

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOUGLAS WINSTON, as Administrator
of the Estate of TAMIR RICE, Deceased

1:14-CV-02670-SO

Plaintiff

JUDGE SOLOMON OLIVER, JR

vs.

TIMOTHY LOEHMANN, et. al.

Defendants

PLAINTIFFS OBJECTION TO
DEFENDANTS MOTION TO STAY
(Hearing Requested)

Now comes the Plaintiff, Douglas Winston, administrator, and hereby submits Plaintiffs objection to Defendants Motion To Stay.

Defendants moved for a stay of this civil rights action in light of the five (5) month old criminal investigation involving the City of Cleveland and Cleveland Police Officers, Timothy Loehmann and Frank Garmback. For the reasons below the motion should be denied.

Defendants' Motion to Stay Proceedings

Standard of Review

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases in its docket with economy of time and effort for itself, for counsel and for litigant, and the entry of such an order ordinarily rests with

the sound discretion of the District Court. *Ohio Envtl. Council v U.S. Dist. Court, S.Dist of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir 1977).

It is clear that “nothing in the Constitution requires a civil action to be stayed in the face of a pending or impending criminal indictment,” *Chao v Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich 2007) and there is no requirement that a civil proceeding be stayed pending the outcome of criminal proceedings,” *FTC v E.M.A. Nationwide Inc.*, 767 F.3d 611, 646 (quoting *S.E.C. v Novaferon Labs, Inc.*, 941 F.2d 1210 at 2).

Courts consider and balance certain factors when determining whether a stay of civil proceedings is appropriate in a given case.

In this instance, the Defendants bear the burden of proving that there is a pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order. *FTC v Nationwide Inc.*, at 628 (quoting *Ohio Envtl. Council*, 565 F.2d at 396).

FACTS

December 27, 2012, The City of Cleveland, through Mayor Frank Jackson, indicated that all future police involved shootings will be investigated by an outside agency.

http://www.cleveland.com/metro/index.ssf/2012/12/cleveland_mayor_frank_jackson_5.html. On November 22, 2014, Tamir Rice was shot and killed by Cleveland Police officers, Frank Garmback and Timothy Loehmann. On January 2, 2015 (forty-one days later) Cleveland finally handed over the investigation to Cuyahoga County Sheriff Cliff

Pinkney's office for investigation.

http://www.cleveland.com/metro/index.ssf/2015/01/cuyahoga_county_sheriffs_department.html. This matter sat idle forty-one days without any apparent investigative work product or assignment as promised in December 2012 by Mayor Frank Jackson. Now, five months later, this investigation is still pending despite the incident being captured on video and published on the world wide web for public consumption and review. In that video, it is clear that Tamir Rice was shot within a one second of the officers arrival and he was never given an opportunity to comply with any verbal commands (if they actually had been given). The video clearly shows that for four (4) minutes and three (3) seconds after being shot no Cleveland Police officer attempted to render any life saving aid to Tamir Rice. The video clearly depicts that the missing orange tip from the toy would not have made any difference because Tamir Rice never brandished it. The video also clearly depicts that the Cleveland Police Officers nearly drove their police vehicle on top of Tamir Rice; bringing the vehicle to stop only several feet away from Tamir Rice. This video captures the entire event including the eleven (11) minutes that elapsed before the ambulance arrived to save Tamir Rice. This video would be basis for the entire investigation.

The Sheriff's office has had no communication with the family of Tamir Rice concerning the investigation. The Sheriff's investigation is apparently going to continue indefinitely as it has been five (5) months and there is no end in sight. The shooting of unarmed African-American males (in this case child) by police officers has become the leading social justice issue of international concern. Significant discussion and public

concern grows daily. Peaceful protestations have developed in major cities throughout America including Cleveland, Ohio, New York City, Baltimore, Maryland, Ferguson, Missouri, Philadelphia, Pennsylvania, Boston, Massachusetts, Youngstown, Ohio, Cincinnati, Ohio and virtually every major city throughout the United States. Tamir Rice's death has sparked Ohio Governor John Kasich to formulate a state-wide task force commission on race relations between the African-American community and law enforcement. Governor John Kasich on April 29, 2015 signed Executive Order 2015-04K establishing The Ohio Collaborative Community Police Advisory Review Board. Needless to say there is paramount public concern about this proceedings as opposed to any other excessive force type case.

