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Court of Common Pleas

MOTION FOR...
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By: ROBERT C. PIVONKA 0067311

Confirmation Nbr. 2236258

TINA RENEE KING ET AL

CV 20 941131

vs.

Judge: KELLY ANN GALLAGHER

MENORAH PARK FOUNDATION ET AL

Pages Filed: 13

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

| | | |
|--|---|--------------------------------|
| Tina Renee King, <i>et al.</i> , |) | CASE NO.: CV-20-941131 |
| |) | |
| Plaintiffs, |) | JUDGE KELLY ANN GALLAGHER |
| |) | |
| v. |) | |
| |) | |
| Menorah Park Foundation, <i>et al.</i> , |) | DEFENDANTS’ MOTION FOR |
| |) | STAY OF ALL PROCEEDINGS |
| |) | AND PROTECTIVE ORDER |
| Defendants. |) | |
| |) | |
| |) | |

NOW COME Defendants The Montefiore Home (“Montefiore”), Menorah Park Center for Senior Living Bet Moshav Zekenim Hadati (“Menorah Park”), James P. Newbrough, Jr. (“Newbrough”), and Richard Schwalberg (“Schwalberg”) by and through counsel and pursuant to Rule 26(C) of the Ohio Rules of Civil Procedure and move this Honorable Court for an indefinite stay of all proceedings and a protective order from discovery. The grounds for this Motion are set forth below.

I. BACKGROUND

Defendants Montefiore and Menorah Park operate skilled nursing facilities in Beachwood Ohio.¹ Plaintiffs Tina Renee King (“King”) and Marie Gelle (“Gelle”) (collectively, “Plaintiffs”) were formerly employed by Montefiore as that facility’s Director of Nursing (“DON”) and Assistant Director of Nursing (“ADON”) respectively. In the midst of the COVID-19 pandemic, on or about October 13, 2021, Plaintiffs were supposed to swab all the residents in one Montefiore’s Mandel 3 unit for COVID-19 testing. The Plaintiffs reported that they had swabbed

¹ Newbrough is the President and CEO of Montefiore and Menorah Park, and Schwalberg is the COO of the facilities.

the residents in question and submitted the samples for COVID-19 testing. Despite their claim that they swabbed the Mandel 3 residents – many of whom were exhibiting symptoms of COVID-19 infection – the test results for all the residents Plaintiffs claimed to have swabbed came back negative. The one Mandel 3 resident swabbed by another nurse came back positive. When the Mandel 3 residents were re-tested four days later, 22 tested positive for COVID-19 infection.

In the following days, a Montefiore employee reported to management that she suspected that the Plaintiffs did not actually swab the Mandel 3 residents on October 13, 2020 and that they had submitted false samples for testing. Montefiore investigated and received information that Plaintiffs had submitted false samples. Plaintiffs and the Montefiore's Administrator were discharged.

Defendants reported the findings of its investigation to the Ohio Attorney General ("OAG"), the Ohio Department of Health ("ODH"), the Ohio Board of Nursing ("OBN"), and the Ohio Board of Executives of Long-Term Services & Supports ("BELTSS"). (*See* Affidavit of Richard Schwalberg attached hereto as Exhibit A at ¶3 (hereafter "Schwalberg Aff.")). Each of these agencies has initiated and is conducting its own investigations. Defendants are cooperating appropriately with the investigations being conducted by these agencies. (*Id.*) Defendants have been advised that the OAG is conducting a criminal investigation. (*Id.*) The OAG has asked that Defendants step aside and permit it to conduct its investigation without interference – specifically directing Defendants to not conduct any further investigation of their own and/or discuss information about the OAG's investigation. (*Id.* at ¶4.) Defendants have complied and intend to continue complying with this directive from OAG. The OAG's investigation is ongoing. Investigations by ODH, OBN, and BELTSS also are ongoing.

Plaintiffs served discovery in this action on March 26, 2021. Information sought by

Plaintiffs would disclose information relating to and/or learned as a result of the OAG's pending investigation. Defendants are concerned that responding to Plaintiffs' discovery at this time will be an interference with the OAG's pending criminal investigation.

Counsel have had several conversations regarding potentially jointly seeking a stay of this litigation pending the conclusion of the OAG's and other investigations of the Plaintiffs. (Affidavit of Robert C. Pivonka attached hereto as Exhibit B at ¶3 (hereinafter "Pivonka Aff.")). Indeed, the Defendants sought and received extensions of time to Answer or otherwise respond in part to afford additional time for the Parties to discuss this important issue. (*Id.* at ¶4.) In spite of several prior cordial conversations about potentially seeking a stay, on March 26, 2021, Plaintiffs' counsel served discovery requests and told Defendants' counsel for the first time that Plaintiffs "are strongly opposed" to seeking a stay and that the suggestion was "particularly noxious" to them. (*Id.*)

II. LAW AND ARGUMENT

A. The Court Should Exercise its Discretion to Order a Stay.

Ohio courts have discretion to grant a stay in a civil litigation in certain situations when a parallel criminal investigation is ongoing. Courts consider the following factors:

(1) The extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether [a party has] been indicted; (3) the private interests of the [parties] in proceeding expeditiously weighed against the prejudice to [parties] caused by the delay; (4) the private interests of and burden on the [parties]; (5) the interests of the courts; and (6) the public interest.

