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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT

C.A. NO. 2483CV00692

PAUL O'KEEFE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
JOHN JOSEPH O' KEEFE III; PAUL O'KEEFE,
INDIVIDUALLY; JOHN O'KEEFE II;
MARGARET O'KEEFE; and MARGARET
O' KEEFE AS GRANDPARENT /
GUARDIAN OF KAYLEY FURBUSH,

Plaintiffs,

v.

C&C HOSPITALITY, LLC d/b/a C.F.
MCCARTHY'S; G&S HOSPITALITY, LLC d/b/a
C.F. MCCARTHY'S; WATERFALL BAR &
GRILL, LTD d/b/a WATERFALL BAR & GRILL;
and KAREN READ,

Defendants.

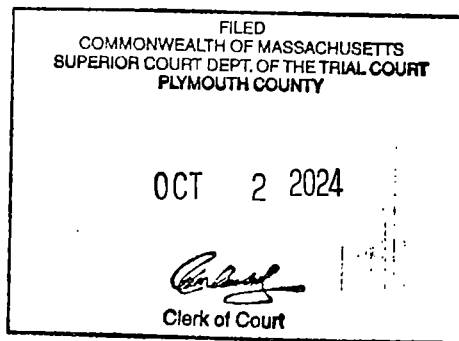


EXHIBIT LIST FOR DEFENDANT'S MOTION TO STAY CIVIL PROCEEDINGS

<u>Exhibit A</u> – Superior Court Cases.....	1
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EXHIBIT A

24 Mass.L.Rptr. 410

24 Mass.L.Rptr. 410
Only the Westlaw citation is currently available.
Superior Court of Massachusetts,
Suffolk County.

Angel DEL VALLE, et al.,
v.
BECHTEL CORP., et al.

No. 06-3654.

|
July 30, 2008.

*MEMORANDUM AND ORDER ON DEFENDANT
MODERN CONTINENTAL CONSTRUCTION CO., INC.'S
MOTION FOR A PROTECTIVE ORDER PROTECTING
IT FROM TESTIMONIAL DISCOVERY UNTIL THE
CONCLUSION OF CRIMINAL PROCEEDINGS AGAINST
IT*

STEPHEN E. NEEL, Justice.

*1 Defendant Modern Continental Construction Co., Inc. (Modern) moves for a protective order “directing postponement of any testimonial discovery [depositions, requests for admission and answers to interrogatories] directed to Modern and any officer, employee, agent or representative, past or present, who so requests, until the criminal action is resolved or until such other time as this Court deems appropriate.” Modern’s Memorandum, at 13. Modern seeks “the very same protection” that it asserts the Court has already afforded defendant Powers Fasteners (Powers), *id.* at 4, citing Exhibit B to Modern’s Memorandum (i.e., the Court’s October 24, 2007 Memorandum and Order on Powers’ Motion for a Protective Order Pending the Outcome of Criminal Proceedings, and on Emergency Motion of Ray Williamson for Protective Order (October 2007 Order), and the Court’s April 10, 2008 Order on Emergency Motion of the Bechtel/Parson Brinkerhoff Defendants’ and Defendant Modern Continental Construction Co. To Compel Attendance of Jeff Powers at his Deposition Noticed for April 4, 2008 (April 2008 Order)).

As plaintiffs point out in their opposition, the Court did not grant Powers the relief which Modern now seeks. Rather, in light of the circumstances at the time of the October 2007 Order, the Court deferred action on Powers’ motion, and

allowed the separate motion of the Powers-related deponents (Ray Williamson and, subsequently, John Armour) to stay their depositions for three months.¹

The factors which the Court considered in the October 2007 Order are the factors to be considered here. *Id.* at 1–2.² Likewise, Modern’s present circumstances are in some ways similar to Powers’ at the time the Court entered the October 2007 Order. Modern stands indicted now, as Powers did then, and depositions of Modern’s present or former employees are to be taken shortly, as were those of Powers. The federal grand jury continues, and additional charges may yet be brought. There are at least two significant differences, however: the parties to this case are significantly further along toward completion of fact discovery than they were last October, and none of the individual Modern-related deponents³ has objected to being deposed. Plaintiffs’ Opposition, at 8.

The Court weighs the five factors set out above as follows.

The interest of the plaintiffs in proceeding expeditiously “with this litigation or any particular aspect of it,” *Nowaczyk* at 174, matches that of most of the defendants, at least so far as completion of fact discovery is concerned. A delay of depositions and other fact discovery substantially⁴ beyond the current deadline poses a real risk of irremediable loss of witness memories, and perhaps a lesser, but still concerning, risk of witness unavailability for deposition or trial, whether through death, disability, or other circumstance. The resulting prejudice to the parties’ ability to prove or defend against claims or cross-claims, which pose many millions of dollars in potential liability, would be substantial.

