

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PhD)	
Pennsylvania State University)	
Department of Meteorology)	
University Park, PA 16802)	Case No.: 2012 CA 008263B
)	Calendar No. 3
Plaintiff,)	Judge: Frederick H. Weisberg
)	
v.)	Next Scheduled Event: None
)	
NATIONAL REVIEW, INC.)	
215 Lexington Avenue)	
New York, NY 10016,)	
)	
- and -)	
)	
COMPETITIVE ENTERPRISE INSTITUTE)	
1899 L Street, NW)	
Washington, DC 20036)	
)	
- and -)	
)	
RAND SIMBERG)	
c/o Competitive Enterprise)	
Institute)	
1899 L Street, NW)	
Washington, DC 20036)	
)	
- and -)	
)	
MARK STEYN)	
Box 30)	
Woodsville, NH 03785)	
)	
Defendants.)	

**MARK STEYN'S RENEWED REQUEST FOR EXPEDITED
HEARING AND TO LIFT STAY OF DISCOVERY
AND SUPPLEMENTAL BRIEF ON PLAINTIFF /
COUNTER-DEFENDANT'S MOTION TO DISMISS COUNTERCLAIMS**

More than two years ago, this Court granted, over the objections of Plaintiff and Defendant Steyn, the motion of Defendant National Review for a stay of discovery pending appeal. Ex. 1. All Defendants except Steyn had filed interlocutory appeals of the Court's denial of their Anti-SLAPP special motions to dismiss. The Court granted the stay in the belief that the matter would soon be resolved by the Court of Appeals. Given the inactivity by the Court of Appeals, Defendant Steyn renews his request for an expedited hearing.

I. Lift the Discovery Stay

The time has come -- it has really long since passed -- for this Court to lift the stay of proceedings as between plaintiff and defendant Mark Steyn. The Court entered that stay on April 11, 2014 -- more than two years ago! -- pending decision by the District of Columbia Court of Appeals on Defendants' interlocutory appeals. Although the Court of Appeals heard oral argument on those appeals on November 24, 2014 -- a year and a half ago -- that Court has still not issued a decision. As a result of this long passage of time, the stay should be lifted regarding Plaintiff and Steyn.

While this Court's April 2014 order stayed all proceedings, it stated that the Court of Appeals "may dismiss the appeal without significant delay" and that "there has been too much

procedural delay already in this case.” Ex. 1 at 2. The Court went on: “A continuing stay of discovery will impose the burdens of additional delay on all parties, but particularly on Plaintiff and Defendant Steyn, who has distanced himself from the other Defendants and expressed his desire to proceed expeditiously.” Id.

On May 2, 2016, Plaintiff’s counsel wrote a letter to the Clerk of the Court of Appeals complaining about this inordinate delay. Ex. 2. In it, Plaintiff’s counsel wrote:

In this defamation case, where no discovery has been taken and the memory of participants and witnesses is particularly important, extended passage of time can deny the parties a fair opportunity to develop critical evidence. In fact, in light of the interlocutory nature of these appeals, in April, 2014 this Court ordered these appeals expedited. Accordingly, I respectfully request that you transmit to the Court this request that the Court issue its decision without further delay.

Steyn agrees with the sentiments expressed there by Mann’s lawyer, and believes they also strongly counsel in favor of lifting the stay as between Plaintiff and Steyn.

The reasons for lifting the stay are even more compelling from Steyn’s perspective. Steyn’s freedom of speech is chilled. Steyn is a political and cultural commentator, and the very pendency of this case creates a cloud over Steyn’s reputation for truth, accuracy and reliability as a commentator. Steyn’s expert witnesses are older than Mann’s; time affects them more.

Many of Steyn's expert witnesses are emeritus professors and comparatively advanced in years, being of an age and eminence that enables them to stand against the bullying and intimidation that prevails in climate science. Therefore, the passage of time is not an unimportant thing. Indeed, one of Steyn's proposed witnesses has, in fact, died while this interlocutory appeal has been with the appellate court.

