NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

BRIEF IN OPPOSITION
April 28, 2021 11:58

By: STEVEN A. SINDELL 0002508

Confirmation Nbr. 2239638

TINA RENEE KING ET AL

CV 20 941131

vs.

Judge: KELLY ANN GALLAGHER

MENORAH PARK FOUNDATION ET AL

Pages Filed: 12

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

Tina Renee King, et al.

Plaintiffs,

v.

Menorah Park Foundation, et al.

Defendants

CASE NO: CV-20-941131

JUDGE KELLY ANN GALLAGHER

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF ALL PROCEEDINGS AND PROTECTIVE ORDER

Attached hereto is Plaintiffs' Brief in Opposition to Defendants' Motion for Stay of All Proceedings and Protective Order.

Respectfully Submitted,

Steven A. Sindell, Esq. (0002508)
Rachel Sindell, Esq. (0078463)
Sindell and Sindell, LLP
23611 Chagrin Blvd., Suite 227
Beachwood, Ohio 44122
Tel. 216-292-3393
Email: info@sindellattorneys.com
Attorneys for Plaintiffs

Electronically Filed 04/28/2021 11:58 / BRIEF / CV 20 941131 / Confirmation Nbr. 2239638 / BATCH

FACTS

Ms. King and Ms. Gelle, the Plaintiffs in this action, are two experienced Registered Nurses who worked at the Montefiore Home in their capacities as DON (Director of Nursing), with respect to Ms. King and ADON (Assistant Director of Nursing), with respect to Ms. Gelle. They are among the dedicated healthcare workers who worked devotedly and tirelessly to care for Covid-19 patients, among others, on the front lines of the battle against the pandemic. They have no disciplinary records with any boards or agencies and certainly no relevant criminal records. They have no history or records of any addictions, dependencies, impairments or treatments whatsoever in those regards. Likewise, they have no emotional or mental histories of diagnoses, impairments or treatments of that nature. Their employment histories as nurses are competent, successful and commendable, including several years at Montefiore/Menorah Park.

Moreover, Plaintiffs are telling the truth when they forthrightly deny the vicious accusations that they intentionally falsified nasal test samples from Covid test swabs of Montefiore's Mandel 3 Unit patients. At this early stage of this action, they pursued one of the best courses available to them: **reliable polygraph tests to which they voluntarily submitted from highly qualified and widely utilized experts at Poly-Tech which established the truthfulness of their denials of the accusations being made against them by Defendants.** (These polygraph test results and the resumes of the experts, along with the court decision in *State v. Sharma,* praising the level of expertise and frequent use of Poly-Tech's services by law enforcement, including the Office of the Ohio Attorney General, are attached.)

On or about October 29, 2020, 16 days after the covid tests were done on October 13, 2020, and immediately upon the termination of the employments of these two nurses, Defendants issued and widely publicized accusations against these two nurses that they falsified covid test samples and results. Little could be more damaging or defamatory to a Registered Nurse than being personally and publicly identified as having committed misconduct of this nature. Such an accusation, if false and published maliciously in reckless disregard for the truth, is clearly actionable. Not only did Defendants send this "announcement" to families,

residents, patients and others connected with Montefiore/Menorah Park, it was published in a newspaper and on television news.

In addition, Defendants immediately supplied and confirmed their accusations to the Ohio Board of Nursing, the Ohio Department of Health and the Health Care Fraud Section of the Office of the Ohio Attorney General. As a result, Plaintiffs were requested and induced by the Ohio Board of Nursing to place their nursing licenses on inactive status. Ms. Gelle and Ms. King were both granted unemployment compensation benefits, Ms. King without any opposition from Montefiore, Ms. Gelle without any initial opposition from Montefiore, but rather an extremely late, untimely and belated one. Ms. Gelle is unemployed and is currently receiving unemployment compensation benefits. Ms. King is employed in a low wage factory job. Both are suffering serious economic distress and personal upset. The Office of the Ohio Attorney General is targeting both Plaintiffs in a criminal investigation and is in multiple contact with attorneys and management of Montefiore/Menorah Park. The Ohio Department of Health appears to have concluded and publicly asserted as a "fact" based upon what has been supplied to them by Montefiore/Menorah Park (without ever directly inquiring of or interviewing Ms. Gelle or Ms. King) that Plaintiffs falsified test samples. Montefiore's investigator spent about 3-4 minutes on the telephone with each of these nurses and never viewed the surveillance video which the Administrator and Montefiore/Menorah Park supposedly relied upon, not by viewing it, but on the word of the Administrator **who initially prevaricated to management that he had no knowledge of any falsification**. Even though the ODH knew all of this, it still "concluded" in a public report that these nurses falsified Covid test samples!

