UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DANIEL HODGES,	:	CIVIL ACTION NO.: 01-2345
MICHAEL HODGES, AND MELANIE HODGES	:	JUDGE ORTEGA
VERSUS	:	
RICHARD FOSTER, CITY MARSHAL, NIGHTS AND LIGHTS, LLC, KYLE BANKS, in his individual and official capacities, AND MARK WILLIS	:	MAGISTRATE JUDGE MITCHELL

JOINT REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS / SANCTIONS

Plaintiffs' Opposition claims that their assertion of the privilege against self-incrimination is proper in this matter, that dismissal of their action is improper, and that the court may not undertake a review of the Fifth Amendment issues in this case because Defendants did not complete the depositions such that a question-by-question analysis could be performed. Further, the Plaintiffs request that discovery continue in this matter, albeit in limited fashion, notwithstanding their asserted privilege. As demonstrated below, the Plaintiffs' position is not supported by Fifth Circuit law, and the remedy they seek is insufficient to protect the Defendants' interest in a fair proceeding.

I. PLAINTIFFS DO NOT HAVE AN ABSOLUTE CONSTITUTIONAL RIGHT TO ASSERT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN A CIVIL CASE.

Plaintiffs' claim that their assertion of the Fifth Amendment privilege against self-incrimination is proper and not capable of a question-by-question review by the court is misplaced for two reasons. First, Plaintiffs' counsel made it abundantly clear at Michael

Hodges' deposition that she would recommend that he assert the Fifth Amendment in response to any question referring to any event that occurred after the moment that he was handcuffed. (See Def's Jt. Mot. to Dismiss, Exh. B.) Defendants' counsel persisted in attempting to fashion questions that would not evoke a Fifth Amendment response, but Plaintiffs' counsel repeatedly recommended that Hodges assert the privilege. Rather than continue the fruitless questioning concerning events that Plaintiffs' counsel had indicated would not be answered based on the privilege, Defendants' counsel terminated the deposition.

Second, and most importantly, the type of question-by-question review called for by the Plaintiffs is not required in this case. Defendants do not question that, where appropriate, the Plaintiffs have a constitutional right to assert the Fifth Amendment privilege against self-incrimination and decline to answer questions that may subject to them to criminal liability. The question is not, however, whether the privilege was properly asserted, which may require a question-by-question review, but rather, what consequences the Plaintiff must bear for doing so.

In Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), the plaintiff brought a libel action claiming that a CBS Evening News broadcast reporting that he had defrauded students and the federal government out of student loan aid was untrue. Prior to the broadcast, Wehling had appeared before by a grand jury investigating his handling of the funds, but declined to answer questions under the Fifth Amendment. Later, when CBS sought to depose Wehling in the related civil action in order to prove the truth of its broadcast, Wehling similarly refused to respond on the grounds that his testimony could be self-incriminating. The federal court ordered Wehling to answer deposition questions and ultimately dismissed his suit when he refused to comply.

On appeal, after first acknowledging Wehling's right to invoke the Fifth Amendment, the Fifth Circuit stated:

> The question here, however, is not whether Wehling had a right to invoke the constitutional privilege against self-incrimination, which he did, but what effect the assertion of this privilege would have on his libel action against CBS.

Id. at 1087.

This case raises the same questions. The plaintiffs are free to assert their Fifth Amendment privilege in this matter, but, if they do so, they do not have an absolute right to prosecute their case under the shield of the Fifth Amendment. The Wehling court continued:

> We do not dispute CBS's assertion that it would be unfair to permit Wehling to proceed with his lawsuit and, at the same time, deprive CBS of information needed to prepare its truth defense. The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would, in terms of the customary metaphor, enable plaintiff to use his Fifth Amendment shield as a sword. This he cannot do.

Id. (internal citations omitted).

Just as the Plaintiffs have an interest in asserting their Fifth Amendment privilege, the Defendants in this matter have an equally important constitutional due process right to a fair proceeding. Defendants cannot be forced to bear the considerable burden of defending against the Plaintiffs' civil rights claims without the ability to fully investigate the facts underlying those claims and devise a discovery and trial strategy.

> We recognize, of course, that Wehling is not the only party to this action who has important rights that must be respected. As we have observed, CBS should not be required to defend against a party who refuses to reveal the very information which might absolve defendant of all liability. "While it may be true that an individual should suffer no penalty for the assertion of a constitutional right, neither should third parties sued by that individual who have no apparent interest in the criminal

> prosecution, be placed at a disadvantage thereby." Therefore we emphasize that a civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege. When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.

Id. (internal citations omitted).

To determine the appropriate remedy, the court must balance the Plaintiffs' rights under the Fifth Amendment with the Defendants' need for the information sought and order the remedy that least infringes upon the Plaintiff's privilege while also guaranteeing the Defendants' access to information crucial to its defense. When the Defendants' interests cannot be protected without infringing upon the Plaintiffs' interest in silence, dismissal is the only appropriate remedy.