Steyn even complained to the U.S. Senate about the unconscionable length of time this case has lingered without activity. In connection with hearings on climate change, on December 8, 2015, Steyn was invited to appear before The Senate Committee on Commerce, Science, and Transportation in the Subcommittee on Space, Science, and Competitiveness entitled "Data or Dogma? Promoting Open Inquiry in the Debate Over the Magnitude of Human Impact on Earth's Climate" and he testified in part:

Oral arguments were heard over one year ago, yet judges Vanessa Ruiz, Corinne Beckwith and Catharine Easterly, all confirmed to the DC court by the Senate, have failed to rule. . . .

As a result, an interlocutory appeal has dragged on for almost two years. . . .

The purpose of anti-SLAPP laws is to prevent the use of litigation to chill free speech -- on climate change and any other issues. When it takes up to three years to get a ruling . . . there is no point to anti-SLAPP legislation. . . .

The constitutional limbo allows serial plaintiffs like Michael Mann to use the DC courts to torture non-DC residents: this is a disgrace, and ultimately it is the responsibility of you and your colleagues. I responded to Mann's discovery requests almost two years ago. He has yet to respond to mine. . . .

As Steyn noted in his Senate testimony, the D.C. Court of Appeals has drawn criticism for taking up to three years to issue decisions. It is particularly absurd that an interlocutory ruling on a piece of legislation intended to expedite cases has now taken over two years and counting. From both Plaintiff and Steyn's point of view, the speed supposedly required to resolve Anti-SLAPP motions has been seriously compromised.

Thus from both Plaintiff and Steyn's point of view, the speed supposedly required to resolve Anti-SLAPP motions has been seriously compromised.

Plaintiff and Steyn should be allowed to conduct discovery on Mann's claims -- before their evidence and their witnesses get stale. Since Mann has now indicated he wants the case to go forward, and opposed the original stay request by National Review, we suggest that, at a minimum, Mann respond to the outstanding discovery requests from Steyn. No harm will come from this because the information can easily be shared with the other Defendants if the case is not dismissed.

While Steyn may (and will) conduct discovery to defend himself from Mann's claims, any discovery related solely to the counterclaims is automatically stayed by statute pending the resolution of Plaintiff's Special Motion to Dismiss Defendant / Counter-Plaintiff thus provides this Supplemental Brief seeking an expedited hearing on Plaintiff's Anti-SLAPP motion so that Mark Steyn may begin discovery on his counterclaims.

II. An Expedited Hearing on Plaintiff's Special Motion to Dismiss is Necessary

Under the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(d), Steyn renews his request for this Court to conduct an Expedited Hearing on Plaintiff's Motion to Dismiss Steyn's counterclaims. Section 16-5502(d) requires an expedited hearing on a special motion to dismiss filed pursuant to the Anti-SLAPP Act. Both parties have requested this expedited hearing in the briefing on the Motion to Dismiss the Counterclaims, and Steyn now renews this request.

An expedited hearing is also necessary to allow Steyn to proceed with discovery for his counterclaims in a case that has been pending for almost four years. This Court stayed discovery on Steyn's counterclaims given the automatic stay triggered by Mann's Special Motion to Dismiss. D.C. Code § 16-5502(c)(1). This Court noted that the automatic stay on the counterclaim discovery will remain in place "long enough for the court to

rule on Plaintiff's pending Anti-SLAPP special motion to dismiss the counterclaim." Ex. 1, n.3. An expedited hearing will allow Steyn to proceed with discovery and move this case to a trial as quickly as possible.

III. Conclusion

For the foregoing reasons, the stay of discovery as between Plaintiff and Steyn should be lifted, and Mann's Special Motion to Dismiss Counterclaims should be denied. Should the court desire a hearing, Steyn requests an expedited hearing so that this case may move forward.