See, e.g., United States v. Ogbazion, 2012 U.S. Dist. LEXIS 136016 at *2-*3 (S.D. Ohio Sept. 24, 2012), *citing Louis Vuitton v. LY USA, Inc.*, 676 F.3d 83, 98 (2nd Cir. 2012); *see also Arts Rental Equip, Inc. v. Bear Creek Constr., LLC*, 2013 Ohio Misc. LEXIS 33, *3-*5 (Hamilton Cty. June 18, 2013). While this is admittedly an unusual and extraordinary remedy, it is within the discretion

of the trial court. *See, e.g., id.* One court explained, “When a party to a civil action is subject to criminal proceedings and/or investigations that relate to such civil action, courts will often stay the civil proceedings so as to prevent the use of civil discovery and evidentiary procedures to obtain evidence for use in a criminal matter.” *McCullaugh v. Kendrick*, 2009 U.S. Dist. LEXIS 87849 at *4-*5 (N.D. Ohio Sept. 9, 2009) *quoting Eastwood v. U.S.*, 2008 U.S. Dist. LEXIS 106777 at *1-*2 (E.D. Tenn. Nov. 14, 2008). The *Arts Rental* court cited two additional factors: good faith of the litigants and the status of the cases. *Arts Rental*, 2013 Misc. LEXIS 33 at *3, *citing Microfinancial Inc. v. Premier Holidays Int’l*, 385 F.3d 72 (1st Cir. 2004).

Consideration of these commonly applied factors supports issuing a stay in this matter. The issues in this case and in the other investigations – most notably the OAG’s criminal investigation – are virtually identical. This lawsuit arises from Defendants’ decision to terminate the employment of the Plaintiffs in October 2020 after Defendants’ investigation revealed that Plaintiffs had submitted falsified resident samples for COVID-19 testing. At issue are the termination itself as well as Plaintiffs’ claim that Defendants made defamatory statements about them. The question of whether Plaintiffs did, in fact, submit falsified samples for COVID-19 testing is the central issue of the investigations by the OAG, the ODH Fraud and Abuse Unit, and the OBN. Information sought in discovery will necessarily overlap the information being sought in the OAG’s criminal investigation. Moreover, provision of information in discovery almost certainly will provide non-public information to the Plaintiffs who are potential targets of the OAG and other investigations. This factor strongly supports the issuance of a stay in this matter and a protective order with respect to Plaintiffs’ discovery requests.

Consideration of the second factor – the current status of the case – does not strongly support or fail to support issuance of a stay. This lawsuit is in the very early stages with the

Defendants only recently filing their Answer and Counterclaim. The pending investigations have been ongoing for several months and likely are reaching their conclusion. While the Plaintiffs have not been indicted, it is reasonable to expect that a decision on that point is not far away.

The third factor also supports issuing a stay. None of the Parties will be prejudiced by a delay in this matter. This matter is in its very early stages with the Answer and Counterclaim only recently having been filed. A delay while the OAG and other agencies complete their investigation will not create prejudice. Evidence already is being gathered and preserved in connection with those investigations, so a delay in this matter will not affect the future availability of evidence in this case. The Plaintiffs are seeking financial damages and not injunctive relief, so a delay will not prevent them from obtaining full recovery if they are successful in this matter. This factor supports the issuance of a stay.

Regarding the fourth factor, Defendants' private interests strongly support a stay in that requiring Defendants to proceed and respond to discovery places them in the untenable position of violating the admonition of the OAG investigator. The OAG instructed Defendant Schwalberg to not get involved in the investigation of this matter and also to not discuss the issues that were addressed in his interview by the OAG in order to help protect the integrity of the OAG's investigation. Schwalberg is also aware that other OAG interviewees were similarly admonished. As a result, Defendants have a legitimate concern that the current progress of this matter – including but not limited to further investigation of the matter and responding to Plaintiffs' discovery requests – would be contrary to the OAG's instructions and also potentially interfere with the OAG's ongoing criminal investigation (as well as the investigations being carried out by ODH, the OBN, and BELTSS). Preventing Defendants from being placed in this impossible predicament strongly favors issuance of a stay.