This incident has also shattered the life of the Rice Family. In particular, Samaria Rice, Tamir Rice's mother, has since been forced to move to a homeless shelter because she could no longer live next door to the killing field of her son. Because it is unknown whether there may need to be an additional medical examination; the body of Tamir Rice has not been put to rest. Tamir Rice not being finally laid to rest prevents emotional healing and incurs a daily expense. The foot dragging of this investigation has now spanned three seasons.

Discussion

In general, the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.1995). " 'In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable

under our jurisprudence.' " *Id.*, quoting *Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1374(D.C.Cir.1980)) (original brackets). The decision whether to stay civil proceedings while a parallel criminal case is pending "is left to the sound discretion of the district court." *IBM Corp. v. Brown*, 857 F. Supp. 1384, 1387 (C.D.Cal.1994), citing *Securities & Exchange Comm'n v. Dresser Indus.*, 628 F.2d at 1375. The court's determination turns upon the "particular circumstances and competing interests involved in the case." *Keating*, 45 F.3d at 324, quoting *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir.1989)). District courts often consider the following factors: (1) the interest of the plaintiff in proceeding expeditiously with this litigation and the potential prejudice to the plaintiff caused by a delay; (2) the burden which any particular aspect of the proceedings may impose on the defendant; (3) the convenience of the court in the management of its cases and the efficient use of judicial resources; (4) the interests of persons or entities not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. *Id.*, citing *Federal Sav. and Loan Ins. Corp. v. Molinaro* (9th Cir. 1989) 889 F.2d 899, 903, *see also F.T.C. v. J.K. Publications, Inc.* (C.D. Cal. 2000) 99 F.Supp.2d 1176, 1197. Plaintiff submits that the applicable factors weigh in favor of denying the request for a stay.

Plaintiff will suffer prejudice if the case is stayed

The Sixth Circuit has warned "that lengthy and indefinite stays place a plaintiff effectively out of court." *FTC v EMA Nationwide Inc.*, 767 F.3d 611; 2014 U.S. App LEXIS 17316; *Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center, Inc.* ("Blue Cross") (9th Cir. 2007) 490 F.3d 718, 724 (remanding with instructions to reconsider stays

that were “both indefinite and expected to be lengthy”). Indefinite delay amounts to a refusal to proceed to a disposition on the merits. *Id.*, citing *Discon Inc. v. NYNEX Corp.*, 4 F.3d 130, 134 (2d Cir.1993). Even if litigation may eventually resume, such stays create a “danger of denying justice by delay.” *Blue Cross*, 490 F.3d 718, citing *American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc.* (11th Cir. 1984) 743 F.2d 1519, 1524. Delay “inherently increases the risk that witnesses' memories will fade and evidence will become stale.” *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir.2002). Plaintiffs will suffer much prejudice. The plaintiffs include: Samaria Rice (Mother), Leonard Warner (father), Tajai Rice (sister), and all other siblings. First, the memories of witnesses – including multiple eyewitnesses to the killing of Tamir Rice, the tackle of Tajai Rice, the officers involved, unknown 911 operators, and responding and supervisory governmental personnel will fade. Second, witnesses may become unavailable or leave the area, which poses the danger of prejudice both in terms of the loss of critical evidence and also in terms of added costs associated with securing that evidence. Third, none of the 911 operators or other unknown defendants have been identified, Fourth, a stay would effectively take the case out of Plaintiff’s hands and place it in the hands of City Law Department personnel, while Plaintiff and the Court would be provided no guarantee that the City would not collaborate with other defendants to delay the case as long as possible. Fifth, delay is costly, both in terms of attorney hours that would continue to accrue as well as in terms of the administrative costs of maintaining the case in readiness for litigation over a long period. Sixth, Plaintiff has an interest in the expeditious litigation of this case that would be thwarted by a stay *See F.T.C. v J.K. Publications, Inc.*

