

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

MICHELE SAVALLE, :  
Plaintiff, :  
vs. : CASE NO. 3:00CV675 (WWE)  
KOBYLICK, INC., ET AL. :  
Defendants. :

RECOMMENDED RULING  
ON DEFENDANTS' MOTION FOR RECONSIDERATION OF THE  
COURT'S APRIL 18, 2001 ORDER LIFTING STAY OF DISCOVERY

On July 18, 2001, this court heard argument on defendants' motion for reconsideration of the court's order lifting the stay of discovery for defendant Mark Kobyluck ("defendant").<sup>1</sup> [Doc. # 42.] Judge Eginton entered a stay of all discovery directed to defendant on August 2, 2000, until criminal proceedings against him were complete. [Doc. # 14.] The court lifted the stay on April 18, 2001 [Doc. # 38], and defendants filed their motion for reconsideration on May 2, 2001 [Doc. # 42]. **Defendants' Motion for Reconsideration is GRANTED.** [Doc. # 42.] **After hearing argument on this matter, and for the reasons discussed below, the Court recommends that the stay be lifted, and that discovery directed toward defendant proceed.**

FINDINGS OF FACT

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<sup>1</sup> On June 27, 2001, Judge Eginton referred this motion to the undersigned for purposes of holding a hearing on the issues it raised. [Doc. # 63.]

1. Plaintiff commenced this action on April 12, 2000, bringing claims against defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Connecticut Fair Employment Practices Act, and the common law of the State of Connecticut alleging acts of sexual harassment, infliction of emotional distress, and false imprisonment.
2. Plaintiff was employed as a truck driver by defendant Kobyluck Corp. from the spring of 1996 until May 3, 1999.
3. In the spring of 1998, defendant became plaintiff's direct supervisor.
4. After defendant began supervising plaintiff, she alleges that he began making inappropriate sexual comments to her.
5. Plaintiff alleges that defendant sexually assaulted her on May 3, 1999.
6. On May 4, 1999, plaintiff reported defendant's conduct to the Police Department of Montville, Connecticut.
7. On May 26, 1999, plaintiff filed a complaint with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunities Commission.
8. Discovery in this case is essentially complete, with the exception of all discovery directed toward defendant.<sup>2</sup>
9. The criminal proceedings against defendant have been pending

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<sup>2</sup> Counsel indicated that were minor discovery matters with respect to several new defendants that remained outstanding.

for more than two years.

10. Defendant has not entered a plea in the criminal matter and a trial date has not been set.

11. Criminal proceedings in defendant's case have been scheduled in state court on the following dates:

June 21, 2000  
July 12, 2000  
August 3, 2000  
August 24, 2000  
September 8, 2000  
September 18, 2000  
September 26, 2000  
October 3, 2000  
October 31, 2000  
November 28, 2000  
January 4, 2001  
January 11, 2001  
February 27, 2001  
April 20, 2001

12. On each of these dates, defendant's counsel requested and was granted a continuance.

13. On each of these dates, plaintiff appeared in court. Defendant was not present for any of the above state court proceedings.

14. Defendant seeks an indefinite stay of discovery in this matter pending resolution of the criminal case.<sup>3</sup>

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<sup>3</sup> Defendant is represented by separate counsel in the criminal proceeding. Counsel in the matter before this court did not know whether defendant had exercised his constitutional right to a speedy trial or taken any action to move the criminal matter toward a resolution.

## **DISCUSSION**

Upon reconsideration and in light of the findings made above, the Court recommends that the stay be lifted pursuant to conditions as set forth below.

Defendants argue that the stay should remain in force because (1) there have been no changes in the circumstances subsequent to the court ordering the discovery stay; (2) there is no undue prejudice to plaintiff in delaying discovery pending the resolution of the criminal matter; (3) in the absence of a stay, defendant's constitutional rights will not be adequately protected; and (3) there is no serious prejudice to the court in delaying further discovery on the civil matter. The court disagrees. As set forth in further detail below, the court believes that a significant change in circumstances has occurred in the case which necessitates the lifting of the discovery stay.

