

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT BRYER,

Plaintiff,

v.

SERGEANT RICHARD JEFFERSON,
OFFICER BRANDON L. HAMMOND,
OFFICER WILLIAM LEE VINCENT,
and THE CITY OF MILFORD,

Defendants.

Civil Action No. 12-1028-GMS

ORDER

WHEREAS presently before the court is the plaintiff's Motion for Stay of Proceedings (D.I. 28);

WHEREAS also before the court is the Opposition to Plaintiff's Motion for Stay of Proceedings and Cross Motion to Compel filed by Sergeant Richard Jefferson, Officer Brandon L. Hammond, and the City of Milford (collectively, the "moving defendants") (D.I. 29); and

WHEREAS the court has considered the parties' submissions as well as the applicable law;

IT IS HEREBY ORDERED THAT:

1. The plaintiff's Motion for Stay of Proceedings (D.I. 28) is GRANTED;¹ and

¹ The plaintiff, Robert Bryer ("Bryer"), seeks to stay this action pending the resolution of related criminal proceedings in the Superior Court of the State of Delaware. (D.I. 28 at 1-2.) This civil rights action concerns an incident that occurred on August 14, 2010 and resulted in Bryer being arrested and charged with Reckless Endangerment, Aggravated Assault, Resisting Arrest, Disorderly Conduct, and Endangering the Welfare of Children. (D.I. 1 at ¶¶ 7-22.) Those state criminal charges were dismissed prior to the filing of the present civil suit, but, on May 6, 2013, a grand jury of the Superior Court returned a seven-count indictment against Bryer on substantially the same charges. (D.I. 1 at ¶ 22; D.I. 28 at Ex. A.) Bryer believes "that he is entitled to a Stay in the

Proceedings . . . as he and other plaintiff witnesses are now subject to a criminal prosecution.” (D.I. 28 at 2.) Bryer further “believes that there is a presumable conflict between continuing discovery in his civil matter before the Court and the renewed criminal proceedings brought against him which cannot be resolved until the renewed criminal proceedings are concluded.” (*Id.*)

While the moving defendants acknowledge that the privilege against self-incrimination may be raised in civil proceedings, they contend that a stay would be inappropriate here. (D.I. 29 at 3–5.) They suggest that the court allow discovery—and, in particular, the deposition of Bryer—to go forward, requiring Bryer to invoke his Fifth Amendment rights with some particularity when an actual risk of self-incrimination arises. (*Id.* at 6.) The moving defendants also note that they might wish to proceed with the civil case even were Bryer to invoke his Fifth Amendment rights during his deposition. (*Id.* at 5.)

The court believes that a stay of this matter pending resolution of the criminal proceedings will most efficiently avoid the discovery issues and potential for prejudice that may accompany an assertion of Fifth Amendment rights in the civil context. As an initial matter, it is well settled that “[t]he privilege against self-incrimination may be raised in civil as well as in criminal proceedings and applies not only at trial, but during the discovery process as well.” *SEC v. Graystone Nash, Inc.*, 25 F.3d 187 (3d Cir. 1994). Courts recognize, however, that the invocation of a civil litigant’s Fifth Amendment rights may have a prejudicial effect on his adversaries. See *McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003). In exercising its discretionary authority to manage discovery, the court may act to mitigate this threat of prejudice by, *inter alia*, imposing discovery sanctions or ordering a stay. See *id.* at 217–19; *Graystone Nash*, 25 F.3d at 194. The Third Circuit has observed that “[a] trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary’s entitlement to equitable treatment,” and that “the detriment to the party asserting [the right against self-incrimination] should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.” *Graystone Nash*, 25 F.3d at 192.

As suggested above, “[a] stay of a civil case where there are pending criminal proceedings is not constitutionally required, however, it may be warranted in certain circumstances.” *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 526 (D.N.J. 1998). In deciding whether to grant such a stay, courts generally consider a number of factors, including: (1) the degree of overlap between the civil and criminal action; (2) the stage of the criminal proceedings; (3) the prejudice to the nonmoving party that would result from a stay; (4) the burden on the moving party of permitting concurrent litigation; (5) the interests of the court; and (6) the public interest. See, e.g., *United States v. All Articles of Other-Sonic Generic Ultrasound Transmission Gel*, No. 12-2264-ES-SCM, 2013 WL 1285413, at *2–4 (D.N.J. Mar. 27, 2013); *Maloney v. Gordon*, 328 F. Supp. 2d 508, 511 (D. Del. 2004).

