SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Todd E. Edelman
vs.	:	Initial Conference Dec. 1, 2017, 9:30 AM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 212
Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUESTS FOR A STAY AND EXTENSIONS OF TIME TO FILE 12(B)(6) MOTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

D.C. SUPERIOR COURT RULES

STATUTES

SUMMARY OF ARGUMENT

In seeking to stay the lawsuit now before this Court or, in the alternative, to extend the time for filing their Rule 12(b)(6) motions, Defendants argue that they are setting out to conserve judicial and party resources. In fact, either of their requests, if granted, would have the opposite effect, continuing a pattern of subjecting individual Plaintiffs with shallow pockets to a war of attrition.

Plaintiffs and Defendants agree that two essentially identical lawsuits should not proceed simultaneously in two courts. Although Plaintiffs filed a notice of appeal of an unfavorable Ohio jurisdictional ruling to preserve their rights, they have not taken further steps there and Defendants need not answer or take any action in that case at this time. Moreover, as Defendants do not disclose, Plaintiffs have twice offered to drop the Ohio appeal voluntarily if they conclude that their rights would not be prejudiced by proceeding only in the District of Columbia.[1]

That offer remains open. However, as Plaintiffs have discussed with Defendants in two e-mails, for Plaintiffs to know whether Defendants will raise issues that could be cured under Ohio law but, potentially, not under D.C. law, Plaintiffs must see not only the motions Defendants have already filed, but also their proposed motions to dismiss under Rule 12(b)(6). If Plaintiffs cannot review those motions before having to decide whether to pursue their Ohio appeal, they may have no choice but to take the otherwise potentially unnecessary step of bringing all parties back to the Ohio courts.

On October 15, 2017, due to Defendants' delay in filing their motions, Plaintiffs filed a

[1] On page 2 of their Memorandum, Defendants state: "Plaintiffs oppose this motion and say they will respond by October 18, 2017 to Defendants' request that they instead voluntarily dismiss their Ohio appeal." In fact, the option of a voluntary dismissal in Ohio was first raised by Plaintiffs in an e-mail on September 28, 2017, not by Defendants.

request with the Ohio Second District Court of Appeals for an extension of time in which to file a brief setting forth their grounds for an appeal. That brief would otherwise be due by October 24, 2017.

Plaintiffs respectfully request, therefore, that the Defendants' motion for a stay be denied. Defendants insisted throughout the Ohio litigation that Washington, D.C., is the appropriate forum for this case, and they should live up to that choice now. If Plaintiffs decide to pursue the Ohio appeal after seeing Defendants' Rule 12(b)(6) motions, they will then join with Defendants in a consent motion to stay the action before this Court.

In addition, Plaintiffs respectfully request that, if the stay is denied, the Court deny Defendants' request to extend the time for filing their 12(b)(6) motions. Those motions, or Defendants' answers to the Complaint, were due on October 4, 2017. Plaintiffs do not oppose Defendants' belated filing of 12(b)(6) motions if they are filed within five days of the Court ruling on the present motion, so that Plaintiffs will have time to brief their Ohio appeal if they decide not to drop it.

Three reasons support the denial of Defendants' request for an extension:

First, as stated above, Plaintiffs cannot be in a position to drop the Ohio appeal – as Defendants wish – until they have seen Defendants' 12(b)(6) arguments.

Second, under D.C. Superior Court Civil Procedure Rule 12, Defendants were required to file an answer to the Complaint or make one of the motions delineated in Rule 12 by October 4, 2017. Defendants did not do so. (On October 2, when Defendants requested an extension of time to file their SLAPP Act and Arbitration motions, an extension that Plaintiffs did not oppose, they did not request an extension for filing their Rule 12(b)(6) motions.) Accordingly, the time has passed for Defendants to answer the Complaint or move pursuant to

Rule 12(b)(6) motions to extend their time to answer.

Finally, contrary to Defendants' assertions and as discussed in Section C below, if this Court concludes that the D.C. SLAPP Act applies, it will be required to analyze the same issues and facts in considering the 12(b)(6) motions and the SLAPP Act motions. As the D.C. Court of Appeals stated in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1220 (D.C. 2016) "the showing required to defeat an Anti-SLAPP Act special motion to dismiss is more demanding than is required to overcome a Rule 12(b)(6) motion to dismiss …."

