

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 2,

CASE NO.: 08-CV-80119-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

JANE DOE NO. 3, CASE NO.: 08-CV-80232-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

JANE DOE NO. 4, CASE NO.: 08-CV-80380-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

JANE DOE NO. 5, CASE NO.: 08-CV-80381-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

JANE DOE NO. 6,

CASE NO.: 08-CV-80994-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

JANE DOE NO. 7,

CASE NO.: 08- 80993-CIV-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO MOTION TO STAY AND OR CONTINUE ACTION**

Plaintiffs, JANE DOES 2-7, by and through undersigned counsel, file this Memorandum in Opposition to Stay and or Continue Action, as follows:

I. Introduction

In moving for stay, Defendant has the burden of demonstrating that, due to a parallel criminal proceeding, if he exercises his right against self incrimination he will certainly lose on summary judgment unless a stay is granted. Defendant has failed to satisfy this burden. There is no pending motion for summary judgment. There is also no criminal proceeding at this time arising from Epstein's acts against the Plaintiffs or other victims. Indeed, whether such a criminal proceeding is ever commenced is entirely within the Defendant's control, by complying with the terms of his Non-Prosecution Agreement with the U.S. Attorney's Office. Defendant relies upon an amorphous

possible breach of his Non-Prosecution Agreement with the U.S. Attorney, which does not give rise to the “special circumstances” necessary to warrant a stay. Finally, even if there were grounds for a stay, it would not be appropriate in these cases because Plaintiffs would be severely prejudiced by the delay occasioned by a stay.¹

II. Argument

A. **Defendant Has Not Demonstrated that He Faces a Certain Loss on Summary Judgment If a Stay Is Not Granted**

The Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings involving a common defendant. Shell Oil Co. v. Altina Associates, Inc., 866 F.Supp. 536, 540 (M.D. Fla. 1994). A stay pending resolution of related criminal proceedings is warranted only when the defendant demonstrates that “ ‘special circumstances’ so require in the ‘interests of justice.’ ” United States v. Lot 5, Fox Grove, 23 F.3d 359, 365 (11th Cir. 1994).

In the Eleventh Circuit, the “special circumstances” which may support a stay are limited. The fact that the Defendant may “risk a non-criminal disadvantage by remaining silent for fear of self incrimination in a parallel criminal proceeding does not rise to the level of an unconstitutional infringement.”² Shell Oil, 866 F.Supp. at 540. Accordingly, the Defendant’s right to silence is not a basis to stay the civil case pending resolution of a criminal action. Id. There is one exception applicable where a stay would be necessary to prevent an unconstitutional infringement of the

¹ Defendant Epstein filed an identical Motion to Stay in the case Jane Doe v. Epstein, case no. 08-CIV 80893 MARRA/JOHNSON. Plaintiffs concur in the arguments made by Jane Doe’s counsel in that case in opposition to Defendant’s Motion. (Case no. 08-CIV 80893, DE 31). The same reasoning and arguments apply in the instant cases. Plaintiffs in this Memorandum will attempt to stream line and limit its arguments to avoid unnecessary repetition and duplication with the response in Jane Doe.

² In this regard, The Defendant’s silence by invoking the Fifth Amendment does not prohibit adverse inferences against him in the civil case. Shell Oil, 866 F.Supp. at 40.

defendant's right against self incrimination: “[T]he law in the Eleventh Circuit requires consideration of whether, as a result of invoking the privilege, the defendant faces certain loss of the civil proceeding on summary judgment if the civil proceeding were to continue.” In re Financial Federation Title & Trust, Inc., 252 B.R. 834, 837 (Bankr. S.D. Fla. 2000)³ (citing United States v. Lot 5, 23 F.3d at 364); accord Shell Oil, 866 F.Supp. at 540 (noting that there is a “recognized exception to this general rule: the Fifth Amendment is violated when a person, who is a defendant in both a civil and criminal case, is forced to choose between waiving his privilege against self-incrimination or losing the civil case in [summary proceedings]”).

The cases relied upon by Defendant are consistent with these authorities. In Ventura v. Brosky, 2006 WL 3392207 (S.D. Fla. 2006), the Court stated the rule that a stay is warranted to avoid a situation “where a defendant in both criminal and civil proceedings must choose between whether to waive his privilege against self-incrimination or to lose the civil case in summary or default judgment proceedings.” Id. at *1. Moreover, the stay in Ventura was granted on motion of the defendant Miami-Dade County Police Department because it would be prejudiced by its codefendant, a former police officer, asserting the Fifth Amendment and refusing to answer “in response to the civil Complaint and any discovery directed at him in the case.” Id. Such concerns involving prejudice to a codefendant are not present here. In Securities and Exchange Comm'n v. Rehtorik, 755 F.Supp. 1018 (S.D. Fla. 1990), another case relied upon by Defendant, the Court denied a stay of the case, and made clear in its holding that the defendant had not demonstrated that it would be subject to “automatic liability” on a motion for summary judgment:

³The Court in Financial Federation Title & Trust noted that the standard in the Eleventh Circuit is “more narrow and less subjective” than in other Circuits where a multi-factor test is used. Id. at 837.

