

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 15-60968-CIV-COHN/SELTZER

JENNIFER YOUNG, as the :
Administratrix and personal :
representative of the estate of :
JERMAINE McBEAN, :

Plaintiff, :

v. :

PETER PERAZA, individually, and :
in his official capacity as a Deputy :
Sheriff with the Broward County, FL :
Sheriff's Office; :

BRAD OSTROFF, individually, and :
in his official capacity as a :
Lieutenant with the Broward County, :
FL Sheriff's Office; :

RICHARD LACERRA, individually, :
and in his official capacity as a :
Sergeant with the Broward County, :
FL Sheriff's Office; :

SCOTT ISRAEL, individually, and :
and in his official capacity as Sheriff :
of Broward County, FL, :

Defendants. :

PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED
MOTION TO STAY PROCEEDINGS [Doc. 46]

On December 22, 2015, Defendants herein filed a Renewed Motion to Stay Proceedings. [Doc. 46] Plaintiff Jennifer Young now files her response to that motion.

Background

On July 7, 2015, Defendants filed a motion to stay all proceedings in this case.¹

¹ At that time the only Defendants in the case were Defendants Peraza and Israel.

[Doc. 22] The thrust of that motion was a request that all proceedings be stayed because there was a criminal investigation in process concerning the matters underlying this lawsuit.² Defendants expressed the concern that the parallel criminal investigation would hamper their ability to participate in discovery and would raise constitutional self-incrimination concerns which Defendants believed could unfairly prejudice their ability to defend the case.

Plaintiff opposed Defendants' motion to stay the proceedings. [Doc. 27]

On August 4, 2015, the Court entered an Order denying the motion to stay the proceedings without prejudice to renewal at a later date. [Doc. 32]

The Court denied the motion to stay based on several relevant factors. First, the Court noted that no indictment had been returned yet against Peraza and the parallel criminal proceedings by Broward County officials had been pending for over two years. [Doc. 32 at 3] Secondly, the Court found that Defendants had not raised any specific factual issue of his defense that Peraza would risk forfeiting by invoking his Fifth Amendment privilege and, to the contrary, it appeared to the Court that there might be several independent sources for presenting his defense without his own testimony. [Doc. 32 at 3-4] These factors led the Court to conclude that Defendants had not shown that "special circumstances" required a stay. [Doc. 32 at 4]

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At the time the initial motion to stay was filed the parallel criminal investigation by the Broward County State Attorney's Office had not yet been presented to a grand jury. The United States Department of Justice had finished screening the case and decided to open a full formal investigation. Based on the undersigned's (Schoen's) discussions with the Department of Justice, that federal investigation remains open and in the same posture today as when the original motion to stay was filed, with the Department of Justice monitoring the State criminal proceedings before deciding whether to formally bring a federal criminal prosecution against the relevant parties as well.

The Court also exercised its discretion in considering other relevant factors, including the Plaintiff's interests in proceeding expeditiously, the public's interests in the same, and the burden/prejudice the Plaintiff would stand to suffer from a stay, including the prejudice that could arise from fading eyewitness memories. [Doc. 32 at 4]

However, in denying the motion, the Court wrote, "[D]efendants may renew their request at a later stage in the proceedings upon a material change in circumstances." [Doc. 32 at 5]

Discussion Concerning the Renewed Motion to Stay

On December 10, 2015, there was indeed a "material change of circumstances" from any reasonable perspective. After hearing testimony apparently over several days, a Broward County grand jury returned an indictment against Defendant Peraza, charging him with first degree felony manslaughter with a firearm for the homicide of Jermaine McBean. [Doc. 46-1]

That event led to the Defendants' renewed motion to stay these proceedings. [Doc. 46]

In the renewed motion, Defendants assert that the "special circumstances" making a stay appropriate now exist. [Doc. 46 at 3-8]. Defendants assert that the indictment ought to require a stay, especially in light of the overlapping nature between the criminal and civil cases. [Doc. 46] That addresses the first reason this Court gave for denying the original stay motion.

Defendants further assert that "the deputy Defendants will invoke their Fifth

Amendment rights against self-incrimination when questioned, in discovery and at trial, about the facts essential to nearly all of the claims asserted by Plaintiff.” [Doc. 46 at 6] Defendants then address the Court’s second articulated reason for denying the original stay motion - what factual issues in defense would be forfeited by the invocation of the Fifth Amendment. [Doc. 46 at 6-7]

Putting aside whether Defendants other than Peraza would be permitted to invoke their Fifth Amendment rights under these circumstances,³ Peraza’s argument now remains problematic for at least one of the reasons Plaintiff raised in her opposition to the initial stay motion. That is, Peraza inappropriately seeks to use (abuse) his Fifth Amendment right as both a shield and a sword.

As noted in Plaintiff’s opposition to the initial stay motion, Peraza appeared voluntarily with counsel in the week after he killed Jermaine and he gave a lengthy, detailed, videotaped statement, under oath, of his version of the facts underlying this case and he voluntarily answered, under oath, all questions put to him by the BSO investigators before whom he appeared, in the context of the BSO’s own “investigation” into the homicide of Jermaine McBean. [Doc. 27 at 14; Doc. 27-2] Peraza also filed an Answer in this case, not just denying the allegations in the First Amended Complaint, but asserting that Mr. McBean was responsible for his own death. More recently, just last month, according to reporters covering the case against Peraza, Peraza’s own attorney in the criminal case against him has acknowledged to

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Defendants Lacerra and Ostroff already have given their sworn videotaped depositions in the instant case.

them that Peraza appeared voluntarily and testified before the grand jury that indicted him, again telling his version of Mr. McBean's death. Obviously, the grand jury resoundingly rejected Peraza's claims.