In fact, because all but one of the causes of action is based on defamatory statements which originated in Illinois, and none originated in the District of Columbia, the Illinois Anti-SLAPP statute should govern that aspect of this case, as Section D below discusses. The parties should proceed to brief that narrow issue expeditiously.

BACKGROUND

At the center of this dispute are nine publications of three versions of an investigative report (the "Report(s)") written by David Hoffman, a partner of Sidley Austin LLP, and statements made in the media by the then-APA President after the Report's release. Hoffman is based in and licensed to practice law only in Illinois. He had been asked by APA to investigate the truth of allegations in a book, *Pay Any Price*, released in late 2014 by *The New York Times* reporter James Risen. The APA Board authorized Hoffman "to conduct an independent review of ***whether there is any factual support*** for the assertion that APA engaged in activity that would constitute collusion with the Bush administration to promote, support or facilitate the use of 'enhanced' interrogation techniques by the United States in the war on terror." (emphasis added)[2]

Although Hoffman found no support for the bulk of Risen's allegations, on the

[2] http://www.apa.org/news/press/releases/2014/11/risen-allegations.aspx

instruction of the APA Special Committee overseeing his work, he vastly expanded the investigation's scope. After its conclusion, he issued Reports stating as fact conclusions that were acted on as facts by APA when it fired Plaintiff Behnke, and by Plaintiff Newman's employer when it forced him to resign. When media around the world reported about Hoffman's defamatory conclusions, they took those conclusions to be based on facts, not opinions.

Within two weeks of the Reports' publication, Plaintiffs began to present Defendants with documents and other evidence that contradicted Hoffman's conclusions. Since then, many APA members, including former presidents and former chairs of the APA Ethics Committee, have publicly contradicted Hoffman's "facts" based on their knowledge of the underlying events. The accumulated evidence demonstrates that Defendants acted in reckless disregard of the conclusions' truth and, or, with knowledge that the conclusions were false. For example, some APA Board members, including the head of the Special Committee, were intimately involved in the underlying events and therefore knew the Reports falsified those events. Moreover, Hoffman had in his possession numerous documents and witness statements that contradicted his conclusions.

So clear and public were the problems with the Report and with Hoffman's conduct of his investigation that, in April 2016, APA re-hired Hoffman to review his own work and produce a supplemental Report by June 8, 2016. It has never emerged.

Beginning in August 2015, Plaintiffs repeatedly offered to work towards a settlement and engaged in lengthy discussion with Defendants' counsel towards that end. On February16, 2017, after the parties had entered into two separate tolling agreements with four extensions, and after Defendants did not counter (or, in the case of APA, respond at all) to Plaintiffs' latest

settlement offer, Plaintiffs filed suit in Ohio. The choice of forum was based on the residence of one of the Plaintiffs; substantial activities conducted by the Defendants in that forum, including multiple publications of the defamatory statements read by Ohio residents; and permissive joinder of multiple plaintiffs. On August 25, 2017, the Montgomery County, Ohio, Court of Common Pleas dismissed the case for lack of personal jurisdiction.

In the Ohio action, Defendants repeatedly emphasized, in both their papers and their oral argument, their readiness to litigate in the District of Columbia. For example, in oral argument, counsel for Defendants Hoffman and Sidley stated:

> ….this case in any event should be dismissed so that it can be refiled in the Superior [sic] forum, which is in the District of Columbia, which means that if the Court were to dismiss on that basis, the case would not end. Plaintiffs would have an avenue to assert their claims. August 25, 2017, Oral Argument Transcript, p. 11.

And Defendant Sidley and Hoffman's papers, which APA expressly adopted in its papers, state:

> Plaintiffs have failed to argue, let alone establish, that tolling would not apply under these circumstances. Even if tolling would not preserve Plaintiffs' claims, Sidley and Hoffman will not assert a statute of limitations defense if the Court dismisses the case and Plaintiffs re-file the claims alleged in their Complaint in Washington, D.C. within 60 days of this Court's order of dismissal. Sidley Reply to Plaintiffs' Opposition, p.1.

Now, Plaintiffs wish to proceed as expeditiously as possible in the forum that Defendants requested and where Plaintiffs have expended additional funds to obtain new local counsel.

In November 2015, when Plaintiffs' lead counsel met with APA's outside counsel, she requested the hiring of a neutral third-party arbitrator (the Honorable Patricia M. Wald). APA's Board rejected that request. Despite that history, Defendants are now claiming arbitration rights under two expired employment agreements (one expired almost a decade ago), neither of which has a survivability clause. Given the course of the litigation, Plaintiffs are no longer prepared to offer arbitration on behalf of two of the five Plaintiffs, and will

demonstrate that Defendants have no right to arbitration.