The court is cognizant of the uncomfortable position a defendant faces when forced to simultaneously defend both civil and criminal proceedings. Although nothing in our Constitution requires a stay of civil proceedings while a parallel criminal matter is resolved, courts in this circuit have often granted post-indictment stays. See Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 2001 WL 474240, \*3-\*4 (S.D.N.Y. May 4, 2001), quoting In re Pharmaceutical, 133 F.R.D. 12, 13 (S.D.N.Y. 1990). However, this is not a hard-and-fast rule and the court has

inherent discretion in determining whether to stay civil matters pending before it until criminal proceedings against the defendant are resolved. See Citibank, N.A. v. Hakim, 1993 WL 481335, \*1 (S.D.N.Y. Nov. 18, 1993), quoting Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc., 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980); Banks v. Yokemick, 144 F. Supp. 2d 272, 275 (S.D.N.Y. 2001) (decision whether to grant a stay "demands a particularized inquiry into the circumstances of, and the competing interests in, [each] case").

Once a defendant has been indicted, the concerns implicating his constitutional rights under the Fifth Amendment take on a heightened importance, given the decision of "whether to waive the privilege and give potentially damaging testimony or to assert it at the risk of having a Court or jury draw adverse inferences against him in the civil case." Sterling Nat'l Bank, 2001 WL 474240, \*4. Although requiring a defendant to choose between waiving his Fifth Amendment rights and suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process, forcing the defendant to make this choice greatly increases the potential prejudice facing him in the absence of a stay. See Volmar Dist., Inc. v. New York Post Co., Inc., 152 F.R.D. 36, 39-40 (S.D.N.Y. 1993), citing SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (noting that Constitution does not require a stay of

civil proceedings even if the defendant has been indicted). At the same time, and in most cases, the potential prejudice facing a plaintiff if the stay is granted is reduced after an indictment has been returned "since the criminal litigation has reached a crisis that will lead to a reasonably speedy resolution." Sterling Nat'l Bank, 2001 WL 474240, \*4.

In weighing the potential prejudice facing a defendant in this predicament, there are several concerns a court should consider in deciding whether to stay the civil matter. First, a court should consider the extent to which "denying a stay might undermine a defendant's Fifth Amendment privilege against self-incrimination." Volmar, 152 F.R.D. at 39. Next, the court should consider the possibility that the bounds of discovery in criminal proceedings will be impermissibly expanded or that a defendant's defense strategy will be revealed to the prosecution prior to the criminal trial. See id. Finally, a court should consider the extent to which a stay would otherwise prejudice the pending civil case. See id. The court addresses each of these concerns in turn.

The Court finds that, although defendant's Fifth Amendment privilege will be directly implicated by the lifting of the stay, under the circumstances of this case it is appropriate to do so. For whatever reason, defendant has taken no steps to resolve his criminal case and has done nothing to assert his right to a

speedy trial. More than two years have passed since the alleged occurrence of the events which led to the filing of the instant matter, and since plaintiff filed her initial report with the police, and defendant still has not entered even a not guilty plea in the state criminal case. Furthermore, defendant's counsel in the civil matter represented that no criminal trial date has been set, and that the request for the stay would be for an indefinite length of time.

The law was not meant to be used as a shield by the defendant in this matter to prevent the resolution of either his criminal or civil cases. See Paine, Webber, 486 F. Supp. at 1119 (explaining "[t]hat defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff from expeditiously advancing its claim."). Here, defendant's dilatory tactics in resolving his criminal case for more than two years have placed plaintiff in the position where she has been forced to forego her right to have her claim adjudicated within a reasonable time frame in favor of allowing defendant to continue to hold both matters at bay. Defendant should not be permitted to "intentionally create[] the impediment which he seeks to erect as a shield" by delaying his criminal proceedings and then using the fact that the criminal case remains open as a basis for avoiding discovery on the civil matter. Milton Pollack, *Parallel*

*Civil and Criminal Proceedings*, 129 F.R.D. 201, 205 (1990).