> We think that in the civil context, where, systematically, the parties are on a somewhat equal footing, one party's assertion of his constitutional rights should not obliterate another party's right to a fair proceeding. In other words, while a trial court should strive to accommodate a party's Fifth Amendment interests, it also must ensure that the opposing party is not unduly disadvantaged. After balancing the interests, dismissal may be the only viable alternative.

Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996).

After balancing the respective interests, as shown below, the only appropriate remedy in this case is dismissal of the Plaintiffs' action.

II. DISMISSAL IS THE ONLY APPROPRIATE REMEDY BECAUSE THE PLAINTIFFS HAVE CHOSEN TO PROCEED FIRST IN THIS COURT, HAVE INTENTIONALLY UNDERMINED THE DISCOVERY PROCESS, AND NO LESS BURDENSOME REMEDY EXISTS.

In addition to dismissal, courts have considered many remedies to safeguard a defendant's right to a fair trial in the face of a plaintiff's privilege against self-incrimination, including striking testimony, jury instructions allowing an adverse inference, and staying the

civil proceedings until the resolution of criminal charges. See Serafino, 82 F.3d at 519. While these remedies may be appropriate in some circumstances, none of these remedies allows the Defendants in this matter to engage in meaningful discovery and assert a proper defense against the Plaintiffs' claims.[1] When, as here, the Plaintiffs intentionally use the "Fifth Amendment shield as a sword," Wehling, 608 F.2d at 1087, dismissal is the only appropriate remedy.

A. Plaintiffs Should Not Be Rewarded with a Stay of the Instant Proceedings.

A stay of these proceedings is not a viable remedy. In some cases, like Wehling, a court may stay the civil proceedings until the underlying criminal case is resolved, thereby relieving any incriminating threat imposed by testifying in the civil action. The Plaintiffs, though, have made the tactical decision to proceed first in this matter while the criminal charges against them are pending. In October 2009, the Plaintiffs voluntarily filed motions for continuance requesting the court to stay the criminal charges until the claims before this court were resolved. (See Def's Jt. Mot. to Dismiss, Exh. A.) The court granted the continuances until such time as it received "notice by Mover that his pending Federal Court claim has been resolved either by trial or other action," as requested by the Plaintiffs. (Id.) While the Plaintiffs may not be forced to "choose between his silence and his lawsuit," Wehling, 608 F.2d at 1088, they voluntarily made that choice by moving to stay the criminal proceedings and go forward with this action. They must now bear the consequences of that tactical decision.

Moreover, Plaintiffs' claim that their choice to move for a continuance in the criminal case was motivated by an anticipated resolution to both proceedings without litigation is contradicted by the plain language of their motions before the state court. Plaintiffs' respective motions, which are identical in all material aspects, provide:

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[1] Should the court determine, after balancing the parties' interests, that a less burdensome remedy exists that would effectively protect the Defendants' interests, the Defendants respectfully request such alternative relief.

7.

It is anticipated that numerous witnesses and multiple days of trial will be necessary to litigate the instant criminal proceeding.

8.

It is also anticipated that all of the witnesses who would be required to testify in the instant proceedings will be necessary witnesses in the pending suit in Federal Court.

9.

In the interests of judicial economy and to minimize inconvenience to the parties and witnesses, it is respectfully requested that the trial of the criminal proceeding be continued to be reset once Mover's Federal Court action has been concluded either by trial or other action.

Id. Nowhere in the Plaintiffs' motion do they claim an anticipated resolution to either the criminal or civil proceedings. Rather, the unequivocal language of their motions shows an anticipation of lengthy, protracted litigation that requires considerations of judicial economy and convenience to the parties and the witnesses. To meet this anticipation, Plaintiffs chose to move forward with the civil proceedings first, where they would continue to enjoy the Fifth Amendment privilege while the criminal proceedings remained pending.

After the continuance was granted, Plaintiffs were not forthcoming in this civil action about their intentions to exercise their Fifth Amendment privilege. Under Fed. R. Civ. P. 26(f), the parties are required to meet, confer, and discuss any claims of privilege "as soon as practicable" in order to prepare a discovery plan for the court's consideration. The parties met on June 1, 2014 and submitted a discovery plan in this matter on June 12, 2014. At no time did Plaintiffs indicate an intention to assert their Fifth Amendment privilege before the discovery plan was finalized. Rather, the first indication the Plaintiffs gave that they intended to assert the Fifth Amendment came on October 26, 2015, the day of Daniel Hodges' deposition. Rather than

comply with the spirit of Rule 26, the Plaintiffs concealed their intentions for a year and a half, frustrating the Defendants' discovery efforts.

By design, the Plaintiffs chose to proceed in this court while the criminal charges against them remained pending. When they got into this court, they sat back on their Fifth Amendment rights, and allowed the Defendants to proceed with their defense. When the time came to provide the Defendants information crucial to their defense, they wielded their Fifth Amendment sword. They should not now be rewarded with a stay of this action in order to return to the criminal proceedings they voluntarily left, without the resolution "by trial or other action" that they came to this court to obtain. A stay of these proceedings is an inappropriate remedy.