However, Plaintiffs recently accepted what they believed to be an offer from APA to mediate. APA's response to that acceptance, stated that they were not making a proposal regarding mediation but instead were asking if Plaintiffs were interested in establishing a framework for discussion facilitated by a third party. Sidley and Hoffman have not responded to a question about their willingness to engage in mediation.

A. The Lawsuit in D.C. Should Be Allowed to Proceed

Defendants have not filed their motion for a stay under any rule of D.C. Superior Court Civil Procedure. It is unclear, therefore, on what grounds they are attempting to proceed or by what Civil Procedure standards they believe the motion should be reviewed.

Aside from the lack of foundation in the Civil Rules, the motion should be denied for two primary reasons.

First, at this point there is only one active suit: the action before this Court. In Ohio, Plaintiffs have filed only a notice of appeal, and they have repeatedly told Defendants that they will not pursue that appeal if, after seeing Defendants' Rule 12(b)(6) motions, they conclude that they will not be disadvantaged by proceeding in the District of Columbia. Alternatively, if a stay is necessary because Plaintiffs determine they must proceed in Ohio based on Defendants' motion papers, they will voluntarily stay the case in D.C.

Second, Defendants' reliance on the first-filed rule, a rule developed in federal District Courts, is misplaced. Even in the federal-court context, a stay is discretionary, not a matter of right, and should be based on equitable considerations: "Although some courts make the determination [as to which district court should adjudicate the case] by using the so-called 'first-to-file' rule, we have emphasized that the district court **must** balance equitable

considerations rather than using 'a mechanical rule of thumb'." (emphasis added) *Stone & Webster, Inc. v. Ga. Power Co.*, 965 F.Supp.2d 56, 60-62 (D.D.C. 2013)

When it is applied, as a case cited by Defendants states, the first-filed approach is intended to avoid "the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts." *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970), cited on page 6 of Defendants' motion. As an example of a situation warranting a stay, the *McWane* court stated that "***a defendant should not be permitted to defeat the plaintiff's choice of forum*** in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its own choosing …." (emphasis added)

Here, the circumstances that would warrant a stay do not exist. Far from trying to defeat a party's choice of forum, Plaintiffs are asking to litigate in the forum chosen by Defendants. There are no simultaneous ongoing adjudications, and the Plaintiffs' proposal for proceeding ensures there will not be. In contrast, Defendants' proposed course leads to a potentially wasteful and unnecessary return to the Ohio courts.

Even if the present posture of the case did bring it within the scope of a first-filed approach, state courts have found that "…dominant jurisdiction does not apply to suits filed in other states because 'every state is entirely sovereign and unrestricted in its powers'." *In re Old American County Mutual Fire Insurance Company*, No. 03-12- 00588-CV.; 2012 WL 6699052, *1; (Dec. 20, 2012) (Not Reported in S.W.3d 2012); *accord*, *Advanced Bionics Corporation v. Medtronic*, 29 Cal.4th 697, 707 (Cal. 2002) (the first-filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty).

B. The Deadline for Rule 12(b)(6) Motions Has Passed, and Defendants Cannot Show Good Cause Why the Court Should Extend Their Deadline to Respond to the Complaint

Under Rule 12, Defendants had until October 4 to answer the complaint or file a Rule 12 motion. Now, after the October 4 deadline has passed, Defendants ask the Court for the first time to extend their time to file Rule 12(b)(6) motions until after the Court rules on their motions to compel arbitration and special motions to dismiss. Neither of those motions answers the Complaint or is listed in Rule 12, nor are they brought under any Rule of Civil Procedure.

Because the time has passed for filing an answer or 12(b)(6) motion, Defendants are now required to show "excusable neglect" under Rule 6(b) as to why they failed either to file those documents within the time frames specified in the Super. Ct. Civ. Rules or to request an extension.[3] However, Plaintiffs will not oppose the filing of Rule 12(b)(6) motions if they are filed within five days of the Court ruling on the present motion.

C. Contrary to Defendants' Assertions that the Later Filing of a 12(b)(6) Motion Will Conserve Resources, the D.C. Court of Appeals Found that the 12(b)(6) Standard Is Less Demanding than the SLAPP Standard and Is Subsumed in that Standard.

