

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,)	CASE NO: 23-cv-H-02-0089
)	
Plaintiffs,)	
)	
vs.)	
)	JUDGE: DAVID M. GORMLEY
CITY OF COLUMBUS, et al.,)	
)	
Defendants.)	

**MEMORANDUM CONTRA OF PLAINTIFFS TO DEFENDANTS' MOTION TO STAY
DISCOVERY DURING PENDENCY OF APPEAL FILED AUGUST 31, 2023**

Plaintiffs oppose Defendants' Motion to Stay Discovery ("Motion to Stay") as set forth below.

Certainly a "trial court has the inherent authority to control its docket and to decide discovery matters." *In re Guardianship of Bakhtiar*, 9th Dist. Lorain No. 16CA010932, 2017-Ohio-5835, ¶ 5. Motions to stay or narrow discovery are governed by the Ohio Rules of Civil Procedure, Rule 26(C). See *Grover v. Bartsch*, 170 Ohio App. 3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 4 (affirming a motion to stay discovery pending the resolution of a motion to dismiss, based on Rule 26(C)). Rule 26 explains:

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including

a designation of the time or place or the allocation of expenses;

* * *

(4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters * * * .

Civ.R. 26(C).

However, Civ.R. 26(C) requires that the movant “make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.” *Accord* Loc.R. 28.02 (“Motions for protective orders * * * must be accompanied by a statement reciting efforts made to resolve the matter * * * .”).

Defendants’ motion did not include a statement reciting efforts made to resolve the matter because Defendants made no such efforts.

This requirement for a certification statement is neither hortatory nor optional. The courts have issued this rule and enforced it so that parties will try to resolve their discovery disputes prior to seeking judicial intervention. See *Tilr Corp. v. TalentNow, LLC*, 1st Dist. Hamilton No. C-220323, 2023-Ohio-1345, ¶ 26 (affirming the court’s denial of a request for a protective order because the company “failed to satisfy [Rule 26(C)’s] reasonable effort requirement.”). On this basis alone, the Court should deny Defendants’ motion.¹

The Court should also deny the motion on the merits. Defendants urge a stay because (1) the expense of discovery pending appeal—which Defendants *hope* will reverse this Court and resolve the matters in their favor, (2) Defendants do not have the identity of the Plaintiffs, (3) Plaintiffs have—supposedly—“asked for a multitude of irrelevant and privileged information * *

¹ Of course, Plaintiff’s counsel is willing to meet and confer with Defendants’ counsel to “make a reasonable effort to resolve” all discovery issues in the case.

*,” Motion to Stay at 2, and (4) a stay will not “negatively affect the ability of this case to proceed.”

Id. None of these are correct.

First, delaying discovery in the hope that this Court erred in issuing the preliminary injunction does not justify a stay of discovery because this Court still has jurisdiction to proceed with this case until it issues a final judgment. Indeed, this Court explicitly stated that the preliminary injunction “will remain in effect until it is dissolved or modified by me or until this case is resolved on the merits.” Apr. 25, 2023, J.E. at 30. Further, as Plaintiffs have argued on appeal, the Fifth District does not have jurisdiction because, in the Fifth District, a preliminary injunction is not a final appealable order. *See* Plaintiffs-Appellees’ Mot. Dismiss, *Doe v. City of Columbus*, Fifth Dist. Delaware, 22 CAE 04 0028.

Second, Defendants’ counsel has not attempted to discuss with Plaintiffs’ counsel what could be done to address the issues regarding Defendants’ possible discovery requests from the very real but anonymous Plaintiffs.

Third, Plaintiffs’ discovery seeks information and documents that are very relevant for final adjudication in this case. Defendants’ portrayal of Plaintiffs’ position on the legal issues involved, see Motion to Stay at 3, is wrong, and Plaintiffs’ requests are relevant to the issues at hand.² By contrast, Defendants’ partial responses to Plaintiffs’ discovery requests were late and—in Plaintiffs’ view—largely non-responsive, evasive, and incomplete.³ Plaintiffs’ counsel had reminded Defendants’ counsel that their discovery responses were late, and Plaintiffs’ counsel requested an opportunity to meet and confer before filing a motion to compel. Defendants’ counsel

² If Defendants take issue with Plaintiffs’ discovery requests, Defendants “must, at a minimum, respond and, if necessary, frame any issues regarding the legitimacy of specific discovery requests by way of objection, as provided for in the Civil Rules.” *DeRolph v. State*, 91 Ohio St. 3d 1274, 1276, 747 N.E.2d 823 (2001). Respectfully, Defendants’ responses did not satisfy this burden.

³ After significant delay in responding to Plaintiffs’ discovery requests, Defendants objected to 90% of Plaintiffs’ 22 interrogatories and 11 requests for the production of documents.

never responded to the request to meet and confer. See Ex. A. Plaintiffs will make further efforts to obtain Defendants' cooperation and proper responses to Plaintiffs' discovery requests prior to seeking a motion to compel. Hopefully the discovery dispute will be resolved without having to trouble this Court with a formal motion.

Fourth, a stay of discovery will undermine the progress of this case. If this case is to move forward at all pending appeal, it can only move forward through discovery. Defendants have not moved to stay all further proceedings, only discovery. And Plaintiffs do not agree to such a stay.

Plaintiffs wish to proceed with the reasonable discovery they initially requested on June 21, 2023, and which Defendants wish to avoid. Plaintiffs' discovery requests include document requests for public records, which Defendants must produce, either in response to the discovery requests or in response to a public records request. Defendants wish to conceal this information because it will show that Defendants do not have a reasonable basis for their challenged new ordinances, let alone a compelling basis therefore. See generally Pls.' Renewed Mot. for TRO & Prelim. Inj. at 17–19.