Now Defendants Montefiore/Menorah Park et. al. are desperately attempting to cut Plaintiff off from their best and primary access to facts to substantiate their innocence and establish their defamation and tortious interference claims in this lawsuit by obtaining a stay of proceedings and/or a prohibition against engaging in any discovery. Their claimed grounds are legally without support and we hope and trust exaggerated insofar as Defendants claim that they were "instructed" by the Attorney General's Office not to investigate or share details of their own investigation even in discovery in this case. Thus, these poor helpless Defendants in their need to "cooperate" with their "instructions" from OAG "representatives" not to investigate on their own are handicapped in their ability to defend themselves in

this action. Indeed, defense counsel wrote to Plaintiff's counsel as early as January 15, 2021 to inform counsel that "the matter is being investigated by...most notably the Ohio Attorney General ("OAG"). The outcome of these investigations could have serious implications for Ms. King and Ms. Gelle, **including potential criminal prosecution**...we hope we can have your assurance that your clients do not intend to invoke their fifth amendment right against self-incrimination in response to discovery requests or during their depositions. In anticipation of the significant challenges arising from multiple state investigations of your clients --- **including a criminal investigation** ---we ask you to dismiss this matter without prejudice while those investigations are pending. Specifically, we are requesting that you dismiss ***before*** the revised response date of February 13, 2021." (Bold, our emphasis; Italics, their emphasis) (see attached correspondence)

Until advised by defense counsel of the criminal investigation of these two nurses apparently triggered by the accusations of the Defendants, we were unaware of its existence. There are many people who would receive this kind of news with considerable trepidation, combined with a request from the Ohio Board of Nursing to place their licenses in an inactive status. However, in this case these two nurses insist that they are completely innocent and that these accusations are false. Therefore, they have taken the position that they have nothing to hide and that they do not intend to invoke the fifth amendment because of the threat that they may be prosecuted for something they did not do or the threat of losing their valuable nursing licenses and professional careers.

Having failed to obtain a voluntary dismissal of Plaintiffs' case, Defendants counterclaimed against these nurses and filed an untimely contest (by 3 and a half months past the deadline) to cut off Plaintiff Gelle's unemployment compensation payments and create a potential overpayment reimbursement recoupment. Ms. Gelle has young children at home. But in addition, Defendants are now moving this court to cut off Plaintiffs' civil remedy --- not forever of course --- just until some who knows when indefinite future. In the aforementioned letter from defense counsel, counsel asserts that he questions "whether moving forward with this lawsuit at this time will serve the interests of judicial economy. We also question whether it will serve your clients' interests to prosecute this action at this time..." We ask Your Honor to consider whose interests are being served by this attempt at achieving a voluntary dismissal? We submit it is the same interests that are being

attempted to be served by Defendants' pending Motion to Stay, to bar all discovery, to Counterclaim against Plaintiffs, to oppose Plaintiff Gelle's unemployment compensation, to claim to be unable to defend themselves in this case to further their "cooperation" upon "instructions" from the Office of the Attorney General, and to have attempted to deflect attention from problems in their facility by distracting the public with reckless false accusations against two innocent nurses, et cetera.