*2 With regard to the second factor—burden on defendants—substantial delay would pose an undue burden on most defendants for the reason just stated. On the other hand, denial of the relief Modern seeks would not pose an undue burden on Modern. For example, while Modern acknowledges that it has no fifth amendment privilege, it seeks to bar discovery because of its concerns that Modern-related individuals may assert their individual privileges, to Modern’s detriment. The argument is unavailing: a corporation may not take advantage of the personal fifth amendment privileges of individuals to bar discovery. See *United States v. Kordel*, 397 U.S. 1, 8 (1970)(corporation may not avoid obligation in civil suit to answer interrogatories by selecting individual to verify the answers who asserts his own fifth amendment privilege; “[s]uch a result would effectively permit the corporation to

assert on its own behalf the personal privilege of its individual agents.”) Nor is Modern’s argument that an adverse inference may be drawn against it from an individual’s invocation of the fifth amendment supported by any more authority than was offered by Powers in support of its motion.

Modern’s concern that discovery of it by other parties in this action “will find [its] way into the hands of federal prosecutors who under normal circumstances would be unable to obtain such information under the Federal Rules of Criminal Procedure” is not, standing alone, a sufficient basis upon which to stay such discovery. If it were, no civil case such as this could proceed while a criminal charge was pending, which is not the law: “[i]n the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.” *Securities and Exchange Commission. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C.Cir.1980). Moreover, “a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions ‘when the interests of justice seem to require such action ...’ “ *Id.* at 1375. See *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13–14 (D.Mass.1991)(court may, “in lieu of a general stay, impose protective orders [or] seal interrogatories ...”) To the extent that such measures are appropriate in this case, they may be pursued by motion.

The third factor—convenience of the court in the management of its cases, and the efficient use of judicial resources—clearly disfavors extended and piecemeal discovery in this complex case which involves numerous parties and multiple claims and cross-claims. See *Digital Equipment Corp.*, 142 F.R.D. at 14.

As to the fourth factor—interests of persons not parties to the civil litigation—non-party deponents have not objected to their depositions. Nor does the United States have any rights in civil discovery that might otherwise be implicated.

Finally, the interest of the public in both the pending civil and criminal litigation is substantial, and does not clearly favor either the moving or opposing parties.

ORDER

*3 For the reasons stated above, Modern’s motion for protective order postponing discovery against it is **DENIED**.

All Citations

Not Reported in N.E.2d, 24 Mass.L.Rptr. 410, 2008 WL 4107325

Footnotes

- 1 The April 2008 Order addressed the narrow issue of whether and the extent to which Jeff Powers’ deposition was necessary for Modern and the Bechtel defendants’ preparation of oppositions to Powers’ motion for summary judgment.
- 2 See *Nowaczyk v. Matingas*, 146 F.R.D. 169, 174 (N.D.Ill., E.Div., 1993)(“The Court must weigh five competing interests: (1) The interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) The burden which any particular aspect of the proceedings may impose on defendants; (3) The convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) The interests of persons not parties to the civil litigation; and (5) The interest of the public in pending civil and criminal litigation.” (Citation omitted.))
- 3 Neil Joyce, Fernando Carvalho, Manuel Diaz, DeMazio Perriera, Duarte Ciano, all (with the possible exception of Joyce) to be completed by July 31. A 30(b)(6) deposition of Modern has apparently been postponed.
- 4 As noted above, Modern seeks a stay until the criminal charges against it have been resolved. At the hearing on this motion, the United States estimated that the criminal case against Modern might be tried between one and two years from now.

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30 Mass.L.Rptr. 232

30 Mass.L.Rptr. 232
Superior Court of Massachusetts,
Worcester County.

J & G FOODS, INC.

v.

Gary EATON.

No. WOCV201002460C.

July 12, 2012.

*ORDER ON DEFENDANT'S RENEWED MOTION FOR
STAY OF CASE PENDING RESOLUTION OF RELATED
CRIMINAL CASE*

JOHN S. FERRARA, Justice.

BACKGROUND

*1 On November 16, 2010, the plaintiff in this action, J & G Foods, Inc., filed a Verified Complaint alleging that the defendant was an employee of plaintiff and that he had embezzled funds and falsified business accounts and records to conceal a protracted larcenous scheme. The plaintiff simultaneously filed motions to attach defendant's real estate and accounts of defendant with Wells Fargo Advisors and Bank of America. Those motions were allowed on November 23, 2010, without opposition.