The Court finds that defendant's Fifth Amendment rights in this situation do not outweigh plaintiff's right to trial, even though lifting the stay could potentially undermine defendant's right against self-incrimination. Although this Court recommends that the stay be lifted under the circumstances of this case, it finds that some additional protection should be afforded to defendant. Plaintiff's proposal to begin the remaining areas of discovery would allow her to continue to prepare her case for trial and allow defendant to invoke his Fifth Amendment privilege in responding to requests, but give defendant the opportunity to revoke the privilege prior to trial in order to avoid the adverse inference.<sup>4</sup> In the current situation, the Court finds that plaintiff's proposal will adequately protect defendant's Fifth Amendment rights, given that there is no foreseeable date by which the criminal matter will have concluded.

The court next considers the concerns that, by allowing discovery to proceed in the civil matter, the scope of allowable discovery in the criminal context will be impermissibly expanded

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<sup>4</sup> Specifically, plaintiff proposed that defendant be permitted to invoke the Fifth Amendment when appropriate, but to otherwise require defendant to respond to discovery. Defendant would be permitted to withdraw the Fifth Amendment invocation up to seven days before trial, as long as plaintiff is permitted to depose defendant regarding the revocation before trial. [Doc. # 46, at 9.] Defendant did not suggest any proposal which would permit any discovery by plaintiff.



and that the prosecution could discover the strategy for defending the case prior to the criminal trial. This court agrees with the court in Sterling Nat'l Bank, which distinguished cases where both the civil and criminal matters are brought by the government, from those situations where the civil case is brought by a private litigant. 2001 WL 474240. In civil cases litigated by private parties, there is "no reason to assume that [a private plaintiff] is simply a stalking horse for the government's criminal inquiry, rather than a good faith effort to obtain compensation for its own private injuries." Id. at \*5.

In this case, defendant has not provided any reason for the court to question plaintiff's motives in seeking discovery or any reason to believe that the state is inappropriately using the civil case to gain information for the criminal case. The latter statement is especially true when defendant is represented by separate counsel in the cases and there is no evidence that, over the past two years, plaintiff has been sharing information with state prosecutors. Thus, these considerations are insufficient to convince this court that a stay is necessary to protect defendant's rights and to prevent the misuse of the civil justice system by state prosecutors.

Finally, the Court finds that the last relevant consideration, prejudice to the civil case, weighs significantly in favor of lifting the stay. Here, defendant has procured a

continuous delay in the criminal matter, leaving it to pend indefinitely. Judge Eginton issued a stay of discovery with the expectation that there would be a prompt resolution of the criminal charges. Over an eleven month period there has been no resolution, and indeed no movement toward resolution, or any date certain by which the criminal matter will be resolved. The continuation of the stay has become too unduly prejudicial, forcing plaintiff to forego discovery and delaying the resolution of the civil case.

In addition, plaintiff will be prejudiced by the continued delay of discovery, because she is being deprived of any opportunity to find out whether defendant will rely on other witnesses in defending this action. Although defendant argued that plaintiff was not prejudiced by the delay because the majority of witnesses have been deposed, potential defense witnesses have not been disclosed or deposed. The farther removed the events at issue, the more likely that witness recollections will be diminished.

Concerns which militate against proceeding with discovery directed toward a defendant who has been indicted in a criminal case based on the same basic facts are no longer persuasive in this case. Therefore, the Court recommends that the stay of discovery directed toward defendant be lifted, under the conditions outlined above.

**CONCLUSION**

For the reasons previously discussed, defendants' motion for reconsideration [Doc. # 42] is GRANTED. However, upon reconsideration, the Court recommends that the stay of discovery directed toward the defendant be lifted under the conditions set forth in this ruling. The Court also recommends that Judge Eginton set a firm trial date for the civil case, which would provide defendant with a defined window of time in which to seek resolution of the criminal matter.

The parties are free to seek the district judge's review of this recommended ruling. See 28 U.S.C. § 636(b)(**written objection to ruling must be filed within ten days after service of same**); Fed. R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rule for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary of HHS, 892 F.2d 15, 16 (2d Cir. 1989)(**failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit**).

SO ORDERED at Bridgeport this \_\_\_\_ day of August, 2001.

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HOLLY B. FITZSIMMONS  
UNITED STATES MAGISTRATE JUDGE