

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, in his individual capacity,

Defendant.

ORDER ON DEFENDANT'S MOTION TO STAY

Before the Court is Defendant's Motion to Stay Discovery Pending Ruling on Defendant's Request for Witness Immunity [filed April 10, 2012; docket #183]. The matter has been referred to this Court for disposition [docket #184]. For the reasons that follow, Defendant's motion is **denied**.

I. Background

The Plaintiff instituted this action on December 1, 2009, but filed an Amended Complaint on March 2, 2011 following Judge Blackburn's order resolving various motions for summary judgment filed by the present and former Defendants. *See* dockets ##126, 127. The case arises from an incident that occurred on Plaintiff's property in Loveland, Colorado, on September 6, 2007. Amended Complaint, docket #127 at 1. According to Plaintiff, who brings this action pursuant to 42 U.S.C. § 1983, the Defendant obtained an invalid search warrant, and unlawfully and maliciously prosecuted Plaintiff when Defendant attempted to "rid the community of a large-scale methamphetamine production facility." *See id.*

Defendant responded to the Amended Complaint by filing a motion to dismiss pursuant to

Fed. R. Civ. P. 12(b)(6). On June 17, 2011, Judge Blackburn granted in part and denied in part the motion, and dismissed the Defendant City of Loveland from the case. Docket #140. Defendant filed a notice of appeal, and the case was stayed pending resolution of the appeal. *See* docket #164. The Tenth Circuit issued an order on February 14, 2012 affirming Judge Blackburn's decision. Docket #166. Thus, the sole remaining claim against Defendant Koopman is Plaintiff's claim for malicious prosecution. *See* Amended Complaint, docket #127.

Defendant responded to the Amended Complaint by filing an answer and a motion for judgment on the pleadings. Dockets ## 168, 169. Discovery commenced; this Court then set a Status Conference to determine the status of discovery and any necessary scheduling in the case. Docket #172. Subsequently, Defendant filed the present motion to stay discovery pending a ruling on his request for witness immunity made in the pending dispositive motion. Defendant asserts that he has "raised the issue of witness immunity pursuant to *Rehberg* [v. *Paulk*, -- S. Ct. --, 2012 WL 1069091 (Apr. 2, 2012)] in connection with Koopman's testimony at plaintiff's preliminary hearing in the underlying criminal case, which serves *in part* as the basis for plaintiff's sole malicious prosecution claim." Docket #183 at 1-2. He argues that, consequently, the Court should decide the question of witness immunity prior to permitting any further discovery in this case. *Id.* at 2. The Plaintiff does not object to the requested stay. Docket #186.

II. Discussion

The decision to issue a protective order and thereby stay discovery rests within the sound discretion of the trial court. *Wang v. Hsu*, 919 F.2d 130, 130 (10th Cir. 1990). Such protection is warranted, upon a showing of good cause, to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Here, Defendant

seeks protection from the burden of discovery at this stage in the case. A stay of all discovery is generally disfavored in this District. *Chavez v. Young Am. Ins. Co.*, No. 06-2419, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007).

In this matter, staying the case while Defendant's motion for judgment on the pleadings is pending could substantially delay the ultimate resolution of the matter, with adverse consequences such as a decrease in evidentiary quality and witness availability. As stated above, the case was initiated more than two years ago in December 2009 and discovery has been stayed for the majority of the litigation. Apparently, only some discovery has taken place since February 2012. *See* docket #171 at ¶ 2.

A party seeking a protective order under Rule 26(c) cannot sustain the burden of demonstrating good cause merely by relying upon speculation or conclusory statements. *Tolbert-Smith v. Bodman*, 253 F.R.D. 2, 4 (D.D.C. 2008). The movant must show specific facts demonstrating that the challenged discovery will result in a clearly defined and serious injury to the party seeking protection. *Id.*; *see also Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 206 (D. Colo. 2002). In this matter, Defendant articulates no actual reason for a stay, but merely states that “[t]he Court would act well within its discretion to decide the threshold question of witness immunity prior to permitting further discovery.” Docket #183 at ¶ 2. Typically, movants for a stay of proceedings assert a “burden” from the requirements of discovery; however, defendants always are burdened when they are sued, whether the case ultimately is dismissed, summary judgment is granted, the case is settled, or a trial occurs. *See Chavez, supra*. Here, there is no evidence of a special burden on the Defendant.