On November 23, 2010, the defendant moved to stay the action because of an active criminal investigation, citing his need to assert his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, and the impediment the exercise of his rights created to defense of the civil action. The motion was supported by an affidavit of counsel, who averred that he was aware of an active criminal investigation based on the execution of a search warrant at defendant's home and conversations with members of the District Attorney's Office, and that he was compelled to advise the defendant not to Answer the Complaint or respond to discovery requests. Defendant's motion was denied *without prejudice*.

The defendant also moved that date for an extension of time to file an Answer to the Complaint, which was allowed. The defendant was given to February 25, 2011 to Answer.

On December 15, 2010, the plaintiff moved to enjoin the defendant from "selling, assigning, transferring, concealing, impairing or otherwise disposing of ..." various assets and property, including his ownership interest in Eaton Farms, LP, in Leesport, Pennsylvania, and a Mercedes Benz automobile. That motion was allowed without opposition on December 20, 2010.

On February 22, 2011, the defendant filed an Answer and in response to a number of substantive allegations set forth in the Complaint, he asserted his privilege under the Fifth Amendment.

On December 23, 2011, the defendant was indicted in the Worcester Superior Court, charged with two counts of larceny over \$250 by scheme, and one count of falsifying or omitting entries in the business records of plaintiff in this action. The defendant was arraigned on January 31, 2012, (Docket No. WOCV2011-01341) and the case remains open. The projected deadline for disposition of the case is October 27, 2012, though it is likely that final disposition in the case may occur on a later date.

On April 11, 2012, the defendant filed a renewed motion to stay this action, noting that he had been served with a motion for summary judgment and that his privilege against self-incrimination would preclude him from effectively opposing same. The plaintiff opposes the motion to stay. A hearing on defendant's motion was conducted on April 19, 2012.

LEGAL STANDARD

In deciding whether or not to allow a motion to stay a civil action where a defendant might be inhibited in his defense by the perceived need to assert his Fifth Amendment privilege, there is no constitutional requirement that the court stay the litigation. The determination of the presence or absence of a just reason for issuance of a stay is left to the sound discretion of court. "However, it would constitute a clear abuse of discretion for the judge to turn a deaf ear to a serious claim of privilege." *United States Trust Co. of New York v. Herriot et al.*, 10 Mass.App.Ct. 313, 317 (1980). The rights of the parties in the civil action are to be considered equal, and the court must balance any prejudice to the other civil litigants

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that might result from granting the stay, against the potential harm to the party claiming the privilege from having to choose between defending the civil action and protecting himself from providing evidence that might be used against him in the criminal prosecution. *Id.*, at 317; *Wansong v. Wansong*, 395 Mass. 154, 157–58, (1985).

*2 When a request for a stay of a civil action arises where a motion for summary judgment has been filed and the defendant is seeking to delay having to serve an opposition thereto, the policies underlying Rule 56 of the Rules of Civil Procedure must factor into the court's decision. *Id.*, at 318. Specifically, the Court must be mindful of the Rule's language that, “judgment sought shall be rendered forthwith if ... there is no genuine issue as to any material fact ...”

FINDINGS

The defendant has now been indicted, so exposure to criminal liability cannot be considered a possibility, it is a reality. The instant case is not one involving an action on a promissory note, as in the case of *United States Trust Company of New York v. Herriott*, *supra*, where certain materials to be produced or facts to be admitted were not subject to defendant's Fifth Amendment privilege. In this case, the plaintiff would seek to establish that certain material facts are undisputed, and likely could only do so where those facts are admitted by defendant, or where there is an “admission by silence.”

The defendant notes that the plaintiff has succeeded in attaching many if not all of his available assets and the granting of a stay would not significantly prejudice the plaintiff. The plaintiff does not cite any prejudice in his opposition, other than that of delay. The civil action is now nineteen months old. A delay of an additional six months to await disposition of the criminal case would not appear to significantly harm this defendant. Balancing the prejudice to defendant against the potential harm to the plaintiff from having to choose between defending the civil action and protecting himself from providing evidence that might be used against him in the criminal prosecution, the court finds that a stay of this action is warranted.

ORDER

For the foregoing reasons, therefore, the defendant's motion for a stay of this action is *ALLOWED*, and this action shall be stayed for a period of six (6) months, or until there has been a disposition in the criminal case of *Commonwealth v. Gary Eaton*, Docket No. WOCV2011–01341, whichever occurs soonest.

All Citations

Not Reported in N.E.2d, 30 Mass.L.Rptr. 232, 2012 WL 4049225

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2012 WL 6123592 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Suffolk County

PRECISION TESTING LABORATORIES, INC., Plaintiff,

v.