Plaintiffs' discovery in this case involves obtaining mostly public records, not confidential law enforcement records. No protected information will be sought, such as the names or identities of patients, which can be redacted from any medical records. Public information about reported covid cases and timing of test results are certainly discoverable from Defendants and state agencies. Witness testimonies relevant to the issues in this case should be possible and discoverable without interfering with law enforcement. Prosecutors do not own witnesses or Defendants' relevant or discoverable business records. Prosecutors do not have the right or authority, in a case like this one, to require a Defendant in a related civil matter not to defend itself or investigate relevant facts and witnesses. Corporate entities do not have any right possessed by individuals to assert a fifth amendment privilege against self-incrimination. If prosecutors in the Office of the Ohio Attorney General seek to prevent Plaintiffs in this case from engaging in civil discovery in pursuing their civil remedies and discovery in this case, (which we find difficult to believe they have any interest or reason to do), they can certainly bring any legal claims along those lines to the attention of this Court. The fact is that at this point, our discovery thusfar amounts to a few Requests for Admissions, a few production requests and a couple of Interrogatories. (See attached)

In our view, the evidence supposedly supporting Defendants' accusations are based upon the professed viewing reported by the Administrator of surveillance tapes of the Mandel 3 Unit which are blank and/or do not exist and which we believe were removed by upper management after the date of October 13, 2021, when the test samples in question were collected by Ms. Gelle and Ms. King. The report of the Administrator that he viewed surveillance tapes which supposedly showed that Plaintiffs were not seen going in and out of Mandel 3 Unit rooms collecting swabs from Mandel 3 Unit patients at the time and date in question was stated by him **after he had previously denied having any knowledge of any**

falsification or fabrication of testing samples, all of which is in the ODH public report. Thus, the Administrator who was fired along with Plaintiffs initially **prevaricated about his knowledge and there are no tapes in existence to support his new claimed report about the content of those surveillance tapes.** This same Administrator claims that the two Plaintiff nurses together "winked" at him somehow indicating that there would be no positive tests from the Covid tests on the Mandel 3 Unit from the sample collections there from patients on October 13, 2020. Also, a disgruntled LPN who was reported by Ms. King for not being present on the Mandel 3 Unit (and who appeared to have just woken up for sleeping on the job) thereafter claimed the she, as the LPN assigned to the Mandel 3 Unit at the time Plaintiffs collected the patient samples, did not see Plaintiffs there during the early morning hours (4:00 a.m. to 6:00 a.m. or 7:00 a.m.) on October 13, 2020.

The Montefiore investigator, according to the ODH Report, never actually viewed the surveillance tape reported to have been viewed by the Administrator. That could have been because it didn't exist or was blank, but the ODH Report did not mention that detail. The ODH Report did not mention that Ms. Gelle, on October 21, 2020, when told to her in her 3-4 minute telephone "interview" with the investigator about the Administrator's Report of his claimed viewing of the surveillance tape, Ms. Gelle tried to look at the surveillance tape herself; when she did so, she found the relevant portion to be blank. As Ms. King was being terminated, she told Defendant Schwalberg that there was no surveillance tape showing that neither Ms. Gelle nor Ms. King were on the Mandel 3 Unit at the relevant date and time. It was within a short time thereafter that Mr. Schwalberg v called in after daytime hours on a Friday a technician to remove something from the surveillance camera and/or examine it. Our pending Requests for Admissions seek to confirm these facts.

A review of the signed Statement of both Plaintiffs (attached hereto) explains that there are records of employee test results that reveal that a few days **BEFORE** the Covid 19 outbreak there was a wave of covid positive employee results, a number of them concentrated on employees permanently assigned to work on the Mandel 3 Unit. This can easily explain the reason for the subsequent outbreak in significant numbers 2-5 days later on the Mandel 3 Unit. We urge that the mere fact that the one resident not sampled by Ms. Gelle or Ms. King on October 13, 2020, but rather by another employee, which turned out to be the only positive

result from the Mandel 3 Unit test sample collection on October 13, 2020, is a red herring which is a speculative reed to contribute to proof of an accusation, otherwise unproven, that Ms. Gelle and Ms. King falsified covid test samples on that date. We can only hope and trust that the Office of the Attorney General will give considerable weight to a reliable and expert polygraph test exonerating Plaintiffs, along with the rather inadequate contentions based on purely speculative evidence without a clear indication that some of the matters raised in Plaintiffs' attached signed Statement will be investigated through available records which the Defendants and other agencies possess.