Generally, it is the policy in this district not to stay discovery pending a ruling on dispositive

motions. *See Ruampant v. Moynihan*, 2006 U.S. Dist. LEXIS 57304, *4-5 (D. Colo. Aug. 14, 2006). This is particularly true in cases like this one, pending before Judge Blackburn, who instructs the parties that motions having the effect of delaying proceedings “are strongly discouraged because of the adverse effects they have on case management.” REB Practice Standards - Civil Actions, II.F. and G. Trial dates have been vacated twice in this matter already. *See* dockets ##117, 163. Moreover, Defendant concedes that the immunity defense applies to the Plaintiff’s claim only “in part”; the Court sees no justification for staying the proceedings entirely based upon this partial defense. Consequently, the general interests of controlling the court’s docket and the fair and speedy administration of justice require that the present motion to stay discovery be denied.

III. Conclusion

Accordingly, for the reasons stated above, it is hereby ORDERED that Defendant’s Motion to Stay Discovery Pending Ruling on Defendant’s Request for Witness Immunity [filed April 10, 2012; docket #183] is denied.

Dated at Denver, Colorado, this 12th day of April, 2012.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge

WICK & TRAUTWEIN, LLC
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April 13, 2012

David R. Stewart, PhD, PE
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Via email to dave.stewart@stewartenv.com

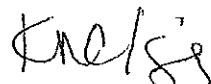
Re: *Myers v. Koopman*
U.S. District Court, District of Colorado, Case No. 09CV2802

Dear Dr. Stewart:

Enclosed is a copy of the complete Final Methamphetamine Report (Plaintiff's environmental expert's report) dated November 21, 2007, containing pages 3 and 4, which were missing from the copy previously sent to you.

Yours truly,

WICK & TRAUTWEIN, LLC



Kent N. Campbell

KNC/jej
Enclosure

cc: John Duval (via email)
Nile Knez (via email)
Pat Merrill (via email)
Bettie Greenberg (via email)
Chief Luke Hecker (via email)
Detective Brian Koopman (via email)

Final Methamphetamine Report

Prepared for:

**Mr. Jim Myers
Great Western Salvage, Ltd.
1101 North Madison Ave.
Loveland, CO 80537**

Assessment Location:

**1101 North Madison Ave.
Loveland, CO 80537**

**November 21, 2007
Project 1244.07**



**Survey and Report by:
Century Environmental Hygiene LLC
199 South Shields Street
Fort Collins, CO 80521**

Plaintiffs' Exhibit 1

Summary

Century Environmental Hygiene (CEH) was retained by Great Western Salvage, Ltd. to perform a preliminary assessment (PA) for methamphetamine (meth) in a building at 1101 North Madison Ave., Loveland, CO. The PA report, dated October 7, 2007, is attached as an appendix to this final report. Based on the data available from the PA, no detectable meth was found on the building, although meth was detected on one piece of movable furniture. Samples from the walls of the room in which this furniture was found contained no meth. As the furniture that had meth contamination was part of a small group of furniture that was left in the building by a particular individual, all of the furniture left by that individual was assumed to be contaminated and was removed from the building. Based on this, the building would be considered to be compliant with 6 CCR 1014-3 at this time.

Discussion

Per the PA, no meth was detectable on any part of the building. Meth was detected on one piece of furniture in the southwest corner room on the second floor. This room contained the following items of personal property at the time of the preliminary assessment:

- Bureau
- Rug or carpet
- Vacuum cleaner
- TV stand
- 2 large cardboard boxes containing various items

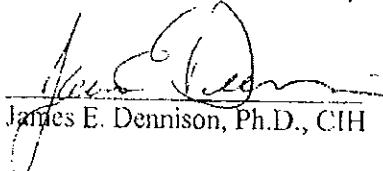
Reportedly, these items all belonged to an individual who resided in the building for approximately one week's time. According to the property owner, this individual left these items and no other property. Evidently, this property was meth-contaminated at another location, because if it had been contaminated while in the subject property, there would have been detectable meth on the building structure as well. Thus, it was reasonable to assume that these items are the only meth-contaminated items in the building and that if they were removed, all meth contamination in the building would be eliminated to the point where the building is compliant. This does not strictly mean that there is no meth anywhere in the building; as traces of meth or sporadic locations where meth could possibly exceed the Cleanup Level could exist, but that these would be limited to the extent that the building can be considered compliant with regulatory levels.

