Motion for a Stay and for any further relief the Court deems just and proper.

DATED the 3rd day of August, 2011.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 3rd day of August 2011, I electronically filed the foregoing Plaintiff's Motion to Certify Appeal as Frivolous 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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And I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participants name:

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