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

MICHAEL MANN'S RESPONSE TO MARK STEYN'S RENEWED REQUEST FOR EXPEDITED HEARING AND TO LIFT STAY OF DISCOVERY

Plaintiff / Counter-Defendant Michael E. Mann, Ph.D. respectfully submits this Response to Defendant / Counter-Plaintiff Mark Steyn's Renewed Request for Expedited Hearing and to Lift Stay of Discovery ("Mr. Steyn's Request").

Background

This case arose from Mr. Steyn's and his co-defendants' (National Review, CEI, and Rand Simberg) defamatory and outrageous blog posts published in July 2012. Dr. Mann filed this lawsuit in October 2012 alleging defamation and intentional infliction of emotional distress. Shortly thereafter, all defendants filed motions to dismiss pursuant to the D.C. Anti-SLAPP Act and Rule 12(b)(6), arguing that the statements at issue were constitutionally-protected opinion and/or rhetorical hyperbole and that Dr. Mann was not likely to be able to demonstrate actual malice. Prior to the trial court's ruling on defendants' motions to dismiss, Dr. Mann moved to amend his complaint to include an additional defamation claim for a statement comparing Dr. Mann to Jerry Sandusky and stating that Dr. Mann had "molested and tortured data in the service

of politicized science." This Court granted Dr. Mann's motion to amend on July 10, 2013. On July 19, 2013, the Court denied defendants' original 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. Shortly thereafter, all defendants' moved for the Court to reconsider its denials of the original motions to dismiss and to dismiss Dr. Mann's amended complaint. This Court denied the motions for reconsideration, and as discussed below, ultimately denied the motions to dismiss the amended complaint.

On September 17, 2013, all defendants filed notices of appeal of the denials of the motions to dismiss, pursuant to the collateral order doctrine. In early October 2013, the Court granted the defendants' (including Mr. Steyn's) motion for a protective order and stayed discovery pending the Court of Appeals' decision. *See* Order, dated October 2, 2013. On December 19, 2013, the Court of Appeals dismissed defendants' appeals as moot as a result of the defendants' still-pending motions to dismiss the amended complaint.

On January 22, 2014, the Court denied defendants' motions to dismiss Dr. Mann's amended complaint, affirming the original denials of the motion to dismiss and finding that Dr. Mann was likely to succeed on the merits of all of his defamation and intentional infliction of emotional distress claims. In April 2014, National Review, CEI and Rand Simberg filed notices of appeal and this Court stayed discovery pending resolution of those appeals. However, Mr. Steyn opted not to appeal the denial of the motions to dismiss the amended complaint. Rather, Mr. Steyn filed an answer and counterclaims and expressed his desire to move forward with discovery. *See* Mr. Steyn's Response to National Review's Motion for Protective Order (March 21, 2014). Dr. Mann, too, desired (and continues to desire) to move forward with discovery;

however, not in a piecemeal fashion, but only in the event this Court allow him to obtain third-party discovery from the remaining defendants. *See* Dr. Mann's Response to National Review's Motion for Protective Order (April 7, 2014). Nonetheless, this Court granted National Review's motion for a protective order, noting that 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." *See* Order, dated April 11, 2014 (attached as Ex. 1 to Mr. Steyn's Request) ("Stay Order"), at p. 2.

The pending appeals were heard by the Court of Appeals at oral argument and submitted for decision in November 2014. The Court of Appeals has not yet issued a decision.

Discovery Stay

Dr. Mann shares Mr. Steyn's concerns regarding the significant delays caused by the long-pending interlocutory appeals. As this Court noted over two years ago,

> To be sure, there has been too much procedural delay 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 ….

See Stay Order, at p. 2. In light of the significant delay, and resulting prejudice to the parties' ability to develop evidence in support of their claims, Dr. Mann sent a letter to the Court of Appeals in April 2016, requesting that it issue its decision without further delay. *See* Letter from J. Williams to J. Castillo, dated May 2, 2016 (attached as Ex. 2 to Mr. Steyn's Request). There has been no response.

We understand that National Review, CEI and Rand Simberg are opposed to Mr. Steyn's request that the Court life the discovery stay. Accordingly, judicial efficiency and fairness dictate that discovery on Dr. Mann's claims against Mr. Steyn await the Court of Appeals'

decision. While Dr. Mann believes that any continued delay is unfair and prejudicial, proceeding with discovery, without the participation of National Review, CEI, or Mr. Simberg, will not alleviate that delay and prejudice. It would be inefficient and costly for only Dr. Mann and Mr. Steyn to exchange written discovery and move forward with deposition testimony and expert witness preparation now, given that when the discovery stay is lifted as to Dr. Mann's claims against National Review, CEI and Mr. Simberg, the parties will ultimately be forced to go through the discovery process yet again, duplicating effort and expense. Moreover, it is highly likely if not assured that Mr. Steyn's co-defendants possess documents and information that are relevant to Dr. Mann's claims against Mr. Steyn. Accordingly, it would be unfair for Dr. Mann to be prohibited from obtaining those relevant documents while he is engaged in discovery with Mr. Steyn.

Dr. Mann's Motion to Dismiss Mr. Steyn's Counter-Claims

Dr. Mann supports Mr. Steyn's request that the Court resolve Dr. Mann's pending Anti-SLAPP motion to dismiss Mr. Steyn's counterclaims. Mr. Steyn's counterclaims are solely between he and Dr. Mann, and there is no reason why this Court cannot resolve the threshold issue of whether those counterclaims should be dismissed while the Court of Appeals considers the appeal of this Court's order denying defendants' anti-SLAPP motion.

In his counterclaims Mr. Steyn seeks $30 million in damages incurred as a result of having to defend himself in this lawsuit. As such, Mr. Steyn's counter-claims fall squarely within the purview of the Anti-SLAPP statute. *See* D.C. Code § 16-5501(1)(A)(i) (the Anti-SLAPP statute applies to "issue[s] under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"). And Mr. Steyn is plainly unlikely to succeed on his counterclaims. There is no cognizable cause of action stemming from

Dr. Mann's filing this lawsuit. There is no implied private right of action not to be subject to litigation under the Anti-SLAPP statute (First Counterclaim), no constitutional tort claim based upon the mere filing of a lawsuit (Second Counterclaim), nor a cause of action for "abusive litigation in violation of the common law" (Third Counterclaim)[1]. Accordingly, as set forth in Dr. Mann's Anti-SLAPP motion, Mr. Steyn's counterclaims should be dismissed with prejudice and the Court should award Dr. Mann the costs and attorney's fees incurred in filing his motion.

DATED: June 7, 2016 Respectfully submitted,

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[1] In his opposition to Dr. Mann's motion to dismiss, Mr. Steyn argues that his Third Counterclaim is not a malicious prosecution or abuse of process claim, but rather merely "akin" to such claims. It is apparent that Mr. Steyn has concocted this cause of action out of whole cloth in part, at least, to avoid the inconvenient fact that the mere initiation of litigation is never actionable as abuse of process, and a plaintiff must prove the underlying suit terminated in his favor in order to prevail on a malicious prosecution claim. *See Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2016, I caused a copy of the foregoing Response to Defendant / Counter-Plaintiff Mark Steyn's Renewed Request for Expedited Hearing and to Lift Stay of Discovery to be served via CaseFileXpress on the following:

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