LEGAL ARGUMENT

Motion to Stay

Defendants' case citations simply fail (almost in toto) to support their arguments in favor of an indefinite stay of this entire action and the concurrent elimination of all discovery.

Defendants cited ***United States v. Ogbazion,*** 2012 U.S. Dist. LEXIS 136016 (S.D. Ohio, Sept. 24, 2012)(Defs' Br. at 5). In that decision, authored by Federal District Judge Timothy S. Black, the defendants were sued in a civil action by the U.S. government for allegedly engaging in pervasive nationwide fraud in their tax preparation and lending operations. The defendants moved to stay the civil action pending the outcome of a parallel federal criminal investigation. The court denied the stay proceedings citing ***Louis Vuitton v. LY USA, Inc.,*** 676 F.3d 83, 98 (2nd Cir. 2012) that "a stay of civil proceedings due to a pending criminal investigation is 'an extraordinary remedy'". (***Obazion***, at 2). The court rejected Defendants' claim that the absence of a stay "hinders the Defendants' abilities to mount a defense in this civil action". (at 2) The court further noted that corporate defendants do not enjoy a Fifth Amendment privilege against self-incrimination. The ***Louis Vuitton*** decision, supra, (cited in Defs' Br. at 3), also involved a denial of Defendants' Motion to Stay pending resolution of a criminal proceeding. That decision held that the corporate defendants had no constitutional privilege against self-incrimination.

Defendants cite (at 3 of Defs' Brief) ***Arts Rental Equip., Inc. v. Bear Creek Constr., LLC,*** 2013 Ohio Misc. LEXIS 33 (Hamilton Cty., June 18, 2013). In that decision, the court denied Defendants' Motion for an Indefinite Stay pending the outcome of criminal proceedings which had some overlapping but not identical issues with the civil case. Defendants argued unsuccessfully that two witnesses they required asserted their own privileges against self-incrimination.

Defendants (Br. at 4) cite ***McCullaugh v. Krendick,*** 2009 U.S. Dist. LEXIS 87849 (N.D. Ohio, Sept. 9, 2009). In that decision, the court denied Defendants' (nonentity individual persons) Motion to Stay pending the conclusion of an investigation by the U.S. Department of Justice. The court noted that there was "significant overlap between the alleged criminal investigation and the civil action". (at *7) In this case, the Defendants argued that at trial in the civil case they would be unable to testify in their own defense because of the looming investigation. Nevertheless, the court denied Defendants' Motion to Stay, noting that **"the granting of a stay is an extraordinary remedy, not to be granted lightly".** (Emphasis added) (***McCullaugh*** at 4, citing ***In re Who's Who Worldwide Registry, Inc.,*** 197 B.R. 193, 195 (Bankr E.D.N.Y. 1996)).

Defendants cite ***Microfinancial, Inc. v. Premier Holidays Int'l, Inc.,*** 385 F. 3d 72 (1st Cir. 2004) (Defs' Br. at 4). Once again, this is yet another case in which Defendants made a Motion to Stay a civil case in the lower court pending the outcome of a criminal investigation involving parallel facts; the Motion to Stay was denied by the lower court. The civil case proceeded to trial resulting in a damage verdict against Defendants in the sum of $23,000,000 (twenty-three million dollars). The Defendants appealed on the basis that the lower court erred in denying Defendants' Motion to Stay. The U.S. First Circuit Court of Appeals affirmed the verdict and rejected Defendants' claim that the trial court erred in denying Defendants' Motion to Stay the civil case. The court noted Defendants' multiple extensions and that they "procrastinated throughout".(at 78) The federal appellate court noted that with respect to a party's Motion to Stay, **"a movant must carry a heavy burden to succeed in such an endeavor".** (Emphasis added) (at 77) The federal appellate court also noted, rather pointedly, that **"the defendants' caterwauling about the onus of conducting a civil trial during the pendency of** a **federal grand jury investigation rings hollow".** (Emphasis added) (at 78)