Although the D.C. SLAPP Act should not apply to this case, as Section D demonstrates, for purposes of this motion Plaintiffs will assume that the Court may find to the contrary. In addition, although Plaintiffs will demonstrate that they are not public officials or limited-purpose public figures, Plaintiffs will also assume for present purposes that the Court

[3] **Rule 6. Computing and Extending Time; Time for Motion Papers.** (b) EXTENDING TIME. (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:…(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

may find that they are. If that is the case, to respond to Defendants' motion to dismiss based on the D.C. SLAPP Act, Plaintiffs' burden includes proffering evidence of falsity and actual malice with respect to Defendants' defamatory statements.

That standard was articulated in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), a case Defendants cite in their motion. The *Mann* Court also stated that the SLAPP Act standard is more demanding than the 12(b)(6) standard. We quote at length from that case because of its thorough explanation of why the SLAPP Act standard should be held to subsume the Rule 12(b)(6) standard:

> FN # 2: Because we hold that the showing required to defeat an Anti-SLAPP special motion to dismiss is more demanding than is required to overcome a Rule 12(b)(6) motion to dismiss, Dr. Mann's successful response to appellants' Anti-SLAPP special motions to dismiss necessarily also defeats appellants' Rule 12 (b)(6) motions to dismiss. *Id.* at p. 1221
>
> … provisions of the Anti-SLAPP Act impose requirements and burdens on the claimant that significantly advantage the defendant. … the filing of a special motion to dismiss stays the claimant's right to seek discovery "until the motion has been disposed of," with a limited exception that favors the defendant. D.C. Code §16-5502(c).[4] The Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection. *Id.* §16-5502(b). This is a reversal of the allocation of burdens for dismissal of a complaint under Superior Court Rule of Civil Procedure 12(b)(6) … and for summary judgment under Superior Court Rule of Civil Procedure 56 ... *Id.* at p. 1237
>
> Our interpretation of the requirements and standard applicable to special motions to dismiss ensures that the Anti-SLAPP Act provision is not redundant relative to the rules of civil procedure. A defendant may still file a motion to dismiss a complaint at the onset of litigation under Rule 12, based solely on deficiencies in the pleadings. *See* Super. Ct. Civ. R. 12(a) (requiring that motion for failure to state a claim must be filed within 20 days of service of complaint). *Id.* at p. 1238

[4] As of late September 2017, Defendants were unwilling to agree to respond to Plaintiffs' limited discovery requests served with the Complaint. Defendants stated that Plaintiffs should wait to review the Defendants' motion papers to discuss those requests. Because both the D.C. Arbitration and SLAPP Acts require expedited hearings, Plaintiffs anticipate they will be filing a request for targeted, expedited discovery under Super. Ct. Civ. R. 26 and 56(d) and the SLAPP Act exception as needed.

To respond to a SLAPP Act motion, Plaintiffs are required to proffer evidence in relation to each of the main elements of its prima facie case of defamation. The 12(b)(6) standard is thus subsumed in the SLAPP Act standard. It is unclear what additional issues Defendants intend to raise separately in their 12(b)(6) motions, after Plaintiffs and the Court have engaged in substantial work to evaluate Plaintiffs' case in response to the SLAPP Act motions. Accordingly, Defendants should be required to answer the Complaint or file 12(b)(6) motions promptly.

D. Defendants' Motion Wrongly Assumes that the D.C. Rather than Illinois Anti-SLAPP Statute Will Apply.

Plaintiffs will address each of Defendants' points on the merits in the appropriate place in their opposition papers. At this time, however, they cannot appear to accept through silence Defendants' assertion that the D.C. SLAPP Act will apply to Defendants' conduct in this case. In their papers filed on October 13, 2017, Defendants fail to address a threshold choice-of-law issue.

As Defendant APA argued in its Ohio motion papers based on the D.C. SLAPP Act: "…courts in many other jurisdictions have held that the Anti-SLAPP law of a defendant's domicile state or of the state where the speech originated applies, even where another state's defamation law applies …. The courts' rationale underpinning these rulings is the recognition that states with Anti-SLAPP laws have 'a strong interest in having [their] own [A]nti-SLAPP legislation applied to speech originating within [their] borders and made by [their] citizens.' *Intercon Sols.*, [*v. Basel Action Network*,] 969 F. Supp. 2d [1026] 1035 [(N.D. Ill. 2013)]…" APA Special Motion to Dismiss under the D.C. SLAPP Act filed in Ohio, pp. 19-20.