The owner contracted with Advanced Remedial Services to remove the property on December 2, 2007. The contractor removed the contaminated items by wrapping them in polyethylene, hand carrying them out of the building, and disposing of them at Larimer County Landfill. Copies of the contractor's submittals are attached.

Certifications of procedures and results

The methods used were consistent with 6 CCR 1014-3.

I do hereby certify that I conducted a preliminary assessment of the subject property in accordance with 6 CCR 1014-3 §4. I further certify that the cleanup standards established by 6 CCR 1014-3 §7 have been met as evidenced by testing I conducted.



James E. Dennison, Ph.D., CIH

Disclaimer:

No evaluations beyond those described in the report have been made and CEH is not responsible for any hazards or risks, apparent or otherwise, other than those included in this evaluation. As with any conclusions made based on visual observations and/or random and limited sampling, there is an inherent possibility that undetected conditions exist, and CEH does not accept liability for any not reasonably ascertainable from the data or observations made. Sampling can be inherently obtrusive, and CEH does not accept liability for any damage to the property reasonably occurring during the course of the work in connection with its duties. The only warranty expressed or implied is that the work conforms to standard industry practice at the time it was performed. In the unlikely event a defect in the work is noted, the client has the option to request that the defect be remedied at no additional cost, or a pro rata deduction in the fee billed. CEH's maximum liability to any party shall not exceed the fee for the defective portion of the work. Any reports issued are for the sole use of the client and reliance on it by others is at their sole risk.

Appendices:

- A. Preliminary Assessment report
- B. Contractor Submittals

9. There are no adjacent areas for this stand-alone building.
10. The house has no currently working heating except for a propane fired furnace located on the second floor that services the apartment on the north side of the second floor. Ductwork from this system leads into and from the apartment only.

11. Sampling Procedures

Sampling and analysis were performed in accordance with the requirements of 6 CCR 1014-3 (Colorado meth regulations, hereafter referred to as meth regulations.) The sampling was conducted by James Dennison, CIH, Ph.D. of CEH. All samples were single-surface samples comprised of an area of 100 cm² or multiples thereof. Sample locations were generally selected in a more or less random manner. Samples were collected from non-porous surfaces by marking an area of 100 cm² with a pre-cut template. Gauze was prepared by opening wrapped packages of single gauze pads and inserting several unused gauze into a clean centrifuge tube. The gauze were then saturated with isopropanol and excess solvent drained until the gauze did not contain enough solvent to drip during sample collection. Gauze was removed from the centrifuge tube and a wipe sample was taken from within the template area using an S-pattern, folded once, re-wiped in an orthogonal S-pattern, folded again, and then placed into a pre-labeled centrifuge tube. Gloves were changed between samples. When a rough surface was encountered, the sample was collected by blotting the area uniformly. Sampling was observed by the client or agents of the client, but in no case did the client or agent of client performed any sampling, provide any input into sample locations, touch any sampling equipment or samples; a complete chain of custody of samples was maintained at all times.

Quality control (QC) samples consisted of field blanks. All samples, including both data and QC samples, were submitted to the lab without any information that identifies the nature of the sample. Only sample numbers were provided to the lab; no location or sample area information was provided. This practice ensured to the maximum possible extent that the lab was unaware which samples were QC. Field blanks were collected at an approximate frequency of 10% of samples. The field blank was treated the same as other samples, *i.e.* the gauze that became the field blank in a given unit was the last gauze in the centrifuge tube, meaning that the field blank was exposed to potential cross-contamination throughout the handling of all media. Meth was not detected in any of the field blanks collected.

Samples were analyzed by Morse Environmental, Inc., a joint laboratory with Legacy Metrolab of Portland, OR. Morse/Legacy is a laboratory approved for use under the meth regulations, and successfully participates in the Washington State certification program (Colorado has no certification program of its own). The analytical method used was methamphetamine by GC/MS. The lab runs a QA/QC program that includes lab blank, method blank, check standards, and surrogate spikes. All lab QA/QC data were within limits. Their lab blanks and method blanks contained no detectable meth. Check standards and surrogate standards indicated recovery within acceptable limits.