The defendants can exercise their Fifth Amendment rights in the face of the S.E.C.'s summary judgment motion by not presenting evidence which would implicate them in the alleged securities fraud. Though an adverse inference may be drawn due to their silence, the S.E.C. must still carry its burden of proving fraud committed by the defendants; their silence alone will not give rise to automatic liability. As such, the defendants would not be compelled to speak. To speak or not to speak becomes, in such a case, a question of strategy rather than one of unconstitutional compulsion.

Id. at 1020.

Accordingly, the Defendant's Motion to Stay is, at best, premature. Defendant Epstein fails to demonstrate that he is certain to lose on summary judgment if he exercises his constitutional right against self-incrimination. Indeed, there is no summary judgment motion pending. Defendant's Motion to Stay must accordingly be denied.

B. This Court Has Previously Made It Clear That a Stay is Not Warranted, and Circumstances Have Not Changed

Defendant previously moved for a mandatory stay pursuant to 18 U.S.C. §3509(k). This Court denied that Motion on the grounds that there was no criminal action pending, a requirement for a stay under §3509(k). (DE 33). The Court in its Opinion also stated that a discretionary stay was not warranted:

The Court also does not believe a discretionary stay is warranted . . . [T]he Court sees no reason to delay this litigation for the next thirty-three months. After all, Defendant is in control of his own destiny – it is up to him (and him alone) whether the plea agreement reached with the State of Florida is breached. If Defendant does not breach the agreement, then he should have no concerns regarding his Fifth Amendment right against self-incrimination. The fact that the U.S. Attorney (or other law enforcement officials) may object to some discovery in these civil cases is not, in and of itself, a reason to stay the civil action. Any such issues shall be resolved as they arise in the course of this litigation.

(Order Denying Motion to Stay, p. 4). In again seeking a stay, Defendant seized on the last sentence

quoted above and takes it out of context in contending that the time is now ripe for a stay. The Court stated that issues arising in the event that the U.S. Attorney or other law enforcement officials object to discovery can be resolved during the course of the litigation. (DE 33, p. 4). The Court was not inviting the Defendant to file another motion for stay later in the course of discovery. In any event, there are no changed circumstances which would warrant a different analysis and conclusion from that reached by the Court last August.

C. The Defendant Cannot Meet His Burden of Demonstrating Grounds for a Stay on the Basis of Vague Assertions of the Position of the USAO

There is no criminal prosecution pending for the acts of Epstein against any of the Plaintiffs in these civil cases. Epstein's Motion thus fails at the outset because there is no parallel criminal action.⁴ In any event, the Defendant vaguely asserts, without supporting documentation, that the "USAO has already attempted to claim violations of the Non-Prosecution Agreement." (Motion to Stay (DE 57), p. 2). The Defendant submits the Affidavit of his criminal attorney, Jack Goldberger, who asserts that "the USAO has taken the position on a number of occasions that it might consider" various actions by Epstein to be a breach of the Non-Prosecution Agreement. Nowhere does the Motion or this supporting Affidavit assert that the USAO has declared a breach of the Non-Prosecution Agreement, nor does it indicate that the issue of breach has been raised by either party in any court. It is therefore difficult to understand how this can be grounds for a stay. Defendant does nothing more than speculate on the intentions of the USAO. The Motion to Stay is therefore, at best, premature.

D. Plaintiffs Would Be Prejudiced by a Stay

⁴ The cases discussing the stay issues are premised on a pending criminal action parallel to the civil proceeding. See, e.g., Rehtorik, 755 F.Supp. at 1019-1020; United States v. Lot 5, 23 F.3d at 364 (quoting United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983)).

Because Defendant has failed to set forth circumstances that would support a stay, there is no need to proceed further. Nonetheless, Plaintiffs note that they will be severely prejudiced if a stay is granted. First, the stay requested is a lengthy one, to the end of 2010. Such a delay is simply unfair to the Plaintiffs, who are entitled to civil remedies for the wrongs that were committed by Epstein.

Additionally, the delay in discovery will be prejudicial to Plaintiffs. Investigation and discovery will become more difficult with the passage of time. The bulk of the allegations occurred in 2004-05, when the Plaintiffs were minors. Plaintiffs should not have to wait to engage in discovery. Finally, the delay occasioned by a stay would prejudice these Plaintiffs vis-à-vis other victims of Epstein who brought their claims in state court and would not be stayed, particularly if these other victims recover punitive damage judgments against Epstein before Plaintiffs have even had an opportunity to litigate their claims.

Conclusion

Based on the foregoing, Plaintiffs respectfully request that Defendant's Motions to Stay and/or Continue Action be denied in their entirety.

Dated: April 23, 2009

Respectfully submitted,

By: s/ Stuart S. Mermelstein
Stuart S. Mermelstein (FL Bar No. 947245)
ssm@sexabuseattorney.com
Adam D. Horowitz (FL Bar No. 376980)
ahorowitz@sexabuseattorney.com
MERMELSTEIN & HOROWITZ, P.A.
Attorneys for Plaintiffs
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: 305-931-2200
Fax: 305-931-0877

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Stuart S. Mermelstein _____.

SERVICE LIST
DOE vs. JEFFREY EPSTEIN
United States District Court, Southern District of Florida

Jack Alan Goldberger, Esq.
jgoldberger@agwpa.com

Robert D. Critton, Esq.
rcritton@bclclaw.com

/s/ Stuart S. Mermelstein
