

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2021 MAR -2 P 3:20

20-CVS-8346

TAMIKA WALTER KELLY, KRISTY MOORE, AMANDA HOWELL, KATE MEININGER, ELIZABETH MEININGER, JOHN SHERRY, AND RIVCA RACHEL SANOGUEIRA,

PLAINTIFFS,

v.

THE STATE OF NORTH CAROLINA and NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY,

DEFENDANTS,

PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*, and TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*,

LEGISLATIVE INTERVENOR-DEFENDANTS, and

JANET NUNN, CHRISTOPHER AND NICHOLE PEEDIN, and KATRINA POWERS,

INTERVENOR-DEFENDANTS.

INTERVENOR-DEFENDANTS'
JOINT MOTION TO STAY DISCOVERY

Legislative Intervenor-Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (“Legislative Intervenor-Defendants”), and Parent Intervenor-Defendants Janet Nunn, Christopher and Nichole Peedin, and Katrina Powers (“Parent Intervenor-Defendants”) (collectively, “Intervenor-Defendants”) move the Court to stay further discovery until Motions to Transfer and motions asserting 12(b)(1) and 12(b)(6) defenses have

been ruled upon. Defendants the State of North Carolina and North Carolina State Education Assistance Authority (“Defendants”) consent to the Motion. In support of this Motion, Intervenor-Defendants show the following:

FACTUAL BACKGROUND

1. On August 19, 2020, Parent Intervenor-Defendants filed an Answer with their Motion to Intervene in this case, raising defenses to the Complaint under N.C. R. Civ. P. 12(b)(1) and 12(b)(6).

2. On October 19, 2020, Defendants filed an Answer in this case, raising defenses to the Complaint under N.C. R. Civ. P. 12(b)(1) and 12(b)(6), and the very next day they filed a Motion to Transfer to a Three-Judge Panel.

3. On October 26, 2020, Legislative Intervenor-Defendants also filed an Answer, raising defenses to the Complaint under N.C. R. Civ. P. 12(b)(1) and 12(b)(6).

4. After an initial order rejecting intervention and an appeal, the parties agreed to intervention by the Parent Intervenor-Defendants, and an order reflecting such was entered November 25, 2020.

5. On December 4, 2020, Defendants submitted a Calendar Request by e-mail to Trial Court Administrator Kellie Z. Myers, requesting a hearing date of January 21, 2021 for their Motion to Transfer to a Three-Judge Panel. Plaintiffs’ counsel was also sent a copy of the Calendar Request.

6. On December 22, 2020, Plaintiffs served Defendant North Carolina State Education Assistance (“NCSEA”) with written discovery, including interrogatories, document requests, and requests for admission.

7. On January 6, 2021, Legislative Intervenor-Defendants filed a Motion to Transfer to a Three-Judge Panel the entire case, requesting that the motion also be heard on January 21, 2021.

8. On January 15, 2021, Trial Court Administrator Kellie Z. Myers sent the parties an e-mail stating that the requests for a three-judge panel were not set for hearing on January 21, 2021, requesting a Status Report from the parties, and stating that the Senior Resident Superior Court Judge would inform the parties of the next steps.

9. On February 10, 2021, the Parties submitted a Joint Status Report by e-mail to Ms. Myers and Adam H. Steele.

10. On February 22, 2021, Defendant NCSEA served Plaintiffs with their Responses to the written discovery.

11. On February 22, 2021, Plaintiffs served third-party subpoenas on five private schools in Randolph County with requests for documents and notices of depositions.

ARGUMENT

“A discovery stay is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.” *United States v. Land Rover Vehicles*, No. 5:14-CV-34-F, 2015 U.S. Dist. LEXIS 58661, at *4 (E.D.N.C. May 5, 2015). In this case, a stay of discovery is necessary to preserve the resources of all involved because this case is still in its infancy. Deposition discovery and subpoenas for written records, especially from third parties, are premature because the procedural question whether to transfer to a three-judge panel and dispositive motions to dismiss and for judgment on the pleadings have yet to be decided.¹

¹ Motions to dismiss and motions for judgment on the pleadings have not been filed in the case because both groups of intervenor-defendants believe they should be heard by the three-judge panel and because the procedural rules for intervention require filing an Answer before filing a motion to dismiss or motion for judgment on the pleadings. As soon as the motions to transfer are

“A court has broad inherent power to stay discovery until preliminary issues can be settled which may be dispositive of some important aspect of the case.” *Remi Holdings v. Ix Wr 3023 Hsbc Way L.P., Starwood Capital Group Holdings*, Superior Court of North Carolina, Mecklenburg County (Apr 15, 2016), 2016 N.C. Super. LEXIS 65 (quoting *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988)). This power to stay stems from the power of each court “to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” See *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 648 (2017).