PREVENTIVE MEDICINE ASSOCIATES, INC. and Punyamurtula Kishore, Defendants.

and

BANK OF AMERICA, et al., Trustee Process Defendants,

and

KISHORE FAMILY REALTY, LLC, et al., Reach and Apply Defendants.

No. 2011-SUCV-01197F.

January 20, 2012.

MEMORANDUM AND ORDER ON JOINT MOTION FOR RECONSIDERATION

On December 29, 2011, this Court denied a motion brought by both defendants, Punyamurtula Kishore; M.D. and Preventive Medicine Associates, Inc. with the assent of the plaintiff corporation, in which they sought to temporarily stay this action pending resolution of the underlying criminal proceedings.

The defendant, Punyamurtula Kishore, M.D. and his corporation, defendant Preventive Medicine Associates, Inc. have been indicted in the following two criminal cases:

1. Suffolk Crim. No. 2011-11005

The only defendant in this case is Preventive Medicine Associates, Inc. There are sixteen counts in this indictment, eight counts alleging a medical assistance, bribe/kickback; and eight counts alleging medical assistance fraud by a non-provider.

2. Suffolk Crim. No. 2011-11006

The only defendant in this indictment is Punyamurtula Kishore, M.D. There are sixteen counts, eight counts alleging medical assistance bribe/kickback and eight counts alleging medical assistance fraud by a provider.

The dates of the alleged criminal offenses by Doctor Kishore and Preventative Medicine Associates, Inc. range from July 7, 2006 to May 6, 2010. The defendants, Punyamurtula Kishore, M.D. and Preventive Medicine Associates, Inc. ask this Court to "temporarily stay" this civil action, but in one of his memoranda, counsel for the defendants indicate that he would be free to seek further stays after the initial term of stay expires. In essence, counsel for both defendants, both of whom are represented by the same attorney, asks for the stay of this civil action pending the resolution of the criminal cases by trial or plea.

This Court recognizes its discretion in this matter, see: In Re 650 Fifth Avenue & Related Properties. Civil Action No. 1:08-CV-10934-RJH (SDNY, August 16, 2011); Trustees of Plumbers National Pension Fund v. Transworld Mechanical, Inc., et al., 866 F.Supp. 1134, 1138-1142 (SDNY, 1995).

As set out in Trustees of Plumbers National Pension Fund, there are some factors that the Court should consider on a motion to stay a civil action due to the pendency of a criminal matter that involves the same underlying conduct that is involved in the civil case. They, in part, are as follows:

1. Overlap of Issues - here it clearly appears that the subject matter of this civil case is the subject of one or more of the criminal indictments. This factor favors the entry of a stay of this civil action.

2. Statues of Criminal Case - The criminal case is "set down" for trial in September, 2012. Since the criminal cases have been assigned a trial date, it therefore appears to this Court that the criminal cases will be reached for trial first. This factor favors the stay.

3. Private and Public Interests - Here the plaintiff in the civil action asserts to the stay the criminal case has been given a trial date and the resolution of the criminal matter may assist with the resolution of the civil matter. This factor favors the stay.

See also: American Express Bus. Fin. v. RW Professional Leasing Serv., 225 F.Supp. 2d 263, 264-265 (EDNY, 2002).

Basically, in light of the assent of the plaintiff to the Defendants' Motion to Stay of this civil action and in light of the other factors discussed above, this Court believes that this civil action should be stayed as to Doctor Kishore until the disposition or trial of the criminal cases or until further order of this Court.

As to the corporate defendant, Preventive Medicine Associates, Inc., it is well established that it, as a corporation, does not have a Fifth Amendment privilege against self-incrimination. In Matter of John Doe Grand Jury Investigation, 418 Mass. 549, 552-553 (1994). However, counsel for Preventive Medicine Associates, Inc., indicates that Doctor-Kishore is the only person who would be able to respond to a subpoena to produce documents and that he would continue to assert his Fifth Amendment Rights as a record keeper, as he has all along in his individual personal capacity. See: Metro Equipment Corp. v. Commonwealth, 74 Mass. App. Ct. 63, 68 (2009), ("While the custodian [of corporate records] has no privilege in the documents themselves, a custodian of corporate records might invoke his art.12 right against self-incrimination in response to a subpoena for those corporate records when the act of productions itself would be self-incriminating.") This Court in light of the factors mentioned above and in the interests of sound judicial management, believes in its discretion that this civil case should be stayed as to both defendants until the disposition or trial of the underlying criminal cases or until further order of this Court.

