

Not Reported in F.Supp.2d, 2008 WL 4185704 (E.D.N.Y.)
(Cite as: 2008 WL 4185704 (E.D.N.Y.))

C

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
DAVID PEYSER SPORTSWEAR, INC., MV
Corp., Inc., and Dps Sales, Inc., Plaintiffs,
v.
QUALITY PAYROLL SYSTEMS, INC., BMB En-
terprises, Inc., Bert Geller, Julius Veit, and Does
1-10, inclusive, Defendants.

No. 06-CV-5742(JS)(AKT).
Sept. 3, 2008.

Franklyn H. Snitow, Esq., Snitow Kanfer Holtzer &
Millus, LLP, New York, NY, for Plaintiffs.

David Blansky, Esq., LaMonica Herbst & Manis-
calco, Wantagh, NY, for Defendants Geller and Veit.

No Appearance Other Defendants.

*ORDER ADOPTING REPORT & RECOMMENDA-
TION*

SEYBERT, District Judge.

*1 Upon review of the Report and Recom-
mendation ("Report") of Magistrate Judge A. Kath-
leen Tomlinson issued August 4, 2008, to which no
party has objected, the Court hereby ADOPTS the
Report in its entirety.

Pursuant to Rule 72 of the Federal Rules of
Civil Procedure any objections to the Report were
to be filed with the Clerk of the Court within ten
days of service of the Report. The time for filing
objections has expired and no Party has objected.
Accordingly, all objections are hereby deemed to
have been waived.

The Court ADOPTS the Report in its entirety
and ORDERS that the action be STAYED pending
resolution of the criminal proceedings against De-

fendant Bert Geller. In accordance with the provi-
sions placed on the stay granted in a related pro-
ceeding, 06-CV-3013, the Court further ORDERS
counsel for Bert Geller to provide bi-monthly writ-
ten updates to Magistrate Judge Tomlinson and all
parties to this action regarding the status of the
criminal proceedings so that Magistrate Judge Tom-
linson may determine whether the stay should re-
main in place.

SO ORDERED.

REPORT AND RECOMMENDATION

A. KATHLEEN TOMLINSON, United States Ma-
gistrate Judge.

Defendants Bert Geller and Julius Veit
(collectively "Defendants") have moved the Court
for an Order staying this action pending disposition
of the criminal indictment handed up against Bert
Geller by a grand jury in Suffolk County. *See* DE
38. Plaintiffs oppose that motion. District Judge
Seybert referred the motion for a stay to me to issue
a Report and Recommendation "on how the Court
should dispose of Defendants' motion." DE 40. For
the reasons set forth below, I respectfully recom-
mend to District Judge Seybert that the motion be
GRANTED.

I. BACKGROUND

This action asserts claims for breach of con-
tract, fraud, unjust enrichment, conversion, negli-
gence and violations of the Racketeer Influenced
and Corrupt Organizations Act 18 U.S.C. § 1961 et
seq. ("RICO") arising out of alleged gross misman-
agement and/or theft of Plaintiff's payroll funds and
funds to be paid the federal and state taxing author-
ities. The Complaint set forth claims against Qual-
ity Payroll Systems, Inc. ("Quality Payroll"), BMB
Enterprises, Inc., Bert Geller, Julis Veit, Michael
Tintweiss and Keybank National Association. The
parties stipulated to the dismissal of Defendant Mi-
chael Tintweiss in January 2007. By Order dated
September 30, 2007, Judge Seybert dismissed
Plaintiffs' claims against Keybank National Associ-

Not Reported in F.Supp.2d, 2008 WL 4185704 (E.D.N.Y.)
(Cite as: 2008 WL 4185704 (E.D.N.Y.))

ation. Quality Payroll and BMB Enterprises, Inc. have not appeared in the action, although the Court notes that according to Plaintiffs' November 27, 2007 letter motion, Quality Payroll has filed for bankruptcy, leaving only Mr. Geller and Mr. Veit as active participants in this action while the Bankruptcy Court's automatic stay is in place as to the Corporation. Both Mr. Geller and Mr. Veit have requested a stay of these proceedings pending resolution of the criminal proceedings against Mr. Geller.

*2 A related action brought by Keybank National Association against Quality Payroll, BMB Enterprises, Inc., Bert Geller, Julius Veit and Michael Tintweiss, *Keybank v. Quality Payroll Systems, Inc.*, No. 06-CV-03013 (JS) has already been stayed pending the outcome of criminal proceedings against Mr. Geller. By Order dated November 11, 2007, discovery in CV 06-3013 was stayed. On February 13, 2008, the stay was continued until May 15, 2008, and by Order dated May 15, 2008, the stay was again continued until August 15, 2008.

Discovery in this matter was scheduled to be completed January 30, 2008 [DE 37]. Thus, this action was relatively far along at the time the motion to stay the proceedings was filed on January 17, 2008. In the event this matter is stayed pending the outcome of the criminal proceedings against Mr. Geller, the parties should be in the position to complete discovery and file any dispositive motions within 30 days—the amount of time that was available to the parties under the Case Management and Scheduling order in place at the time the motion was made.