The Court also has an interest in issuing this stay. Judicial economy favors placing this litigation – and the parties’ discovery – on hold while the OAG investigation plays out. If this litigation is not subject to a stay, every additional discovery request will result in additional concerns and potentially corresponding motions for protective orders. In addition, numerous potential witnesses from whom a deposition is sought will be placed in the same untenable position of disregarding the instructions of the OAG to not discuss the matter while the criminal investigation is pending. Accordingly, this factor also supports a stay.

The fifth factor – the public interest – also strongly favors issuing a stay. The OAG is investigating serious allegations relating to the Plaintiffs’ falsification of Montefiore resident COVID-19 tests. It is unquestionably in the public’s interest to permit this investigation to proceed without interference or the release of information that has not previously been publicly disclosed. Once the OAG has concluded its investigation, this litigation can resume without fear of interfering with and/or affecting that investigation.

The two remaining factors – the good faith of the litigants and the status of the case – also favor granting a stay. Defendants are seeking this stay in good faith and with no intention of unnecessarily delaying this matter. On a number of occasions, the OAG has requested that Defendants not undertake additional investigation of this matter and has instructed witnesses to not discuss the investigation publicly. With this Motion, Defendants seek only to comply with the OAG’s direction and help protect the integrity of its pending criminal investigation. Moreover, because the case is still in the early stages, it will not cause any undue disruption or prejudice any of the Parties.

As stated above, ordering a stay of this matter while the OAG’s criminal investigation is ongoing (and other government agencies also are conducting their own investigations) is clearly

within the Court's discretion. Consideration of the well-settled factors strongly supports granting a stay. Accordingly, the Court should exercise its discretion and order an indefinite stay of these proceedings while the OAG's investigation remains pending.

B. The Court Should Issue a Protective Order Prohibiting Discovery.

Pursuant to Rule 26(C) of the Ohio Rules of Civil Procedure, trial courts have the authority to limit discovery. Trial courts may grant a protective order for good cause shown to protect a party from "annoyance, embarrassment, oppression, undue burden or expense." Ohio Civ.R. 26(C). The decision to grant a protective order "rests within the sound discretion of the trial court." *See, e.g., All Kelley & Ferraro Asbestos Cases v. A.W. Chesterton Co.*, 2011 Ohio Misc. LEXIS 1017 (Cuyahoga Cty. Apr. 4, 2011) *citing Ruwe v. Springfield Township Trustees*, 29 Ohio St. 3d 59, 61 (1987). When determining whether to grant a protective order, "the trial court balances the interest of the requesting party's need for the information against the potential harm and hardship on the party from whom discovery was requested." *Id. citing Arnold v. American Nat'l Red Cross*, 93 Ohio App.3d 564, 576 (1994) and *Huebner v. Miles*, 92 Ohio App. 3d 493, 501 (1993).

As discussed at length above, being required to respond to the discovery requests issued by Plaintiffs in this case – including interrogatories, requests for production of documents, and requests for admissions – creates an oppressive and burdensome situation for Defendants because it will require them to act contrary to instructions from the OAG which were given in connection with an ongoing criminal investigation. The Plaintiffs' interest in obtaining the requested discovery at this time is outweighed by the potential harm and hardship on Defendants that could arise from disregarding the OAG's direction. Moreover, the Plaintiffs' interest in obtaining the information at this time is outweighed by the public's interest in the OAG's unencumbered investigation.

Defendants, through counsel, sought Plaintiffs' agreement for a stay in this matter, but Plaintiffs refused in very strong terms.

III. **CONCLUSION**

For all the forgoing reasons, the Defendants respectfully move this Honorable Court to order an indefinite stay of all proceedings in this litigation until the OAG concludes its criminal investigation of the events that underlie this litigation. In addition, Defendants request that the Court issue a protective order that discovery not be had while the stay is in effect.

Respectfully submitted,

ROLF GOFFMAN MARTIN LANG LLP

/s/ Robert C. Pivonka

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Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that on April 23, 2021, a copy of the foregoing *Defendants' Motion for Stay of all Proceedings and Protective Order* was served via the court's electronic filing system and email upon the following:

Steven A Sindell (0002508)
Rachel Sindell (0078463)
Sindell And Sindell LLP
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Attorney for Plaintiffs

/s/ Robert C. Pivonka
Robert C. Pivonka

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

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| Plaintiffs, |) | JUDGE KELLY ANN GALLAGHER |
| |) | |
| v. |) | |
| |) | |
| Menorah Park Foundation, <i>et al.</i> , |) | AFFIDAVIT OF ROBERT C. |
| |) | PIVONKA |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |
| |) | |

Affiant, Robert C. Pivonka, being first duly sworn, deposes and states as follows:

1. I am over the age of 21, am of sound mind, and have the capacity to make this Affidavit.
2. I am a Partner with Rolf Goffman Martin Lang LLP. I am lead counsel for the Defendants in the above-captioned matter. This litigation arises out of an incident that occurred at The Montefiore Home in October 2020 relating to resident COVID-19 testing (the “October 2020 Incident”).
3. In connection with my representation of the Defendants in this matter, I have had multiple communications with Plaintiffs’ counsel attorney Steven Sindell (“Plaintiffs’ Counsel”) regarding this matter and the various pending governmental investigations of the October 2020 Incident. We have discussed that there are investigations by the Ohio Attorney General (“OAG”), the Ohio Department of Health, the Ohio Board of Nursing, and the Ohio Board of Executives of Long-Term Services & Supports.