ORDERS

1. After review of all submissions, the parties' Joint Motion for Reconsideration is ALLOWED.

2. The Court's Order of December 29, 2011 denying the Parties' Joint Motion to partially stay proceedings pending disposition or trial in Suffolk Superior Court Criminal Action Nos. 2011-11005 and 2011-11006 is ORDERED VACATED and said Motion to Stay is now ALLOWED as to both defendants in this civil action until the disposition or trial of the underlying criminal cases or until further order of this Court.

<<signature>>

Thomas E. Connolly

Justice of the Superior Court

Date: January 20, 2012

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EXHIBIT B

**2483CV00692 Paul O'Keefe Individually and Personal Rep of the Estate of John Joseph O'Keefe III et al
vs. C&C Hospitality, LLC d/b/a C.F. Mccarthy's et al**

Case Type: Torts	
Case Status: Open	
File Date 08/26/2024	
DCM Track: A - Average	
Initiating Action: Wrongful Death - Non-medical, G.L.c.229, §2A	
Status Date: 08/26/2024	
Case Judge:	
Next Event:	

All Information | Party | **Tickler** | Docket | Disposition

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Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	08/26/2024	11/25/2024	91	09/04/2024
Answer	08/26/2024	12/24/2024	120	
Rule 12/19/20 Served By	08/26/2024	12/24/2024	120	
Rule 12/19/20 Filed By	08/26/2024	01/23/2025	150	
Rule 12/19/20 Heard By	08/26/2024	02/24/2025	182	
Rule 15 Served By	08/26/2024	10/20/2025	420	
Rule 15 Filed By	08/26/2024	11/19/2025	450	
Rule 15 Heard By	08/26/2024	11/19/2025	450	
Discovery	08/26/2024	08/17/2026	721	
Rule 56 Served By	08/26/2024	09/15/2026	750	
Rule 56 Filed By	08/26/2024	10/15/2026	780	
Final Pre-Trial Conference	08/26/2024	02/12/2027	900	
Judgment	08/26/2024	08/26/2027	1095	

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/26/2024	Attorney appearance On this date Marc A Diller, Esq. added as Private Counsel for Plaintiff Paul O'Keefe		
08/26/2024	Attorney appearance On this date Marc A Diller, Esq. added as Private Counsel for Plaintiff John O'Keefe II		
08/26/2024	Attorney appearance On this date Marc A Diller, Esq. added as Private Counsel for Plaintiff Margaret O'Keefe		
08/26/2024	Attorney appearance On this date Marc A Diller, Esq. added as Private Counsel for Plaintiff Margaret O'Keefe		
08/26/2024	Case assigned to: DCM Track A - Average was added on 08/26/2024		
08/26/2024	Original civil complaint filed.	1	
08/26/2024	Civil action cover sheet filed.	2	
08/26/2024	Demand for jury trial entered.		
08/26/2024	Plaintiffs Paul O'Keefe Individually and Personal Rep of the Estate of John Joseph O'Keefe III, Margaret O'Keefe, John O'Keefe II, O'Keefe, Margaret O'Keefe, Margaret As Guardian for Kayley Furbush's Motion for Appointment of Special Process Server (M.R.C.P. Rule 4C)	3	
08/26/2024	Endorsement on Motion for Appointment of Special Process Server (M.R.C.P. Rule 4C) (#3.0): ALLOWED as to constable Jeffery Silton Judge: White, Jr., Hon. William M		

0011

Case Details - Massachusetts Trial Court N5

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/04/2024	Summons Service Returned for Defendant C&C Hospitality, LLC d/b/a C.F. McCarthy's: Service made on Aug 31,2024 by delivering in hand to Steven P Carey person in charge at time of service	4	 Image
09/04/2024	Summons Service Returned for Defendant Waterfall Bar & Grill, LTD d/b/a Waterfall Bar & Grill: Service made on Aug 31,2024 by delivering in hand to Gerard Meehan person in charge at time of service	5	 Image
09/04/2024	Summons Service Returned for Defendant G&S Hospitality, LLC d/b/a C.F. McCarthy's: Service made on Aug 31,2024 by delivering in hand to Steven P Carey person in charge at time of service	6	 Image
09/04/2024	Summons Service Returned for Defendant Read, Karen: Service made on Aug 29,2024 by leaving at last and usual place of abode	7	 Image
09/13/2024	Attorney appearance On this date William L Keville, Jr., Esq. added for Defendant Karen Read	8	 Image
09/13/2024	Attorney appearance On this date Marissa K Palladini, Esq. added for Defendant Karen Read	9	 Image
09/13/2024	Attorney appearance On this date Christopher George, Esq. added for Defendant Karen Read	10	 Image
Case Disposition			
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	
Pending			