

Honorable Robert J. Bryan

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIAN P. CARR,

Plaintiff,

v.

SAM REED, in his official capacity as
Secretary of State of the State of Washington,
and ROB McKENNA, in his official capacity as
Attorney General of the State of Washington
and representing in their official capacity as
representatives of the State of Washington and,
separately, as private individuals the Honorable
ROBERT L. HARRIS, JOHN F. NICHOLS,
BARBARA D. JOHNSON, KENNETH
EIESLAND, RICH MELNICK, JOHN
HAGENSEN, KELLI E. OSLER, JOEL
PENOYAR, (J.) C.C. BRIDGEWATER, J.
ROBIN HUNT, GERRY L. ALEXANDER,
BARBARA MADSEN, MARY E.
FAIRHURST, SUSAN OWENS and JAMES
M. JOHNSON as well as other currently
unnamed parties as determined by the Court,

Defendants.

No. C07-5260 RJB

MOTION TO STAY DISCOVERY

(Note for Motion Calendar:
August 24, 2007)

I. MOTION

COME NOW all the above-captioned defendants including clients of the undersigned: defendants ROBERT L. HARRIS, JOHN F. NICHOLS, BARBARA D. JOHNSON, Washington State Superior Court Judges for Clark County; KENNETH EIESLAND, RICH MELNICK, JOHN HAGENSEN; District Court Judges for Clark County; KELLI E. OSLER, District Court Commissioner for Clark County, by and through their attorney, Bernard F. Veljacic, Deputy Prosecuting Attorney, and jointly move the court to stay the following: initial disclosures as required by FED. R. CIV. P. 26(a)(1), initiation of discovery as required by FED. R. CIV. P. 26, and joint status report and discovery plan as required by FED. R. CIV. P. 26(f) and local rule CR 16.

This motion is based on the records and files herein, and the Points and Authorities submitted herewith.

II. FACTS

On May 22, 2007, Brian Carr filed suit against the above-captioned defendants in the present court alleging error in decisions relating to orders for protection issued by two of the above Clark County defendants, the orders being collateral to then-ongoing dissolution proceedings. Mr. Carr was afforded his right to appeal, but fared unsuccessfully. All state court matters are now final. Mr. Carr now essentially seeks federal court review of state court determinations. The allegations complained of by Carr are barred by absolute judicial immunity, the Rooker-Feldman doctrine, res judicata, in addition to other potential defenses. Mr. Carr, on July 30, 2007, moved the court for leave to amend the complaint by adding an additional defendant. Mr. Carr noted that motion for hearing on August 10, 2007.

1 Additional facts are provided via declaration of William G. Clark, Assistant Attorney
2 General for the State of Washington and counsel for the non-Clark County Defendants captioned
3 above. Mr. Clark's declaration is attached hereto and is hereby incorporated by reference.
4 Counsel for all defendants join in this motion.

5
6 III. POINTS AND AUTHORITIES

7 A. Discovery should not proceed until the threshold issue of immunity is resolved.

8 The Supreme Court has held that until the threshold issue of immunity is resolved,
9 discovery should not proceed. DiMartini v. Ferrin, 889 F.2d 922, 926, 1989 U.S. App. LEXIS
10 17366 (1990), citing Harlow Et Al v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396
11 (1982).

12
13 “Absolute immunity, where applicable, is a protection not only from liability but also
14 from being answerable in any way for one's actions.” Miller v. Gammie, 335 F.3d 889, 894,
15 2003 U.S. App. LEXIS 13720, 2004 Daily Journal DAR 7566. The Miller court recognized that
16 “[t]he defendants, if they were immune, would be prejudiced by ... continuing the litigation,
17 even for the duration of limited discovery, because they would be required to continue to
18 participate in litigation.” Miller at 895.

19
20 Indeed, the court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d
21 396 (1982) recognized the additional costs, both in terms of litigation costs, and in governmental
22 intrusion, inherent in a discovery process where an immunity defense existed. That court ruled
23 “we conclude today that bare allegations of malice should not suffice to subject government
24 officials either to the costs of trial or to the burdens of broad reaching discovery. Harlow at 817.

25
26 DiMartini involved DiMartini's suit against a federal agent, Ferrin, for violation of
27 DiMartini's civil rights. The DiMartini court acknowledged the authority of a Federal District
28

1 Court in staying discovery where an immunity question remained outstanding while in light of
2 the limited discovery recognizing a relaxed standard when considering plaintiff's affidavits
3 opposing summary judgment. DiMartini at 926-927. See also, Pelletier v. Federal Home Loan
4 Bank of San Francisco, et al., 968 F.2d 865, 1992 U.S. App. LEXIS 14638, 92 Daily Journal
5 DAR 9255 (1992).

6
7 To proceed with discovery where a defendant is asserting immunity, as in this case,
8 would be to force that defendant to answer, where the very reason for providing immunity to the
9 defendant is to avoid forcing the defendant so answer. The authority is such that delaying
10 discovery in this case is justified.

11
12 There exists no prejudice to the defendant, as he has moved the court for leave to amend
13 the complaint and thereby add an additional defendant. The defense anticipates that standard
14 deadlines would not be met for this new defendant for some weeks beyond the currently existing
15 deadlines.

16 17 IV. CONCLUSION

18 Based on the foregoing, there is ample authority for the court to stay discovery on this
19 case to allow the parties to file dispositive motions. The defendants seek an order from the court
20 setting August 31, 2007, as the date for submission of dispositive motions, while setting initial
21 disclosures, and initiation of discovery to commence 14 days following the court's ruling on the
22 dispositive motions. Further, the defendants request an order setting the joint status report for 21
23 days following the court's ruling on the dispositive motions.

24
25 DATED this 9th day of August, 2007.

26
27 s/Bernard F. Veljacic, WSBA #28702
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Attorneys for Defendants Reed, McKenna,
Penoyar, Bridgewater, Hunt, Alexander,
Madsen, Fairhurst, Owens and Johnson

CERTIFICATE OF SERVICE

I, Mindy Lamberton, hereby certify that on August 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, who will electronically send notice to the plaintiff.

s/Mindy Lamberton
Clark County Prosecutor's Office
Civil Division