SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al.*, Defendants.	Case No. 2012 CA 008263 B Calendar No.: 3 Judge: Fredrick H. Weisberg Next event: None

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT NATIONAL REVIEW, INC.'S MOTION FOR A PROTECTIVE ORDER STAYING DISCOVERY PENDING APPEAL

Plaintiff Michael E. Mann, Ph.D. ("Dr. Mann") respectfully submits this Memorandum of Points and Authorities in Opposition to Defendant National Review, Inc.'s ("National Review"), Motion for a Protective Order Staying Discovery Pending Appeal. For the reasons sets forth below, National Review's motion should be denied.

Background

This case arose from defendants' defamatory and outrageous blog posts published in July 2012. On July 13, 2012, an article authored by Defendant Rand Simberg entitled "The Other Scandal In Unhappy Valley" appeared on OpenMarket.org, a publication of CEI. The blog post deemed Dr. Mann "the Jerry Sandusky of climate science" and stated that Dr. Mann had engaged in "data manipulation," "academic and scientific misconduct," and was "the posterboy of the corrupt and disgraced climate science echo chamber." On July 15, 2012, an article authored by Defendant Mark Steyn entitled "Football and Hockey" appeared on National Review Online. The article commented on and extensively quoted from Mr. Simberg's piece, including the

statement that Dr. Mann was "the Jerry Sandusky of climate science." In addition to regurgitating Mr. Simberg's defamatory statements, Mr. Steyn went on to say that "Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." After the publication of the above statements, Dr. Mann demanded retractions and apologies from both National Review and CEI. Defendants refused and further accused Dr. Mann of being "intellectually bogus." In their refusal to retract their defamatory statements, defendants told Dr. Mann to "get lost" and told their readers that they would welcome a lawsuit because it would give them the opportunity to take discovery from Dr. Mann and his colleagues. Ironically and in an abrupt turnaround, defendants have changed their tune. Now they are doing everything in their power to avoid discovery into their own conduct.

Dr. Mann filed this lawsuit on October 22, 2012 alleging defamation for all of the above statements with the exception of the statement that Dr. Mann was "the Jerry Sandusky of climate science." With respect to the Sandusky comparison, Dr. Mann initially only made a claim for intentional infliction of emotional distress. On December 14, 2012, defendants filed motions to dismiss pursuant to the D.C. Anti-SLAPP statute and Rule 12(b)(6) arguing that the statements at issue were constitutionally protected opinion and/or rhetorical hyperbole and that Dr. Mann had failed to plead actual malice. Prior to the Court's ruling on defendants' motions to dismiss, Dr. Mann moved to amend his complaint to include a defamation claim for the statement comparing Dr. Mann to Jerry Sandusky and stating that Dr. Mann had "molested and tortured data in the service of politicized science." The Court granted Dr. Mann's motion to amend on July 10, 2013. On July 19, 2013, the Court denied defendants' motions to dismiss, finding that Dr. Mann was likely to succeed on the merits of all of his claims; that defendants' statements were accusations of fraud, not opinion or mere hyperbole; and that there was sufficient evidence of actual malice.

After unsuccessfully moving this Court for reconsideration and interlocutory certification, on September 17, 2013, defendants filed notices of appeal of the denials of the motions to dismiss, pursuant to the collateral order doctrine. In light of those notices of appeal and after concluding that the appeals were not plainly frivolous, this Court ruled that it was appropriate to stay discovery pending a decision by the Court of Appeals. *See* October 2, 2013 Order at 3.

Shortly after this Court stayed all discovery, on October 18, 2013, the Court of Appeals issued an Order to Show Cause, directing defendants to show cause why their appeal should not be dismissed in light of the absence of a right to interlocutory review under the Anti-SLAPP Act and in light of the inapplicability of the collateral order doctrine under *Newmyer v. Sidwell Friends Sch.*, No. 12-CV-847 (Dec. 5, 2012) and *Englert v. MacDonnell*, 551 F.3d 1099 (9th Cir. 2009). *Steyn v. Mann*, Nos. 13-CV-1043, -1044 (Oct. 18, 2013). After defendants responded to the Court of Appeals' Order to Show Cause, the Court of Appeals dismissed as moot defendants' interlocutory appeal, as a result of Dr. Mann's amended complaint. *Steyn v. Mann*, Nos. 13-CV-1043, -1044 (Jan. 13, 2014).

On January 22, 2014, this Court denied defendants' motions to dismiss the amended complaint, affirming the original denials of the motion to dismiss finding that Dr. Mann was likely to succeed on the merits of all of his defamation and intentional infliction of emotional distress claims. Once again, defendants National Review, CEI and Simberg filed notices of appeal.[1] However, and importantly for the resolution of the instant motion, defendant Mark

[1] On March 26, 2014, the Court of Appeals again issued an Order to Show Cause, directing defendants to show cause why their appeal "should not be dismissed as having been taken from a non-appealable order because it does not fall under the collateral order doctrine and the District's 'Anti-SLAPP' statute does not provide for interlocutory review." *Competitive Enterprise Institute v. Mann*, Nos. 14-CV-101, -126 (March 26, 2014).