Under that standard, the D.C. SLAPP Act does not apply in this case. All but one cause of action is based on speech or statements at issue which originated in Illinois. (The remaining

instances, by Dr. Nadine Kaslow on behalf of APA, originated from Georgia.) Moreover, Illinois is Sidley Austin LLP's principal place of business, Hoffman's domicile and state of licensure, and one of Sidley's two places of organization (the other is Delaware). Only one of the five Plaintiffs currently resides in D.C. One has recently relocated from D.C. to California to join her husband there; the others are in North Carolina and Ohio. Only one of the Defendants, APA, is organized in D.C.

The choice-of-law decision is significant. The Illinois Supreme Court has held that Illinois' anti-SLAPP statute does not apply where, as here, Plaintiffs are attempting to redress harm to their reputations through appropriate access to the courts:

> … where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendants' rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act. It is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute.

Sandholm v. Kuecker, 962 N.E.2d 418, 429-430 (2012); See also, *Mann*, *infra*, at 1239.

Because the choice of law is a threshold decision in this case, and the choice will substantially affect the workload of the Court and the parties, Plaintiffs suggest that the parties be asked to brief that issue separately after Defendants answer the complaint or file 12(b)(6) motions. *See Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1338 n.6, 414 U.S. App. D.C. 465 (D.C. Cir. 2015). If the Court determines that Illinois law should be applied, then no briefing on the D.C. SLAPP Act issues would be needed, and the case would proceed under the usual D.C. Superior Court Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Defendants' motion to stay this case or to extend the time to file their Rule 12(b)(6) motions should be denied, and Defendants should be required to

answer the complaint or file those motions within five days of the Court's decision on this motion. Plaintiffs will voluntarily dismiss the Ohio action once they receive Defendants' answers or motions or, alternatively, enter into a consent motion to stay this proceeding within five days of receiving those motions.

The parties should proceed to brief the choice-of-law issue on an agreed schedule, so that the case may proceed expeditiously and without unnecessary expenditure of the Court's or parties' resources.

All further deadlines for oppositions regarding the SLAPP Act and Arbitration motions filed by Defendants on October 13, 2017 should be suspended until the expedited discovery requests to be filed by Plaintiffs by the late of October 31, 2017, or five calendar days after this order, as appropriate, pursuant to Super. Ct. Civ. R. 26 and 56(d) and D.C. Code §16-5502(c)(2), are fully briefed by the parties and considered by the Court.[5] Upon the ruling of the Court on those discovery motions, the Court and parties can agree as to a new briefing schedule for the SLAPP Act, 12(b)(6) and Arbitration motions as appropriate.

Respectfully submitted,

/s/ Bonny J. Forrest
Bonny J. Forrest, Esq. (pro hac vice)
555 Front Street, Suite 1403
San Diego, California 92101
(917) 687-0271
Attorney for Plaintiffs Banks, Dunivin, James and Newman
bonforrest@aol.com

[5] Plaintiffs requested an extension from Defendants on October 17, 2017, to extend the opposition briefing schedule on Defendants' D.C. SLAPP and Arbitration motions (currently due October 24, 2017) until 21 days after the Court has ruled on this Motion. Defendants' conditioned any agreement to an extension on Plaintiffs' agreeing to this stay, and to forego an expedited discovery motion, pursuant to their DC SLAPP and Arbitration motions. Therefore, this opposition shall also serve as an Opposed Motion by Plaintiffs pursuant to D.C. Superior Court Rule 6(b)(1)(A) for an extension of time to file oppositions to those motions as may be needed and is set forth more fully in Plaintiffs' Proposed Order.

/s/ Louis J. Freeh
Louis J. Freeh, Esq. (D.C. Bar No. 332924)
Freeh Sporkin & Sullivan, LLP
2550 M St NW, First Floor
Washington, DC 20037
(202) 390-5959
Attorney for Plaintiff Behnke
bescript@freehgroup.com

/s/ James R. Klimaski
James R. Klimaski, Esq. (D.C. Bar No. 243543)
Klimaski & Associates, P.C.
1717 N St NW – Suite 2
Washington, DC 20036-2827
(202) 296-5600 Fax 202-296-5601
Attorney for all Plaintiffs
Klimaski@Klimaskilaw.com