Dated: May 19, 2016

Respectfully submitted,

CROWELL & MORING

By: 
Michael J. Songer
(D.C. Bar No.453727)
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 624-2500

-and-

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: 
Daniel J. Kornstein
(admitted Pro Hac Vice)
600 Fifth Avenue
New York, New York 10020
(212) 763-5000

Counsel for Defendant Steyn

Exhibit 1

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

_____)	
MICHAEL E. MANN, PH.D.,)	Case No. 2012 CA 8263 B
)	
Plaintiff,)	Judge Frederick H. Weisberg
)	
v.)	
)	
NATIONAL REVIEW, INC. <i>et. al.</i> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter is before the court on the motion of Defendant National Review for a Protective Order Staying Discovery Pending Appeal, and the oppositions of Plaintiff and Defendant Steyn.¹ All of the Defendants except Mr. Steyn have filed interlocutory appeals of the court's denial of their Anti-SLAPP Act special motions to dismiss.

Whether a party may file an interlocutory appeal from a denial of an anti-SLAPP special motion to dismiss is an open question. *See Competitive Enterprise Inst. v. Mann*, Nos. 14-CV-101, 14-CV-126, Order to Show Cause (March 26, 2014). Until the Court of Appeals decides that issue, however, the three Defendants who have filed an appeal should not be required to engage in discovery for many of the reasons discussed in the court's Oct. 2, 2013, Order in this case. "It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." Order of Oct. 2, 2013, at 3 (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). Having directed the Defendants to show cause why the appeal should not

¹ At the time Defendant National Review filed its motion, Plaintiff had not sent renewed discovery requests to Defendants Competitive Enterprise Institute and Simberg, but those Defendants have consented to a stay of discovery pending appeal. Nat'l Review Mem. in Supp. of Mot. for Protective Order at p. 5, n.2.

be dismissed as having been taken from a non-final order, the Court of Appeals may dismiss the appeal without significant additional delay, and discovery can then finally go forward. If the Court of Appeals decides to accept jurisdiction and consider the merits of the anti-SLAPP motions, it would not be fair to force the appealing Defendants to engage in discovery, even if this court would have concurrent jurisdiction and discretion to do so.

To be sure, there has been too much procedural delay already in this case. Plaintiff filed his original complaint in October of 2012, and Defendants filed their original Anti-SLAPP motions in December of 2012. Discovery has not yet occurred. A continuing stay of discovery will impose the burdens of additional delay on all parties, but particularly on Plaintiff and Defendant Steyn, who has distanced himself from the other Defendants and expressed his desire to proceed expeditiously, even if that means the case would go forward only on Plaintiff's claims against Steyn and Steyn's counterclaim, with the other Defendants left behind. Nonetheless, it would be costly, inefficient, and duplicative to have two rounds of discovery: one round between Plaintiff and Defendant Steyn, and a second round between Plaintiff and the other Defendants.² The court is unwilling to sever Mr. Steyn's case from the other Defendants to accommodate his desire to go it alone. If it is not dismissed, there is no compelling reason to try this case more than once. The parties' interests are diverse and irreconcilable, in part because of the way they have chosen to exercise their legitimate procedural rights. A stay of discovery preserves the status quo long enough for the Court of Appeals to rule on the jurisdictional issue and, if it

² Plaintiff opposes the motion to stay discovery and argues that, at a minimum, the court should permit him to proceed with discovery against Defendant Steyn. However, his idea of discovery against Steyn includes the right to take what he chooses to call "third party discovery" from the other three Defendants as it relates to Plaintiff's claims against Steyn. Beyond that, Plaintiff takes the ironic – albeit legally correct – position that he should be able to proceed with discovery against Steyn, but Steyn should be precluded from taking discovery on his counterclaim because Plaintiff's anti-SLAPP special motion to dismiss the counterclaim triggers an automatic statutory stay. D.C. Code § 16-5502(c)(1).

resolves that issue in favor of the three appellants, to decide whether Plaintiff has a right to proceed with his case.