(C.D. Cal. 2000) 99 F.Supp.2d 1176, 1197 (noting that the party opposing the request for a stay had an interest “in proceeding expeditiously with this litigation.”). Seventh, the delay would be indefinite, and it is not clear what conditions would have to be met for the stay to be lifted: would it be after the officer is convicted, after the officer is sentenced, after the officer’s appeal, after the officer’s further appeal, after the officer’s habeas corpus petition, after the officer’s federal appeals, after the conviction is reversed and the case remanded for new trial? The Plaintiff faces years of potential delay, with no date certain on which the stay would be lifted. Eighth, Tamir Rice has yet to be laid to final rest. Plaintiffs are incurring expense daily and are unsure if they can finally rest Tamir Rice due to the pending investigation. A stay would exacerbate this expense and emotional distress.

“It is hard to see why the indirect societal interest in bringing to justice the perpetrators of crimes should ever take precedence over the direct interest of the victims of crimes to obtain redress for their losses.” *I.B.M. Corp. v. Brown* (C.D. Cal. 1994) 857 F.Supp. 1384, 1391 (holding stay of civil proceedings not warranted in light of criminal investigation). All of the above considerations, taken together, suggest substantial prejudice to Plaintiff if a stay is imposed.

Defendant will not suffer prejudice if the case is not stayed

This Court’s denial of a stay will not affect any substantial rights of Defendants. An alleged source of prejudice commonly identified by Defendants is that Plaintiffs in this action will be able to conduct discovery, including by taking depositions of the officers involved. The scope of discovery in this action may be different from the scope

of discovery permitted (or pursued by the prosecutor) in the criminal prosecution. See *Kelly v City of San Jose*, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987) (“State privilege doctrine, whether derived from statutes or court decisions, is not binding on federal courts in these kinds of cases.”). The extent the prosecutor comes into possession of exculpatory evidence, he or she will have a duty to disclose it under *Brady v Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1964). However, defendants cite no authorities indicating that any one above is unjust, that any party’s due process rights would be implicated, or that any party would be unfairly prejudiced. To the extent evidence is discovered in this case that is not admissible in the criminal case, the judge of the criminal court will simply decline to admit that evidence into evidence at trial. In any event, it is reasonable to conclude that Defendants did not cite a single case holding that the above constitutes unfair prejudice because no such case exists.

The officers may invoke their Fifth Amendment rights at their deposition or trial. Important to note, there has not been any criminal charge yet. Regardless, “the fact that [a party] has invoked their Fifth Amendment privilege does not, by itself, create a basis for stay. *FTC*, 99 F.Supp.2d at 1198 (denying the defendant’s request for a stay).

Defendants essentially argue that Officers will be placed in the untenable position of having to chose between testifying at their deposition (or responding to discovery), and thereby waiving their Fifth Amendment rights, or invoking their Fifth Amendment rights at their deposition (or in response to any other discovery) and having that invocation be used against him in a civil case.

Defendants inappropriately assert that their Fifth Amendment right to remain silent in their criminal case was abridged because the court

allowed plaintiff and LAPD [investigators] to proceed [simultaneously], rather than staying the civil proceedings, once the court became aware of the criminal investigation. These abridgements, as seen by defendants, followed from their being forced to choose either to testify in the civil case, thereby waiving their right to remain silent in the criminal case, or to assert their privilege against self-incrimination in the civil case, thereby irreparably injuring their chance of prevailing on the merits of that case. Defendants' Fifth Amendment claims have no merit either generally or as applied to this case. Indeed, defendants [claimed] they were given the unpleasant choice of either testifying, or invoking the Fifth Amendment and risking an adverse inference in this action.[citation] However, the contention that being forced to choose between the compulsion to testify in a civil suit in order to avoid an adverse result on the merits undermines the right to remain silent in a criminal matter, while having surface appeal, will not stand analysis. While the "choice between testifying or invoking the Fifth Amendment may be difficult, ... it does not create the basis for a stay."