Summarizing Defendants' Montefiore/ Menorah Park, et. al. legal citations in our case at bar, (mostly from federal courts and nonOhio state courts), in support of Defendants' Motion to Stay, Defendants' claimed authorities reveal uniformly one instance after another in which their own case citations are examples of trial and appellate courts DENYING DEFENDANTS' MOTIONS TO STAY CIVIL PROCEEDINGS: ***Ogbazion, Louis Vuitton, Arts Rental, McCullaugh and Microfinancial, supra.*** Defendants herein have failed to highlight, explain, or illuminate a single decision in which any trial or appellate court ---anywhere---has decided to grant a Motion to Stay a civil case in circumstances which would convincingly apply to our instant case at bar before Your Honor.

It is perhaps superfluous for Plaintiffs to cite authorities supporting our opposition to Defendants' Motion to Stay herein, inasmuch as Defendants' own cited authorities support our opposition. However, in what may be an overabundance of caution, we offer some **current Ohio state court decisions** for this court's consideration.

For example, see ***Brigner v. Mount Carmel Health Sys.,*** 2019-Ohio-4755 (Tenth A. Dist., Franklin Cty., November 19, 2019) and ***Brigner v. Mount Carmel Health Sys.,*** 2019-Ohio-4344 (Tenth App. Dist., Franklin Cty., October 24, 2019). The two ***Brigner*** cases relate to the exact same case, except for the fact that the November decision deals with the entity Defendant, Mount Carmel, while the October decision deals with the individual Defendant, Dr. Husel. ***Brigner*** involves a civil malpractice suit against a hospital and a doctor. Both defendants moved for an indefinite stay of the civil proceedings pending the outcome of the parallel criminal proceedings (where indictments had been filed) against Dr. Husel. The Franklin County Court of Appeals affirmed the denial of the Motions to Stay the civil cases made by both the doctor and the hospital. The Franklin County Court of Appeals held that notwithstanding that Defendant Dr. Husel felt unable to testify in his defense in the malpractice case because he would assert his privilege against self-incrimination in the criminal cases against him, Dr. Husel was nevertheless NOT ENTITLED to a stay of proceedings in the civil case pending the outcome of the criminal cases against him. Likewise, the appellate court held in ***Brigner*** that Defendant Mount Carmel's Motion to Stay the civil case was properly denied. The appellate court rejected Mount Carmel's claim that it could not "appropriately develop, evaluate or apply theories of defense...without Dr. Husel's participation".

(at *P11) The ***Brigner*** decision cited its reliance on the earlier decision of the Ohio Supreme Court in ***State ex rel. Verhovec v. Mascio,*** (1990) 81 Ohio St. 3d 344.

See also ***State v. Cincinnati Citizen Complaint Auth.***, 2019-Ohio-5349 (First App. Dist., Hamilton Cty., Dec. 27, 2019). This recent decision held that the State of Ohio could not obtain a permanent injunction prohibiting a City Council approved Citizen Complaint Authority from conducting its own separate and independent investigation of a police shooting by interviewing two police officers who were identified as state witnesses in the parallel related criminal proceeding until after the conclusion of the criminal proceeding.

We believe that for Your Honor to grant Defendants' Motion for an indefinite stay in this civil case would be an abuse of discretion. Whether Plaintiffs are indicted or not, they are innocent of the accusations that they falsified Covid-19 test samples, and they have no intention to refuse to give sworn testimony in this case by asserting their privilege against self-incrimination. If wrongfully indicted, they will fight the charges on the merits.