Accordingly, it is this 11th day of April, 2014,

ORDERED that the motion of Defendant National Review, Inc. for a Protective Order Staying Discovery Pending Appeal be, and it hereby is, granted; and all proceedings in this case are stayed pending the decision of the District of Columbia Court of Appeals on the Defendants' interlocutory appeals.³



Judge Frederick H. Weisberg

Copies to all parties listed in Case File Xpress

Clerk of the Court
District of Columbia Court of Appeals

³ If the Court of Appeals remands without reversing the Order denying Defendants' motions to dismiss, the automatic statutory stay of discovery relating solely to Defendant Steyn's counterclaim will remain in place long enough for the court to rule on Plaintiff's pending Anti-SLAPP special motion to dismiss the counterclaim.

Exhibit 2



Williams Lopatto PLLC

John B. Williams
Direct: (202) 296-1611
jbwilliams@williamslopatto.com

May 2, 2016

Hon. Julio Castillo
Clerk, Court of Appeals
430 E Street, NW
Washington, DC 20001

Re: *Competitive Enterprise Institute v. Mann*, No. 14-cv-101
National Review, Inc. v. Mann, No. 14-cv-126

Dear Sir:

I write as counsel for Appellee, Dr. Michael Mann (“Dr. Mann”) in the above-captioned consolidated interlocutory appeals, which were heard by the Court at oral argument, and submitted for decision on November 25, 2014.

The defamations at issue occurred in July, 2012—almost four years ago. The complaint was filed in October, 2012. In ruling on the defendants’ anti-SLAPP motions, two judges of the Superior Court held that Dr. Mann had successfully refuted those motions by demonstrating a likelihood of success on the merits of his claim. These appeals are pending on the Court’s determination of the correctness of those Superior Court decisions.

In this defamation case, where no discovery has been taken and the memory of participants and witnesses is particularly important, extended passage of time can deny the parties a fair opportunity to develop critical evidence. In fact, in light of the interlocutory nature of these appeals, in April, 2014 this Court ordered these appeals expedited. Accordingly, I respectfully request that you transmit to the Court this request that the Court issue its decision without further delay.

Respectfully submitted,

JOHN B. WILLIAMS
Counsel for Appellee Dr. Michael Mann

cc: Counsel of Record

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing Defendant Steyn's Renewed Request for Expedited Hearing and to Lift Stay of Discovery and Supplemental Brief on Plaintiff / Counter-Defendant's Motion to Dismiss Counterclaims and accompanying exhibits were served by electronic means through CaseFileXpress filing system, and as otherwise noted, concurrent with the filing of this document on this 20th day of May, 2016, to:

By CaseFileXpress E-service:

John B. Williams
WILLIAMS LOPATTO PLLC
1776 K Street, NW Suite 800
Washington, DC 20006
jbwilliams@williamslopatto.com

Catherine R. Reilly
COZEN O'CONNOR
1627 I Street, N.W.
Suite 1100
Washington, DC 20006
creilly@cozen.com

Peter J. Fontaine
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
pfontaine@cozen.com
Counsel for Plaintiff Michael Mann

Michael A. Carvin
Anthony J. Dick
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

macarvin@jonesday.com
ajdick@jonesday.com
Counsel for National Review, Inc.

Andrew W. Grossman
David B. Rivkin
BAKER & HOSTETLER LLP
Washington Square
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304
agrossman@bakerlaw.com
drivkin@bakerlaw.com
Counsel for Competitive Enterprise Institute and Rand Simberg

Two additional copies via hand delivery per Administrative Order
06-17:

Chambers
The Hon. Frederick H. Weisberg
Moultrie Courthouse
500 Indiana Ave., NW
Washington, DC 20001

/s/ Michael J. Songer