When and how this power is exercised is committed to the sound discretion of the trial court. *Id.* However, courts have developed factors to help guide judges in the reasonable exercise of their discretion. The primary question on a motion to stay discovery is whether it will “prevent a waste of time and resources by the parties and . . . judicial resources.” *Williams v. Pitt Cty. Bd. of Educ.*, No. 4:18-CV-32-BR, 2018 U.S. Dist. LEXIS 88929, at *1 (E.D.N.C. May 29, 2018). Signposts that help guide the determination of whether permitting discovery to proceed will be wasteful “include the potential for the dispositive motion to terminate all the claims in the case or all the claims against particular defendants, strong support for the dispositive motion on the merits, and irrelevancy of the discovery at issue to the dispositive motion.” *Tilley v. United States*, 270 F. Supp. 2d 731, 735 (M.D.N.C. 2003). A court may also consider the time remaining for discovery after resolution of a dispositive motion and the possibility of prejudice to the party seeking discovery. *Cleveland Constr., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 U.S. Dist. LEXIS 33876, at *5-6 (W.D.N.C. Mar. 31, 2009).

resolved, the Legislative Intervenor-Defendants and the Parent Intervenor-Defendants intend to file motions to dismiss or motions for judgment on the pleadings forthwith. See Joint Status Report, ¶¶ 5-6.

In this case all three factors weigh in favor of granting the motion to stay: 1) The stay would prevent a waste of time and resources. 2) Dispositive motions will likely dispose of the claims. 3) There is plenty of time for discovery if dispositive motions do not dispose of all the claims.

First, staying discovery would prevent a waste of time and resources. The five notices of depositions and subpoenas for documents that Plaintiffs recently issued were all issued to nonparty schools who happen to participate in the Opportunity Scholarship Program (the "Program"). Forcing school leaders, who know less about the inner workings of the Program than Defendants, to produce documents and sit for depositions would be a significant waste of their time and resources when the claims of the case may well be dismissed. Discovery against third parties is an even greater burden than discovery against actual parties to the case, and courts should be reluctant to order it unless necessary. "The courts have an obligation to protect nonparties from burden and expense [of discovery] imposed without sufficient justification." *Arris Grp., Inc. v. Cyberpower Sys. (USA)*, Superior Court of N.C., Durham County (July 11, 2017), 2017 NCBC LEXIS 58, *7. There is no justification for dragging third parties into this case when the parameters of the claims have not been established. "Nonparties faced with civil discovery requests deserve special solicitude. They should not be drawn into the parties' dispute unless the need to include them outweighs the burdens of doing so, considering their nonparty status." *Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 194 (4th Cir. 2019). In this case, there is no immediate need to depose school leaders prior to deciding the transfer motion and dispositive motions, so the need does not outweigh the obvious burden on a deponent who is trying to run his or her school during a pandemic. In fact, any depositions taken now would possibly need to be retaken after an order and opinion on the initial dispositive motions. *See Remy v. Lubbock Nat'l Bank*, No. 5:17-CV-460-FL, 2019 U.S. Dist. LEXIS 45469, at *9 (E.D.N.C. Mar. 20, 2019). At the very least, the resolution of the dispositive motions would narrow the scope of the questions needed to be asked. In addition, the burden of

document production thrust on these nonparties is tremendous. These facts all weigh in favor of a stay at this time.