Field screening for volatile organics and acidity/alkalinity was performed due to the allegations that waste dumping may have occurred. Cooking wastes can include organic solvents, which are usually volatile, and acid or caustic waste, which would alter the pH of the dumping location. The volatile organics were field screened with a photoionization detector (MiniRAE 2000, SN 13222) which was

properly calibrated with 10 ppm isobutylene prior to and after use. Air samples were collected in various locations on the site and directly read by the instrument. pH was measured using pHdriion Vivid 1.11 test strips on water and soils. Soils were first dampened with neutral pH water.

Sample results do not prove that every part of the whole space is above or below the cleanup level (CL), as samples are collected from a small fraction of the total surface area. Due to inherent variability in the contamination level from one location to another location, a space in which samples indicate meth levels below the CL could have other locations where the meth level is above the CL. However, a reasonable effort was made to collect samples from random locations, which supports the idea that the samples provide a representative indication of meth levels, i.e., "average" meth levels. The statement that is made herein is that the meth levels reported were determined in accordance with Colorado requirements, and that the results simply provide an assessment of whether the building is defined as compliant or non-compliant with the CL.

Sample locations were photographed and shown on schematic building sketches. Photographs, building sketches, and field data are provided in Appendices to this report.

12. See above.

13. Results. See Table 1, Appendix A. The first set of samples was collected on September 15, 2007. All samples from this date (other than field blank) were composite samples. Single surface (discrete) samples were not collected due to the size of the building and the large number of samples that would be required to obtain data from the entire building. Rather, composite samples were collected to increase the likelihood of detecting meth, if meth was present. All surface samples were five part composites, with a sub-sample collected in each major room within a space. Initially, it was assumed that the basement, the first floor, the HVAC system on the second floor, the apartment on the second floor, the attic, and the remainder of the second floor each represented a separate functional space. While there was scant initial information to determine functional space boundaries, the initial functional space definitions were based on the theory that if meth was cooked in parts of the building, that area would tend to be more contaminated than areas that were not in the same airspace within the structure. Thus, areas of contiguous airspace were deemed to be functional spaces. Based on the negative test results obtained during the complete assessment, it would also be reasonable to define the whole building as one functional space.

Initially, the police report that contained the allegations that meth was cooking in the attic was not available (prior to the testing on September 15.) For this reason, sampling included five functional spaces (basement, first floor, second floor apartment, remainder of second floor, and HVAC). In the five composite samples from these functional spaces, no detectable meth was present in any of the composite samples (meth level was $<0.004 \text{ ug meth}/100 \text{ cm}^2$ for all surface samples and $<0.007 \text{ ug}/100 \text{ cm}^2$ for the HVAC system) except for the sample that was collected from the "remainder of the second floor" functional space. This functional space included Rooms 14, 15, 16, 17, 23, 24, 25, and 26, which included all rooms on the second floor outside of the apartment. This sample contained 0.92 ug meth in 500 cm^2 , or 0.18 ug meth/ 100 cm^2 . The Cleanup Level is 0.5 for single surface samples, but is 0.1 ug meth/ 100 cm^2 for a five part composite. Thus, this sample exceeds the CL. Based on the nature of composite sampling, it was possible that no one location in the sample exceeded 0.5 ug meth/ 100 cm^2 , meaning that if these five samples were not combined, each may have

contained less than the discrete CL for meth. Per state guidance, it is allowable and advised to re-sample each location to determine whether the meth contamination is localized or distributed within the functional space. Therefore, with client approval, each location was re-sampled on October 1, 2007. Samples from the attic were also collected on that date. The attic was sampled at three locations. At each location, a discrete sample was collected and the adjacent spot was sampled as a composite. The composite sample was then submitted for analysis and the discrete samples were archived for possible future analysis.