Conclusion

Based on the foregoing, Plaintiffs are entitled to discovery and request that this Court deny Defendants' motion to stay discovery.

Respectfully submitted,
/s/ David C. Tryon
David C. Tryon (0028954)
Robert Alt (0091753)
Jay R. Carson (0068526)
Alex M. Certo (0102790)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Plaintiffs' counsel certifies that a true and accurate copy of the foregoing Memorandum Contra of Plaintiffs to Defendants' Motion to Stay Discovery During Pendency of Appeal Filed August 31, 2023, has been served by operation of this Court's electronic filing system this 14th day of September 2023.

/s/ *David C. Tryon*
David C. Tryon (0028954)

Thursday, September 14, 2023 at 10:31:34 Eastern Daylight Time

Subject: Re: 23 CVH 02 0089: Defendants' Response to Interrogatories, RFPD, Admissions
Date: Monday, August 28, 2023 at 6:10:12 PM Eastern Daylight Time
From: David C. Tryon
To: Coglianese, Richard N.
CC: Aukerman, Katie S., Epstein, Aaron D., Sturtz, Matthew D., Jay Carson, Alex M. Certo

When this week are you available for a meet and confirm to discuss this? I look forward to hearing from you.

On Mon, Aug 28, 2023, 4:25 PM Coglianese, Richard N. <RNCOGLIANESE@columbus.gov> wrote:

They are out at the client's for review.

You will get the answers as soon as I hear back from everyone.

You may also review the requirements under R. 37. A motion at this point is improper.

From: David C. Tryon <d.tryon@buckeyeinstitute.org>
Sent: Monday, August 28, 2023 2:07 PM
To: Coglianese, Richard N. <RNCOGLIANESE@columbus.gov>; Aukerman, Katie S. <KSAukerman@columbus.gov>; Epstein, Aaron D. <ADEpstein@columbus.gov>; Sturtz, Matthew D. <MDSturtz@columbus.gov>
Cc: Jay Carson <j.carson@buckeyeinstitute.org>; Alex M. Certo <a.certo@buckeyeinstitute.org>
Subject: [EXTERNAL] Re: 23 CVH 02 0089: Defendants' Response to Interrogatories, RFPD, Admissions

Counsel,

On June 21, 2023, Plaintiffs severed their first set of discovery requests on Defendants. On July 19, 2023, Plaintiffs received your response to Plaintiffs' requests for admissions; however, you did not respond to Plaintiffs' interrogatories or request for the production of documents. On July 21, 2023, Plaintiffs' counsel requested your responses to the interrogatories and requests for the production of documents within five business days. You replied with a request for an extension of four weeks, until

August 18, 2023 and indicated that such an extension was adequate. You did not explain why such additional time was needed. Plaintiffs agreed to that extension. However, we did not receive your responses to the interrogatories and requests for the production of documents or any other communications from you on this topic. Those responses are overdue.

Please provide us with your responses and the responsive documents by September 1. The litigation in the trial court continues even though the case is on appeal, and we are entitled to the written discovery. We cannot agree to any further extensions. If you fail to provide the discovery, we will be forced to file a motion to compel discovery pursuant to Civil Rule 37(A) and an order of sanctions pursuant to Civil Rule 37(D).

We look forward to receiving the discovery responses.

Respectfully,

David Tryon

440-503-7877

David C. Tryon, *Director of Litigation*

The Buckeye Institute

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From: Coglianese, Richard N. <RNCOGLIANESE@columbus.gov>

Date: Friday, July 21, 2023 at 11:30 AM

To: Alex M. Certo <a.certo@buckeyeinstitute.org>, Aukerman, Katie S. <KSAukerman@columbus.gov>, Epstein, Aaron D. <ADEpstein@columbus.gov>, Sturtz, Matthew D. <MDSturtz@columbus.gov>

Cc: Dave C. Tryon <d.tryon@buckeyeinstitute.org>, Jay Carson <j.carson@buckeyeinstitute.org>

Subject: RE: 23 CVH 02 0089: Defendants' Response to Interrogatories, RFPD, Admissions

We are still working on the answers to those but will not be able to furnish responses in 5 days. We will need an extension of four weeks.

We also note that you have failed to respond to the Interrogatory we served you. Please provide that

response or advise why you cannot.

From: Alex M. Certo <a.certo@buckeyeinstitute.org>

Sent: Friday, July 21, 2023 10:43 AM

To: Aukerman, Katie S. <KSAukerman@columbus.gov>; Epstein, Aaron D. <ADEpstein@columbus.gov>; Sturtz, Matthew D. <MDSturtz@columbus.gov>; Coglianese, Richard N. <RNCOGLIANESE@columbus.gov>

Cc: Dave C. Tryon <d.tryon@buckeyeinstitute.org>; Jay Carson <j.carson@buckeyeinstitute.org>

Subject: [EXTERNAL] 23 CVH 02 0089: Defendants' Response to Interrogatories, RFPD, Admissions

Counsel,

We received your response to Plaintiffs' first set of discovery requests on July 19, 2023, in Doe v. Columbus, 23-cv-H-02-0089. While you responded to Plaintiffs' requests for admissions, you did not respond to Plaintiffs' interrogatories or request for the production of documents. Pursuant to Ohio Rules of Civil Procedure 33 and 34 and Plaintiffs' discovery requests, you were required to respond within 28 days of Plaintiffs' request, that is, July 19, 2023. Please provide us with your responses and the responsive documents within 5 business days or advise why you cannot do so. If you have any questions or would like to discuss this, please contact me or David Tryon.

Regards,

Alex M. Certo

Alex M. Certo, *Legal Fellow*

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