Second, dispositive motions will likely dispose of the claims in the lawsuit. These motions asserting 12(b)(1) and 12(b)(6) defenses will “seek[] dismissal of multiple claims and may result in a substantial narrowing of the issues for discovery.” *Biricik v. Zwifelhofer*, No. 7:14-CV-00067-BR, 2014 U.S. Dist. LEXIS 78842, at *1-3 (E.D.N.C. June 9, 2014). Though this motion is not the place to brief a dispositive motion in its entirety, it is worth mentioning that the majority of the claims in the Complaint were already dismissed by the Supreme Court six years ago. *See Hart v. State*, 386 N.C. 122, 141 (2015); *Richardson v. State*, 368 N.C. 158, 160 (2015). Therefore, the requirement of “strong support for the dispositive motion on the merits” from *Tilley* is met. Defendants also note the recent decision of the U.S. Supreme Court validating the inclusion of religiously affiliated schools in educational choice programs like the Program. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020). Because these will be motions for judgment on the pleadings and for dismissal based on lack of subject matter jurisdiction, there is no need for discovery or extrinsic evidence, which cannot be considered by the court when ruling on a Rule 12(c) motion. *Reese v. Brooklyn Village, LLC*, 209 N.C. App. 636, 641 (2011). This is a case where the motions for judgment on the pleadings or “to dismiss turn on legal issues, and there is no need for discovery before the court rules on the motions.” *Remy*, 2019 U.S. Dist. LEXIS 45469, at *6.

When “the Motions to Dismiss make serious arguments seeking dismissal of all of Plaintiff’s claims[, and t]he Court’s resolution of the Motions to Dismiss could significantly limit the cost and burden of discovery, even if fewer than all of Plaintiff’s claims are dismissed,” then courts often stay discovery, pending the outcome of the dispositive motions. *See, e.g., Remi Holdings*, 2016 N.C. Super. LEXIS 65; *Plasman v. Decca Furniture United States*, Superior Court of North Carolina, Catawba County (Jul 15, 2016), 2016 N.C. Super. LEXIS 170; *Soma Tech. v.*

Dalamagas, Superior Court of North Carolina, Mecklenburg County (Dec 06, 2016), 2016 N.C. Super. LEXIS 364. Here also, discovery should be stayed because of the serious arguments in favor of dismissal and judgment on the pleadings.

Third, Plaintiffs will suffer no prejudice from a delay. There is plenty of time for discovery if dispositive motions do not dispose of all the claims. There is no deadline on written discovery like there was in the federal court case of *Cleveland Construction*, which mentioned this factor. Plaintiffs are trying to take advantage of a procedural delay in the case. The next step in the case is resolution of the Motions to Transfer to a Three-Judge Panel. These motions were noticed for hearing on January 21, 2021 but have not yet been calendared. While the parties were awaiting a hearing date, a Status Report was requested from the parties, and such report has since been provided. Therefore, the next procedural step remains a hearing on the Motions to Transfer—an event which necessarily cannot go forward until it has been calendared. Plaintiffs should not be allowed to leverage this administrative delay by trying to impose significant discovery burdens on parties and nonparties before dispositive motions have been heard.

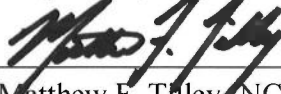
Furthermore, Plaintiffs have already received a substantial number of documents from Defendants in response to written discovery. These responses were made in good faith and show that Defendants are not trying to stonewall Plaintiffs or unnecessarily delay the case. But Plaintiffs are now trying to take advantage of this administrative delay by conducting burdensome third-party discovery and depositions. Plaintiffs are seeking documents and depositions from five third-parties who are not named as defendants in the Complaint. Moreover, Defendants believe this is only the first wave of many such waves of discovery, as these schools are all located in only one of the four counties in which Plaintiffs reside. Defendants anticipate that numerous additional nonparties will be dragged into this case in short order without a stay. The burden on these nonparties would be tremendous and would outweigh the fact that there is no harm to Plaintiffs if

this Court grants a stay of discovery. Discovery may proceed apace after a ruling on the dispositive motions.

WHEREFORE, Intervenor-Defendants request the Court to stay all further discovery until their Motions to Transfer and 12(b)(1) and 12(b)(6) defenses have received a ruling.

This is the 2nd day of March, 2021.

Respectfully submitted,



Matthew F. Tilley (NC No. 40125)

matthew.tilley@wbd-us.com

Russ Ferguson (NC No. 39671)

russ.ferguson@wbd-us.com

WOMBLE BOND DICKINSON (US) LLP

301 S. College Street, Suite 3500

Charlotte, North Carolina 28202

Phone: 704-350-6361

Brian K. Kelsey (TN No. 022874)*

bkelsey@libertyjusticecenter.org

Daniel R. Suhr (WI No. 1056658)*

dsuhr@libertyjusticecenter.org

LIBERTY JUSTICE CENTER

208 S. LaSalle Street, Suite 1690

Chicago, Illinois 60604

Phone: 312-637-2280

**Pro Hac Vice*

Attorneys for Intervenor-Defendants

Philip E. Berger and Timothy K. Moore