

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 04-22572-CIV-KING

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EMMA YAIZA DIAZ; <i>et al.</i> ,	:
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Plaintiffs,	:
	:
vs.	:
	:
KURT S. BROWNING, Secretary of State of Florida, <i>et al.</i> ;	:
	:
Defendants.	:
	:
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**PLAINTIFFS’ OPPOSITION TO DEFENDANT SOLA’S MOTION TO
STAY DISCOVERY AND FOR A PROTECTIVE ORDER AND
TO JOINDERS THEREIN BY DEFENDANTS
ANDERSON, COWLES, HOLLAND, AND SNIPES**

Plaintiffs respectfully submit this response to Defendant Sola’s Motion to Stay Discovery and For a Protective Order and to the Joinders in that motion by Defendants Cowles, Holland, Anderson and Snipes (the “Motion”). The Motion is without merit and should be denied.

Preliminary Statement

This case has been pending since October, 2004, and defendants have yet to provide any discovery whatsoever. Plaintiffs have only until October 3, 2007 to complete all of the discovery they need to support their claims of violations of their constitutional rights. Defendant Sola’s motion for a stay of discovery is entirely without merit. The pendency of his newly filed motion for judgment on the pleadings does not

support staying discovery, if for no other reason than that plaintiffs would be entitled to take discovery of Defendant Sola even if he were dismissed from the suit (and he should not be). Moreover, staying discovery against Defendant Sola would make it virtually impossible for plaintiffs to complete the discovery they need to prove their claims.

Background

On February 27, 2007, this Court ruled on the defendants' motions to dismiss the Third Amended Complaint, granting in part and denying in part the motions to dismiss. On March 5, the Court signed a scheduling order giving Plaintiffs seven months for discovery, setting the end of discovery for October 3, 2007. On March 7, 2007, the Court issued an amended scheduling order resetting the trial date for February 3, 2008.

Defendant Sola moved against the pleadings on the date that the parties had initially agreed upon for their Rule 26(f) conference, and filed this motion for a protective order the next day.

Argument

“A motion to stay discovery is tantamount to a request for a protective order prohibiting or limiting discovery pursuant to Rule 26(c), Fed. R. Civ. P.” *See Kron Med. Corp. v. Groth*, 119 F.R.D. 636, 637 (M.D.N.C. 1988). Such motions are not favored, because when discovery is delayed or prolonged it can cause unnecessary litigation expenses and difficulties, and can create case management problems that impede the court's responsibility to expedite discovery. *See Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988).

To prevail on a motion to stay discovery under F.R.C.P. 26(c), the movants must show that they will suffer prejudice or undue burden. *See Fed. R. Civ. P. 26(c); Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004). Where third party

discovery would be had against a defendant even if that defendant were dismissed, a stay of discovery is not appropriate, because the defendant would not suffer any prejudice and the stay would unnecessarily delay discovery and impose expense and problems on the remaining litigants.

The pendency of a dispositive motion “is not ordinarily a situation that in and of itself would warrant a stay of discovery.” *Twin City Fire Ins. v. Employers Ins. Of Wausau*, 124 F.R.D. 652, 653 (D.C. Nev. 1989). A request to stay all discovery pending resolution of such a motion is not appropriate unless the pending motion would dispose of the entire action. *See Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997); *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987); *Simpson*, 121 F.R.D. at 263. Further, courts ordinarily should not stay discovery which is necessary to gather facts in order to defend against pending dispositive motions. *See, e.g., Wilderness Soc. v. Griles*, 824 F.2d 4, 20 (D.C. Cir 1987); *Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir.1976) (holding that it is an abuse of that discretion to stay general discovery if “plaintiff [has] been denied discovery which relates to the summary judgment motion.”).

I. A Stay of Discovery Would Be Inappropriate Because The Pending Dispositive Motion Would Not Dispose of the Entire Action

To determine whether the motion to stay discovery should be granted, it is necessary for the Court to “take a preliminary peek” to see whether the pending motion appears to be truly case dispositive. *Feldman*, 176 F.R.D. at 652.

Defendant Sola’s motion styled Motion for Judgment on the Pleadings (the “Pending Motion”), even if granted, would not dispose of the entire case, because the claims against the Secretary of State would go forward regardless of how the claims against the Supervisors of Elections were resolved. Therefore, a stay pending the

resolution is not appropriate. See *Feldman*, 176 F.R.D. at 652; *Lugo*, 819 F.2d at 7; *Simpson*, 121 F.R.D. at 263.

Because discovery against the Supervisors would be necessary regardless of the disposition of the Pending Motion, a stay would be inappropriate. The practical sense of this rule is evident here. Because the case would still go forward against the Secretary on the same issue – namely, whether refusing to permit corrections after the close of books is necessary under *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 505 U.S. 1202 (1992) – discovery against the Supervisors on this question would still be necessary in the form of third party discovery even if the Court granted Supervisors’ Pending Motion. Therefore, to stay discovery against the Supervisors would simply delay the discovery necessary to reach resolution of the issues in this case.

“In deciding whether to stay discovery pending resolution of a pending motion, the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery.” *Feldman*, 176 F.R.D. at 652 (citing *Hovermale v. School Board of Hillsborough County*, 128 F.R.D. 287 (M.D. Fla. 1989)). While defendants in this case would not be prejudiced by going forward with discovery, plaintiffs would be severely prejudiced by a stay regardless of the outcome of the Pending Motion.

Because defendants will have to participate in discovery no matter the outcome of Defendant Sola’s dispositive motion, defendants cannot meet their burden of showing that their good faith participation in reasonable discovery on plaintiffs’ claims will unduly burden them or prejudice them in any way. Plaintiffs would seek the same discovery from the Supervisors on the feasibility of a grace period, or the necessity of refusing to provide one, regardless of whether the Supervisors remain defendants in this

case. The Supervisors would not be prejudiced by going forward now with discovery which they would, inevitably, have to provide at a later date.

Plaintiffs, however, would be severely prejudiced by such delay, because they would be unable to complete discovery within the seven-month time-span allotted for discovery. Further, plaintiffs would be prejudiced in their discovery against the Secretary, because they would lack the necessary information on registration practices and procedures in the Counties in order to properly develop their case and properly tailor their discovery against the Secretary.

II. Plaintiffs Are Entitled To Discovery On the Very Motion That Is Pending

The motion to stay discovery should also be denied because Plaintiffs are entitled to discovery on the very motion that is pending. The Defendant Supervisors claim that they have no discretion as to whether to provide a grace period in 2006. But whether or not some of the Supervisors exercised their discretion to provide a grace period under certain circumstances is a factual question on which discovery should be permitted. At least four of the five Supervisors also maintain that they had no discretion to provide a grace period in 2004. Nonetheless, Duval County did provide a grace period after the close of books to update and correct all manner of information on a voter registration application, as the complaint alleges and a Duval County official has affirmed in a sworn affirmation appended to the complaint. The Plaintiffs should not be barred from discovery on the very facts at issue in the Pending Motion, namely whether the Supervisors may have exercised their discretion in providing a grace period after the close of books.

Conclusion

For all these reasons, Plaintiffs therefore respectfully request that this Court dismiss Defendants' Motion.

Dated: West Palm Beach
Florida, April 20, 2006

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via and e-mail this 20th day of April, 2007, to counsel for the parties listed in Exhibit A, attached hereto.

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