But most relevant of all perhaps to Plaintiff's position that this argument by Mr. Peraza is troubling is that Peraza, through his criminal lawyer, is now daily engaging in a campaign, on Peraza's behalf, of victimizing Jermaine McBean once again - this time through the media and through a filing in the criminal case that relies on misleading submissions and outright false representations which Peraza knows to be false.

Accordingly, at the very same time Peraza asks this Court to stay these proceedings to spare him from having to invoke his Fifth Amendment right, he is actively engaging in an orchestrated media campaign in the defense of his criminal case in a way which attempts to sell the public, the Court sitting on the criminal case, and prospective jurors on a completely false narrative, attacking Jermaine McBean's good name, using documents he knows do not accurately represent the facts, and otherwise tormenting Plaintiff and her family with this conduct. This goes to the additional factors the Court, in its discretion, can consider when evaluating the appropriateness of a stay.⁴

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Plaintiff refers here generally to press conferences and statements that Peraza's lawyer in the criminal case have made and specifically to a recent motion Peraza filed in the criminal case which refers to attachments taken out of context and, in some instances (e.g. a hospital report after Jermaine was shot) presenting an absolutely false portrayal of the operative facts - including how many times and where Jermaine was shot by Peraza in support of his false claim that Jermaine pointed the air gun at him. Plaintiff does not wish to dignify that outrageous filing by attaching it here as an exhibit. Plaintiff wishes to be perfectly clear that she does not in any way intend to attribute any such conduct to Mr. Losey, counsel representing the Defendants in this civil case.

Similarly, Plaintiff has real concerns about the continuing availability of all essential witnesses in this case with further delay. A delay now for an indefinite amount of time, already two and half years after Mr. McBean's death is a substantial burden to Plaintiff and to the public's interests and risks causing real prejudice to such interests in a full and fair airing of the facts in this case and to Plaintiff's ability to obtain some measure of justice. These are real and significant concerns, even if perhaps without a full remedy on balance.

Plaintiff's Position

Plaintiff does not in any way dispute that this event constituted a "material change of circumstances" for purposes of a stay motion and Plaintiff readily acknowledges the directly overlapping nature of the indictment and a primary focus of this federal civil rights action.

Given the manner in which Defendant Peraza has proceeded through the media and in court filings in the criminal case, Plaintiff has real concerns about the risk of prejudice arising from such conduct without being able to proceed against Peraza in this case for all of the time the criminal case is pending and while he is engaging in such conduct with impunity. Plaintiff has attempted on occasion to respond to this conduct through the media; but that cannot remove the possible prejudice.

On the other hand, Plaintiff recognizes that, while these factors are relevant to the Court's discretion, at the end of the day, the overriding factor in this circumstance would indeed appear to be the pendency of the indictment on the directly overlapping facts. Plaintiff wishes simply to set forth her concerns to the Court and leave the

decision, of course, to the Court, and she has attempted to do so herein. Plaintiff recognizes that in all fairness, the facts now attending this matter would appear to arise to “special circumstances” justifying a stay.

Plaintiff would respectfully request, however, that a stay in this case carry with it certain specific conditions.

First, Plaintiff would request that at the time the stay is lifted, a new schedule be set in this case providing for several months of fact discovery, rather than just limiting the parties to the amount of time left for discovery under the current schedule. Plaintiff has refrained from pursuing comprehensive discovery in consideration of the issues raised by Defendants in their initial stay motion, in light of representations from the Broward State Attorney’s Office that the case would be presented to a grand jury by the end of 2015. Plaintiff should not be prejudiced for that consideration. Similarly, Defendants have not pursued discovery, likely for the same reason.

The undersigned (Schoen) represents to the Court after conferring with opposing counsel, that both parties join in this request for a new schedule after the stay is lifted which would provide for several months of discovery and would re-set corresponding relevant dates following full discovery.

Secondly, Plaintiff would request that Defendant Peraza be required to provide the Court and Plaintiff with periodic reports, perhaps every two months, regarding the status of the criminal case.

Third, Plaintiff would ask that a provision be made for the parties to be able to

move the Court during the stay period to take a deposition of a witness (or other discovery) whose availability at a later date might be uncertain or for some other reason the Court deems appropriate.

Finally, Plaintiff wishes to file a motion for leave to file a Second Amended Complaint to make the operative Complaint comport with the Court's recent Order on Defendant's motion to dismiss and to reflect relevant facts ascertained to date. Plaintiff intends to file that motion by no later than January 12, 2016. Plaintiff would ask the Court to consider allowing that motion to be filed, while staying all other proceedings or Plaintiff would ask the Court to refrain from formally entering the stay until after January 12, 2016 solely for the purpose of allowing that motion to be filed. This would, if the motion is granted, allow the case to proceed on the Second Amended Complaint (if the Court grants leave to file a Second Amended Complaint) when the stay is lifted. The proposed changes will be minor, with no additional parties or additional causes of action contemplated; but it would serve all parties' interests, Plaintiff respectfully submits, to have the Second Amended Complaint in place for when the stay is lifted.

Respectfully submitted,

/s/ Eric Bluestein
Florida Bar # 58240

/s/ David I. Schoen
Counsel for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, I caused a true and correct copy of the foregoing Response to be served on all counsel of record by filing the same through this Court's ECF system.

/s/ Eric Bluestein