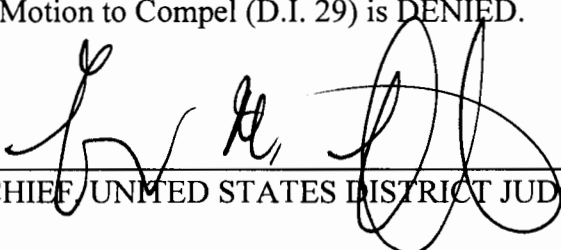
As noted by the moving defendants, Bryer oddly fails to make any reference to the legal standards described above or provide any meaningful discussion of how the multifactor balancing test might be applied to the present case. Nevertheless, the court believes a stay is appropriate here. Perhaps most significantly, the court recognizes that “[t]he strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned. The potential for self-incrimination is greatest during this stage.” *Walsh Sec.*, 7 F. Supp. 2d at 527 (quoting Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989)). Here, a grand jury has already indicted Bryer, and allowing this concurrent litigation to go forward may force Bryer to invoke his Fifth Amendment rights, potentially weakening his civil suit and exposing himself to discovery sanctions. As such, the court believes the “stage of the criminal proceedings” and “burden on the moving party” factors both favor a stay of this litigation.

On the other hand, the moving defendants fail to identify with any specificity how they might be prejudiced by a stay pending the resolution of the state criminal case, stating simply that the “inability to collect fact discovery . . . will surely lead to spoliation and prejudice.” (D.I. 29 at 4.) Given the speculative nature of this protest, the court accords the “prejudice to the non-moving party” factor only minimal weight here. See *Wall Corp. v. BondDesk Grp., LLC*, No. 07-844-GMS, 2009 WL 528564, at *2 n.1 (D. Del. Feb. 24, 2009). The fact that a grand jury has already returned an indictment further supports the court’s assessment of this factor—this is not the disfavored type of case where a stay will be “relatively indefinite, because there is no way to predict when the criminal investigation would end.” *Walsh Sec.*, 7 F. Supp. 2d at 528.

The remaining factors each weigh in favor of a stay or are neutral. The “degree of overlap” consideration counsels a stay since the same events underlying Bryer’s arrest give rise to this civil action. (D.I. 29 at 5–6.) The

2. The moving defendants' Cross Motion to Compel (D.I. 29) is DENIED.

Dated: July 8, 2013


CHIEF UNITED STATES DISTRICT JUDGE

“interests of the court” factor also favors a stay. The court has an interest in the efficient resolution of its cases, and, while it understands that staying this action will result in some delay, it believes that proceeding with discovery under the shadow of the criminal action would actually create greater inefficiency. *See Walsh Sec.*, 7 F. Supp. 2d at 528. If Bryer were to invoke his Fifth Amendment rights, the court likely would be burdened with additional privilege and discovery issues in attempting to mitigate the prejudicial effect of the invocation. *See id.* Finally, neither party provides any argument with respect to the “public interest” factor, and the court regards it as neutral in the present analysis.

Taken together, the above factors recommend a stay pending conclusion of the criminal case. The court, of course, recognizes that “[a]n adverse party in a civil case is not prevented from presenting evidence to the factfinder to support his own position even in the absence of testimony from the party invoking the privilege,” *Graystone Nash*, 25 F.3d at 191, and notes that the moving defendants have expressed some willingness to proceed with this litigation even without testimony from Bryer, (D.I. 29 at 5). This path, however, proves undesirable for several reasons. First, it invites the risk of substantial prejudice should Bryer choose to invoke the privilege during discovery only to waive it on the eve of trial. *See Graystone Nash*, 25 F.3d at 190. While the moving defendants may be amenable to continuing in Bryer’s silence, it is unclear whether they would find such a belated waiver acceptable. Moreover, a fourth defendant, William Lee Vincent, is not a movant on the Cross Motion to Compel and has not expressed any willingness to proceed in the absence of Bryer’s testimony. (D.I. 29 at 1 n.1.) Finally, the moving defendants’ alternative path is simply unnecessary—there is little risk that a temporary stay of this matter pending the resolution of the already-initiated criminal proceedings will prejudice the defendants, but it would achieve the efficiencies discussed above, while allowing Bryer to avoid choosing between his Fifth Amendment privilege and his right to fully pursue this civil action.