4. Beginning with a January 15, 2021 letter to Plaintiffs' counsel, I inquired about Plaintiffs' willingness to dismiss the lawsuit without prejudice pending the completion of the ongoing investigations – most notably the OAG investigation. Plaintiffs Counsel indicated that they were not willing to dismiss the matter pending the investigation. During a February 16, 2021 phone conversation, Plaintiffs' Counsel stated for the first time that they may be willing to “push [the litigation] out” and “wait for the AG [to finish its investigation].” In a follow-up call one week later on February 23, 2021, counsel for the Parties again discussed the possibility of jointly seeking a stay and agreed that Defendants could seek an additional extension of time to answer and/or respond to the Complaint. On March 24, 2021, I again contacted Plaintiffs' counsel and inquired whether they had reached a decision on jointly seeking a stay of this litigation pending the completion of the OAG's investigation and Plaintiffs' Counsel indicated that he would provide a response within a couple of days. On March 26, 2021, Plaintiffs' Counsel sent a letter indicating for the first time that they were “strongly opposed” to seeking a stay and that the suggestion was “particularly noxious” to them. Plaintiffs' counsel's letter also included written discovery requests.

FURTHER AFFIANT SAYETH NAUGHT


Robert C. Pivonka

SWORN TO BEFORE ME, and subscribed in my presence, this ^{23rd} day April, 2021.


NOTARY PUBLIC



**IN THE COURT OF COMMON PLEAS
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| Tina Renee King, <i>et al.</i> , |) | CASE NO.: CV-20-941131 |
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| Plaintiffs, |) | JUDGE KELLY ANN GALLAGHER |
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| v. |) | |
| |) | |
| Menorah Park Foundation, <i>et al.</i> , |) | AFFIDAVIT OF RICHARD |
| |) | SCHWALBERG |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

Affiant, Richard Schwalberg, being first duly sworn, deposes and states as follows:

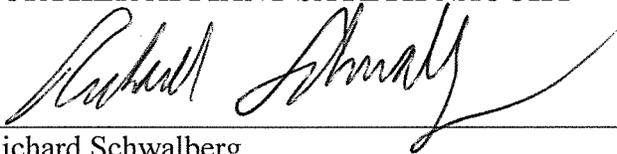
1. I am over the age of 21, am of sound mind, and have the capacity to make this Affidavit.

2. I am the Chief Operations Officer (“COO”) of Menorah Park. In my capacity as COO of Menorah Park, I also have operational oversight responsibility for The Montefiore Home (“Montefiore” or the “Facility”).

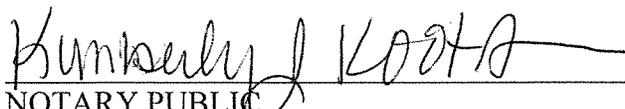
3. Following an October 2020 incident relating to COVID-19 testing of residents in the Facility (the “October 2020 Incident”), Montefiore reported the incident to various state agencies including the Ohio Attorney General (“OAG”), the Ohio Department of Health, the Ohio Board of Nursing, and the Ohio Board of Executives of Long-Term Services & Supports. Each of these agencies has undertaken an investigation of the October 2020 Incident and Menorah Park and Montefiore are cooperating with these investigations. I have been advised that the OAG is conducting a criminal investigation.

4. In my role as COO, I have had contact and interactions with the OAG as they have investigated the October 2020 Incident at Montefiore. During my interactions with representatives of the OAG, I have been directed to not interfere with the OAG's investigation of the October 2020 Incident. Specifically, I was directed that Montefiore should not conduct its own independent investigation of the October 2020 Incident while the OAG's investigation is ongoing including seeking out or interviewing additional witnesses. I also was directed that I should not discuss or disclose information relating to the OAG's investigation of the October 2020 Incident. I have also personally observed OAG personnel providing similar instruction to other witnesses that they interviewed. I have been advised that the OAG has reiterated these instructions on multiple occasions.

FURTHER AFFIANT SAYETH NAUGHT


Richard Schwalberg

SWORN TO BEFORE ME, and subscribed in my presence, this 23rd day April, 2021.


NOTARY PUBLIC