I.B.M. Corp., 857 F.Supp. at 1389, citing *Comptroller of the Currency v. Lance*, 632 F.Supp. 437, 442 (N.D.Ga.1986); *Gellis v. Casey*, 338 F.Supp. 651, 653 (S.D.N.Y.1972). In the final analysis, arguments based on Tim Loehmann's and Frank Garback's Fifth Amendment rights do not provide a basis for a stay. Because no prejudice would result to any party if a stay were not imposed, the motion for stay should be denied.

Judicial economy and efficiency do not favor a stay

There is no possibility that the outcome of the criminal proceeding would moot, bar, or otherwise dispose of these proceedings. In this case, Plaintiff asserts causes of action not just against Tim Loehmann, but against other officers and the City as well. These causes of action will proceed to trial regardless of the outcome of the criminal proceedings. Accordingly, there is no potential benefit to judicial economy associated with a stay of this action. *See also F.T.C.*, 99 F.Supp.2d at 1197 ("[a] stay would disrupt the court's calendar by indefinitely postponing trial").

Indeed, more than one court has observed that “a policy of issuing stays solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration.” *I.B.M. Corp.*, 857 F.Supp. at 1392, citing *Arden Way Associates v. Boesky*, 660 F.Supp. 1494, 1497 (S.D.N.Y.1987); *Paine, Webber, Jackson & Curtis Inc. v. Andrus*, 486 F.Supp. 1118, 1119 (S.D.N.Y.1980).

A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct for two reasons: first, the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and second, the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations.

FTC v Nationwide 767 F.3d at 628 (6th Cir 2014) quoting *Trs. Of Plumbers & Pipefitters Nat. Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995). Clearly, considerations of judicial economy do not militate in favor of a stay.

The interest of third parties and the public do not favor a stay

The public demonstrations and protest throughout Cleveland as well as the nation are indicative of the concern and interest that this matter not be stayed. A stay would delay justice and ignore the greater civil rights issue that has dominated American interest and legislative agendas throughout the United States. This Court must balance the interest of the public against those of the Officers who have not even been indicted or even charged five (5) months after the incident. Moreover, Ohio has taken special interest in this topic by taking the lead in the discussion and push for reform. Governor John Kasich, by executive order, has established the Ohio

Collaborative Community-Police Advisory Board. The aim is to engage Ohioans and bridge the gap between the African-American community and law enforcement. Tamir Rice's killing was the impetus for this commission and its five (5) month comprehensive study. That state-wide commissions ability to investigate, collaborate, and render findings within less time than our trained law enforcement underscores the problem and public interest.

Conclusion

Defendants should not be permitted to use the indefinite criminal investigation (stonewalled for 41 unexplained days by Defendants) to delay and deny civil litigation related to the killing of Tamir Rice by his family. For the reasons above, Defendants have not carried their burden of establishing the "substantial prejudice" necessary to warrant the imposition of a stay, *Dresser*, 628 F.2d at 1374, and all of the applicable factors weigh against the imposition of a stay. Accordingly, Defendants' motion for a stay of this action should be denied.

Respectfully Submitted,
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Certificate of Service

The undersigned certifies that the foregoing Objection To Defendants Motion for Stay Of Civil Proceedings Pending Criminal Proceedings was filed electronically on May 4, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully Submitted

/s/ Walter T Madison

Walter T Madison
Attorney for Plaintiff