Steyn opted not to appeal the denial of the motions to dismiss the amended complaint. Rather, Mr. Steyn has filed an answer and counterclaims and has expressed his intention to move forward with discovery, regardless of the fact that his co-defendants have opted to appeal. *See* Response of Def. Mark Steyn to National Review's Motion for Protective Order Staying Discovery Pending Appeal (March 21, 2014).

Argument

This Court retains jurisdiction over this matter—and therefore discovery is appropriate—because defendants' notices of appeal are premature. As this Court has previously noted, it is doubtful that this Court's denial of an Anti-SLAPP motion is immediately appealable. *See* Order Denying Defendants' Joint Motion for Interlocutory Certification of the Court's July 19, 2013 Orders under D.C. Code § 11-721 at 3 n.4. The Court's doubt is well-founded, especially in light of the Court of Appeals having twice ordered the defendants to show cause as to why their appeals were not improper. *See Competitive Enterprise Institute v. Mann*, Nos. 14-CV-101, -126, Order to Show Cause (March 26, 2014) and *Steyn v. Mann*, Nos. 13-CV-1043, -1044, Order to Show Cause (Dec. 19, 2013).

Even assuming arguendo that the denials of defendants' motions to dismiss pursuant to the Anti-SLAPP Act are immediately appealable, a stay of discovery in this case is still inappropriate. The question of whether this Court may allow discovery to proceed pending defendants' appeal is subject to "common-sense flexibility." *Hammond v. Weekes*, 621 A.2d 838, 841 (D.C. 1993) (quoting *Carter v. Cathedral Ave. Coop., Inc.*, 53 A.2d 681, 684 (D.C. 1987)). Given the circumstances in this case, common sense and fairness counsels for this Court to allow discovery to proceed now. First, in colloquy with the Court and prior to the Court's issuing its October 3, 2013 Order staying discovery, the Court inquired of counsel for Dr. Mann

if there would be any prejudice in staying discovery and counsel replied there would not be if a stay was only for a period of several months. It was with that background that this Court stayed discovery pending defendants' first interlocutory appeal. That was *over six months ago*. Circumstances have changed and any further delay will prejudice Dr. Mann. Dr. Mann filed this lawsuit in October 2012. Because of defendants' misuse of the Anti-SLAPP Act, Dr. Mann has obtained no discovery from National Review, CEI, or Rand Simberg. Given the now substantial delay and the prejudice to Dr. Mann, this Court should not stay discovery once again. Second, the fact that Mr. Steyn has not appealed the denial of the motions to dismiss counsels further against a discovery stay. Mr. Steyn, like Dr. Mann, has made clear his desire to have this Court resolve this lawsuit and to move forward with discovery immediately.[2] As such, there is no reason for this Court to delay discovery further.

However, should this Court agree with National Review and deem it appropriate to issue a stay of discovery, such a stay should not apply to Dr. Mann's claims against Mr. Steyn. This Court at the very least retains jurisdiction of any claims between Dr. Mann and Mark Steyn. *See In re Estate of Green*, 896 A.2d 250, 254 n.6 (D.C. 2006) (a trial court is not divested of jurisdiction to hear matters relating to those claims not on appeal). And there can be no question that Mr. Steyn's co-defendants possess documents and information that are relevant to Dr. Mann's claims against Mr. Steyn. After all, Mr. Steyn has a long-standing relationship with National Review, having written dozens of articles for its print and online editions on a regular basis since at least 2001 and having appeared multiple times as a featured speaker at National Review's "Conservative Summits" and "Margaret Thatcher Weekends." Mr. Simberg similarly

[2] While Dr. Mann agrees with Mr. Steyn that discovery should move forward on Dr. Mann's claims, discovery cannot move forward on Mr. Steyn's counterclaims. Dr. Mann filed a motion to dismiss Mr. Steyn's counterclaims pursuant to the anti-SLAPP Act. Accordingly discovery is stayed as to those claims until this Court rules on that motion. *See* D.C. Code § 16-5502(c)(1).

has a long-standing relationship with CEI, having been an adjunct scholar there for several years. In order to litigate his claims against Mr. Steyn, Dr. Mann must be able to obtain documents and information from National Review, CEI, and Rand Simberg. Therefore, at a minimum this Court should allow Dr. Mann to seek third-party discovery against Mr. Steyn's co-defendants, as it relates to Dr. Mann's claims against Mr. Steyn.

For all the foregoing reasons, defendants' Motion for a Protective Order should be denied, or in the alternative this Court should allow Dr. Mann to obtain third-party discovery from National Review, CEI, and Rand Simberg.

DATED: April 7, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April 2014, I caused a copy of the foregoing Memorandum of Points and Authorities in Opposition to Defendant National Review, Inc.'s Motion for a Protective Order Staying Discovery Pending Appeal to be served via CaseFileXpress on the following:

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PROPOSED ORDER

Upon consideration of Defendant National Review, Inc.'s Motion for a Protective Order Staying Discovery Pending Appeal, and all responses thereto, it is hereby

ORDERED, that the Motion for Protective Order is **DENIED.**

SO ORDERED.

Dated: _____, 2014

_____
Frederick H. Weisberg
(Associate Judge)

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