PROTECTIVE ORDERS PRECLUDING DISCOVERY

Defendants have also made what seems to us like a fantastic and astounding request of this court in the alternative to issuing a total stay of proceedings: namely, **before any discovery issues or disagreements ever arise,** and we quote, "The Court Should Issue A Protective Order Prohibiting Discovery". (Defs' Br. at 7) In the over five decades in which Plaintiffs' counsel has practiced law, including countless civil jury trials and extensive appellate practice in both federal and state fora, (including in person oral argument on the merits in the United States Supreme Court), he has never before been confronted with an opponent's request in a pending civil case for the court to ban all discovery by any party before any discovery has occurred! Such a wild request flies in the face of Due Process of Law, Open Courts, The Right to Counsel, The Right to Trial by Jury and the panoply of rights provided in the Federal and Ohio Constitutions. And the reasons advanced by Defendants are unique and unprecedented: that they are supposedly somehow prevented from investigating and defending this civil case because they are "cooperating" with "instructions" from unidentified "representatives" of the Ohio

Attorney General's Office in that Office's criminal investigation targeting two nurses who have passed reliable polygraph tests denying the accusations made against them (and to the Attorney General's Office) by these supposedly poor victimized and handicapped Defendants. And these Plaintiffs do not intend to avoid sworn testimony in this action by asserting their constitutional privilege against self-incrimination. Could it be that it is Defendants who are fearful of a full, fair and public exposition of the facts, rather than the Plaintiffs?

Defendants cite four Ohio decisions to support their "no discovery" contention: ***All Kelley & Ferraro Asbestos Cases v. A.W. Chesterton Co.***, 2011 Ohio Misc. LEXIS 1017 (Cuy. Cty. Comm. Pls. Ct., April 4, 2011); ***Ruwe v. Board of Township Trustees,*** (1987), 29 Ohio St. 3d 59; ***Arnold v. American Nat'l Red Cross,*** 93 Ohio App. 3d 564 (Eighth App. Dist., Cuy. Cty., 1994) and ***Huebner v. Miles,*** 92 Ohio App. 3d 493 (1993).

Ruwe, supra, although an Ohio Supreme Court decision, has no apparent application which we can discern to any issue in our case at bar or in any way related to Defendants' Motion herein. We are unable to comprehend why it was cited by Defendants.

All Kelley and Ferraro Asbestos Cases, supra, involves a group action of asbestos litigation cases in which Plaintiffs' discovery requests were patently excessive and premature in violation of the court's Case Management Order.

Huebner, supra, reaffirms the universally accepted principle that courts have wide discretion in controlling discovery and to preclude burdensome requests. Plaintiffs' initial written discovery in this case on behalf of Plaintiffs King and Gelle is modest, limited, short and quite appropriate. (see attached)

Arnold, supra, upholds a protective order prohibiting the discovery of the IDENTITY of a blood donor infected with HIV, but also holds that the donor's medical records are discoverable. Plaintiffs in this case at bar are not seeking the names or identities of any patients of Montefiore or Menorah Park.

In summary, Defendants have failed to cite a single decision which even remotely supports its outlandish request that this court issue a sweeping blanket protective order at the outset of this case prohibiting all discovery.

CONCLUSION

For all of the foregoing reasons set forth hereinabove and attachments hereto, Plaintiffs urge this Court to forthrightly and unqualifiedly deny Defendants' Motion to Stay and for a Protective Order.

Respectfully Submitted,

Steven A. Sindell, Esq. (0002508)
Rachel Sindell, Esq. (0078463)
Sindell and Sindell, LLP
23611 Chagrin Blvd., Suite 227
Beachwood, Ohio 44122
Tel. (during Covid pandemic) 216-401-4912 or
216-401-4913 (office: 216-292-3393)
Fax: 216-292-3577
Email: info@sindellattorneys.com
Attorneys for Plaintiffs

Certificate of Service

The within Plaintiffs' Brief in Opposition to Defendants' Motion for Stay and Protective Order and attachments thereto has been filed with the efiling system of the Cuyahoga County Common Pleas Court this 28th day of April, 2021.

Steven A. Sindell, Esq.