In the composite attic sample, no meth was detected. This result indicates that the attic is compliant, and is evidence that meth was not cooked or smoked in the attic. Of the discrete samples in the second floor (outside of the apartment) functional space, none of the samples contained any detectable meth except for sample 100107JD-03, which was taken from the top of a piece of furniture in Room 26, located in the southwest corner of the second floor, adjacent to one of the subsample locations in the prior composite sampled from this functional space. This sample contained 2.2 ug meth, compared to 0.92 ug meth for the original composite. For adjacent samples, these two values are reasonably comparable. As none of the other adjacent samples from the composite locations contained any detectable meth, the data indicate that the other parts of that functional space are compliant, since it is indicated that all of the meth in the composite likely came from the one subsample from Room 26.

According to Mr. Myers, this piece of furniture was left by someone who was moving from one residence to another and stayed in the building for about one week, but left a few pieces of personal property in the building. According to Mr. Myers, all of the property left by this person is stored in the southwest second floor room, and all the movable property in this room belongs to this person. This raised the question of whether the room itself was contaminated, so with client approval, two samples from building surfaces in this room were collected along with one sample from the adjacent hallway, which had not been previously sampled, on October 6, 2007. None of these samples contained any detectable meth. It is therefore clear that the meth contamination found in the previous composite sample and discrete sample from that piece of furniture did not correlate with meth contamination on samples from the structure of the building. It is also clear that while the property of the unrelated person was non-compliant, the building itself is compliant throughout. As no meth was detected from any surface in the building, it stands to reason that the property of the unrelated person was contaminated while the property was in another location prior to arriving at this site, as it is believed that airborne meth in a building cannot contaminate objects in the building without contaminating the building at the same time.

Samples of soil that were tested for pH and volatile organics did not indicate the presence of acid, caustic, or solvent disposal on the site. It is important to note that hazardous waste from non-meth origins could be present, but was outside the scope of this assessment.

To summarize the meth sample data from this building, 31 samples (four 5-part composites and 11 discrete samples) were collected throughout the building at locations that encompass the entirety of the structure from basement to attic, and three samples were collected from the small HVAC system. No meth was detected on any sample from any location, except from a piece of furniture belonging to another person. As meth tends to spread throughout an airspace when it is cooked or smoked, it is unlikely that meth was cooked or smoked in this building in the past five or so years. It is worth noting that no recent cleaning or painting appears to have occurred.

According to state regulations, the personal property belonging to the unrelated person that was stored in Room 26 should be construed as contaminated above the CL. According to Mr. Myers, this property consisted of the following items (photos of the items are provided in the appendix):

Bureau
Rug or carpet
Vacuum cleaner
TV stand
2 large cardboard boxes containing various items

These items should be discarded as meth waste at which point the building may be considered compliant with no further testing. As the building is currently considered compliant, the contaminated property should be wrapped in 6-mil or better plastic bags or polyethylene prior to moving it to avoid the potential of transferring contamination to the building during the disposal process.

14. Health and Safety procedures. All sampling was conducted in accordance with CEH HASP for meth evaluations, including use of disposable booties and gloves.

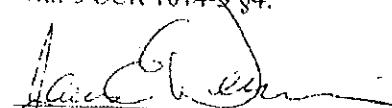
15-18. Not applicable to PA.

19. Consultant SOQ. See Appendix G.

20. Certifications of procedures and results. The methods used were consistent with 6 CCR 1014-3.

Certification

I do hereby certify that I conducted a preliminary assessment of the subject property in accordance with 6 CCR 1014-3 §4.



James E. Dennison, Ph.D., CIH

Disclaimer

No evaluations beyond those described in the report have been made and CEH is not responsible for any hazards or risks, apparent or otherwise, other than those included in this evaluation. As with any conclusions made based on visual observations and/or random and limited sampling, there is an inherent possibility that undetected conditions exist, and CEH does not accept liability for any not reasonably ascertainable from the data or observations made. Sampling can be inherently obtrusive, and CEH does not accept liability for any damage to the property reasonably occurring during the course of the work in connection with its duties. The only warranty expressed or implied is that the work conforms to standard industry practice at the time it was performed. In the unlikely event a defect in the work is noted, the client has the option to request that the defect be remedied at no additional cost, or a pro rata deduction in the fee billed. CEH's maximum liability to any party shall not exceed the fee for the defective portion of the work. Any reports issued are for the sole use of the client and reliance on it by others is at their sole risk.