

SUPERIOR COURT
OF THE
STATE OF DELAWARE

CHARLES E. BUTLER
JUDGE

October 3, 2016

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Re: *Rosin v. University of Delaware, et al.*
C.A. No. N16C-02-075 CEB

Gentlemen:

This lawsuit concerns a defendant bicyclist who allegedly crashed into the plaintiff pedestrian with tragic consequences. The bicyclist has moved to stay his deposition due to his concerns that perhaps the State will step in and file a criminal charge against him. He therefore sees at least a putative 5th Amendment privilege against self-incrimination that his lawyer wants to preserve.

The case law provided to the Court suggests that a civil deponent may defer answering questions where there is a “reasonable fear” of criminal prosecution.¹ When asked what this “reasonable” fear is, his counsel invites fanciful speculation that may qualify as “fear” but is not particularly reasonable. Unfortunately, the parties seem quite unclear as to scope of the “reasonableness” inquiry the Court is required to engage in order to resolve the issue.

We are told that the mishap was investigated by police officers from the University of Delaware and Newark Police Department. We are not told that the matter was referred to the Department of Justice nor has there been any communication between counsel for the defendant and state authorities shedding any light on the concerns expressed in defendant’s motion.

The Third Circuit has followed a six factor balancing test in determining whether a stay is appropriate:

1) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendants have been indicted; 3) the plaintiff’s interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest.²

The first factor, the similarity of issues, has been termed “the most important issue at the threshold” in determining whether or not to grant a stay. The Court will

¹ *Eden v. Oblates of St. Francis de Sales*, 2007 Del. Super. LEXIS 387, at *3 (Super. Ct. Dec. 14, 2007).

² *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 7 F.Supp.2d 523, 527 (D.N.J. 1998)

assume that this civil case and any potential criminal case would involve substantial overlap and this weighs in favor of granting the stay.

The second factor to be considered is the status of the criminal case. The stage of the parallel criminal proceeding may also substantially affect the determination of whether a stay is warranted.³ The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned.⁴ The potential for self-incrimination is greatest during this stage, and “the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act.”⁵ If the Government is conducting an active parallel criminal investigation it is still possible to obtain a stay, even though an indictment or information has not yet been returned.⁶ Without any indication that the State intends to indict the defendant or conduct any further investigation in this case, this factor weighs heavily in favor of denying a stay.

³ *Id.*

⁴ *Id.*

⁵ *Id.* See *In re Par Pharmaceutical, Inc.*, 133 F.R.D. 12, 13 (S.D.N.Y.1990)(“The weight of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment.”).

⁶ *Walsh*, 7 F.Supp.2d at 527.

Turning to the third factor, while delays in civil cases are common, it would be prejudicial to the plaintiff to grant a stay thereby pushing back the resolution of the civil case indefinitely.

In weighing the fourth factor, the Court recognizes that counsel is anxious to protect his client's constitutional rights but parties who face both civil litigation and criminal investigation face difficult choices.⁷ While we will not force that choice quite yet, the Court is not willing to delay the proceedings to some vague, indefinite point in time when counsel feels more comfortable that his client will not be charged.

With respect to the fifth factor, we are completely unimpressed with the proposition that defendant can sit out his deposition for the length of the statute of limitations – particularly since he cannot even articulate the potential offense he has *not* been charged with and therefore does not know how long the statute runs.⁸ The Court has an interest in judicial efficiency in terms of managing its caseload.⁹ The Court has been advised that the investigating police officers are scheduled to

⁷ *Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F.Supp.2d 573, 575 (S.D.N.Y. 2001). See *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (“Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment ‘does not preclude the inference where the privilege is claimed by a party to a Civil cause.’”(quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)).

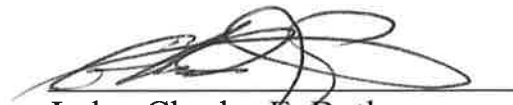
⁸ See *Sterling*, 175 F.Supp.2d at 573 (“It is unrealistic to postpone indefinitely the pending action until criminal charges are brought or the statute of limitations has run for all crimes conceivably committed by defendants. Such a postponement would require this court either to ‘rely upon fortuitous events to manage its docket’ or to guess what criminal act defendants might be charged with, and, consequently, which limitation periods apply to those criminal acts.” (Quoting *Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 13 (D.Mass.1991)).

⁹ *Walsh*, 7 F.Supp.2d at 527

be deposed in the next 60 days or so. They may certainly be quizzed further on the likelihood of a pending criminal indictment. But in the absence of testimony or other evidence that such an eventuality is more real than ephemeral, the Court will not permit an indefinite stay of defendant's deposition.

The final factor, the public's interest, is not implicated until an indictment or criminal investigation is underway. Indeed, without an indictment or credible threat of an ongoing criminal investigation, the public interest in seeing civil disputes resolved in an efficient and timely manner supersedes defendant's mere suspicions that he may be exposed to criminal liability.

We will grant the requested stay until after the deposition of the relevant law enforcement officers and the stay will dissolve immediately thereafter. If after those depositions defendant is still convinced he has a 5th Amendment privilege worthy of assertion and he is entitled to a stay of these proceedings as a result thereof, he may refile his motion armed with whatever new information he has or, at a minimum, a more focused argument and case law.



Judge Charles E. Butler