B. Adverse Inferences, Orders Striking Testimony, and Limited Discovery Orders Are Prejudicial to Defendants.

Adverse inferences and orders striking testimony are likewise insufficient in this case. Allowing this action to proceed to trial, even with protections, will unduly prejudice the Defendants. Before trial can be held, the Defendants necessarily must conduct discovery, evaluate the evidence, and prepare a trial strategy to defend against the Plaintiffs' claims. The Defendants cannot perform any of these tasks without obtaining from the Plaintiffs their firsthand, direct testimony of the events giving rise to their claim. No other sources exist from which the Defendants can obtain the Plaintiffs' version of the facts and their individual perspectives of the events. See Serafino, 82 F.2d at 519 ("Even if a paper trail might show some irregularities, it is a poor proxy for Serafino's direct testimony.").

Without knowing the Plaintiffs' perspective of the facts, the Defendants are at a distinct disadvantage and cannot conduct meaningful discovery, even if alternative sources of information exist. For example, the Defendants' questioning of eyewitnesses will be significantly compromised by their inability to challenge direct assertions made by the Plaintiffs.

To the contrary, as demonstrated by their references to Deputy Banks' arrest report in their opposition, the Plaintiffs have the benefit of both their own perspective as well as inquiring into that of the Defendants. They are able to shape their discovery approach and trial strategy with a full understanding of competing positions in this case, even if the Plaintiffs choose not to testify. As the Fifth Circuit remarked, "The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue." Wehling, 608 F.2d at 1087. A remedy of adverse inferences and orders striking testimony does just that.

Plaintiffs' proposal to proceed with limited discovery while the criminal proceedings are resolved, if the court chooses to revive them, fares no better. Any piecemeal discovery concerning post-arrest, as opposed to pre-arrest, matters calls for multiple depositions and is neither effective nor efficient. Additionally, Defendants cannot possibly conduct meaningful depositions of nonparty witnesses without first understanding the facts put into issue by the Plaintiffs themselves. They will be left to educated guesses as to the Plaintiffs' factual assertions in hopes that they ask the correct questions of the nonparty witnesses. The Plaintiffs will suffer no such disadvantage.

C. Dismissal is the Only Proper Remedy that Safeguards the Defendants' Interest in a Fair Trial.

Because none of the other remedies often considered by courts is suitable under these circumstances, dismissal is the only viable remedy that protects the Defendants' right to a fair trial. They simply cannot move forward in any way with this action while the plaintiffs insist on maintaining their silence. By choosing to proceed in this court rather than face criminal misdemeanor charges brought three years ago, Plaintiffs have left the Defendants and this Court with no recourse. Since Plaintiffs cannot be forced to relinquish their silence, they must

relinquish their lawsuit. The words of the First Circuit ring true: "After balancing the interests, dismissal may be the only viable alternative." Serafino, 82 F.3d at 518.

III. DEFENDANTS RENEW THEIR REQUEST FOR ATTORNEYS' FEES, COSTS, AND OTHER JUST SANCTIONS FOR THE PLAINTIFFS' INTENTIONAL DISRUPTION OF THE DISCOVERY PROCESS.

As first stated in Defendants' joint motion to dismiss, Defendants are entitled to recover their attorneys' fees, costs, and other sanctions for the Plaintiffs' intentional delay of the discovery process. Under Fed. R. Civ. P. 30(d)(2), sanctions are available against one who "impedes, delays, or frustrates the fair examination of the deponent." By choosing to proceed first in this court rather than on the criminal proceedings, failing to inform the Defendants of their intentions to assert their Fifth Amendment privilege early in the proceeding as required by Fed. R. Civ. P. 26(f), and waiting until the Defendants have incurred the expense of scheduling and attending a meaningless deposition to assert their privilege, the Plaintiffs clearly have unnecessarily impeded, delayed, and frustrated the fair examination of Daniel Hodges. They should be compelled to reimburse the Defendants for the attorneys' fees and costs incurred for that deposition as well as the instant motion to dismiss.

CONCLUSION

The Plaintiffs have made their bed. They should be made to lie in it. In April 2014, when the Plaintiffs' complaint was filed in this court, the Plaintiffs knew that misdemeanor charges arising out of the same operative facts underlying their complaint were pending. Had they sought a stay in this court and waited until the criminal charges were resolved, the Fifth Amendment fails to become an issue. Instead, however, the Plaintiffs made a tactical decision to move to continue the criminal proceedings and proceed with this civil action while the Fifth Amendment afforded them protection against self-incrimination. This is a classic example of a

party using the Fifth Amendment shield as a sword, something that cannot and should not be allowed. Because the Plaintiffs have tactically chosen their path and placed the Defendants at an undeniable disadvantage in this matter, their action must be dismissed and costs awarded to the Defendants. No other less-burdensome remedy exists that is an effective means of preventing unfairness to the Defendants.

Respectfully submitted,

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