II. DISCUSSION

Plaintiffs' counsel is correct in stating that there “is no automatic stay available to a defendant in a civil action simply because he is an indicted criminal defendant in a related matter.” DE 39 at 2. However, district courts have the inherent power to stay a civil proceedings when one or more of the defendants is facing criminal prosecution. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Grafman*, No. 04-CV-2609, 2007 WL 4285378 (E.D.N.Y. Dec. 1,

2007) (“When a defendant in a civil case is facing criminal charges, a district court may, in its discretion, stay the civil action, but is not constitutionally required to do so”); *Parker v. Dawson*, No. 06-CV-6191, 2007 WL 2462677 * 3 (E.D.N.Y. Aug. 27, 2007) (“well-settled that a court has the authority to stay an action pending the outcome of criminal proceedings”); *Volmar Distributors, Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36 (S.D.N.Y.1993).

There are several factors to be taken into consideration when determining whether a stay is warranted, including: (1) the extent to which the issues in the criminal case overlap with those in the civil case; (2) the status of the criminal case, and in particular whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice caused by the delay; (4) the private interests of the defendants and the burden that proceeding with the civil action would impose on them; (5) the interests of the court; and (6) the public interest. *Id.*; *see also Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1139 (S.D.N.Y.1995). Courts in the Second Circuit generally stay civil actions against defendants who are subjects of a pending indictment. *Parker*, 2007 WL 2462677 (citing *In re Par Pharmaceutical*, 133 F.R.D. 12, 13 (S.D.N.Y.1990); *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y.1985)).

A. Overlapping Issues

*3 “A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter ... and is even more appropriate when both actions are brought by the government.” *Brock v. Tolkow*, 109 F.R.D. 116, 120-21 (E.D.N.Y.1985).

Plaintiffs argue that the misconduct alleged in the criminal action is a “wide ranging fraud” and Plaintiffs' focus here will be limited to the disposition of his clients' funds. However, where “the wrongful conduct alleged in the civil actions is a subset of that alleged in the criminal action, this

Not Reported in F.Supp.2d, 2008 WL 4185704 (E.D.N.Y.)
(Cite as: 2008 WL 4185704 (E.D.N.Y.))

factor strongly weighs in favor of a stay.” *Parker v. Dawson*, No. 06-CV-6191, 2007 WL 2462677 * 3 (E.D.N.Y. Aug. 27, 2007).

Here, the civil and criminal actions arise out of the same set of facts; thus, this factor weighs in favor of a stay.

B. Status of the Criminal Case

Defendant Geller has been indicted by a grand jury in Suffolk County in connection with his dealings with Quality Payroll. A status conference is scheduled for August 15, 2008 in a case related to this action to update the court on the status of the criminal proceedings. “The weight of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment.” *In re Par Pharmaceutical*, 133 F.R.D. at 12. Here, Mr. Geller has already been indicted. Notwithstanding Plaintiffs’ accurate assertion that Defendant Veit has not been indicted, the Court finds that the relationship of Geller and Veit and the facts arising from that relationship which are inextricably interwoven in both the civil and criminal actions and consideration of these issues weighs in favor of a stay, even for the sake of judicial economy.

C. Prejudice Caused by the Delay

Plaintiffs’ opposition to Defendants’ request for a stay of the proceedings does not identify any prejudice that will be suffered by Plaintiffs as a result of the stay. Plaintiffs argue that they “have lost a large sum of money due to the actions of Quality Payroll and its principals and should not be denied their day in Court.” DE 39. The Court is cognizant of these concerns. Obviously “a stay will result in inconvenience and delay to plaintiffs. But under settled authority the Fifth Amendment is the more important consideration.” *Volmar Distrib., Inc. v. New York Post Co., Inc.*, 152 F.R.D 36, 40 (S.D.N.Y.1993). Moreover, Plaintiffs will not be denied their day in court. Their understandable desire to push forward, however, does not amount to prejudice. This factor favors a stay.

D. Burden on Defendant of Proceeding with Civil Action

In light of the indictment against Mr. Geller, “[p]roceeding with discovery would force these defendants into the uncomfortable position of having to choose between waiving their Fifth Amendment privilege or effectively forfeiting the civil suit.” *Volmar*, 152 F.R.D. at 39. Plaintiffs correctly point out that it is not unconstitutional to force a litigant to make this choice. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308 (1976). However, courts have the discretion to grant the stay because

*4 the denial of a stay could impair a party’s Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b) , expose the defense’s theory of prosecution in advance of trial or otherwise prejudice the criminal case

Trustees of the Plumbers and Pipefitters National Pension Fund v. Transworld Mechanical, Inc., 886 F.Supp. 1134, 1138 (S.D.N.Y.1995). In this action, and particularly given the stay already in place in the parallel action, this factor weighs in favor of a stay.

E. Interests of the Court

As recognized by the court in *Chao v. Fleming*, 498 F.Supp.2d 1034 (W.D.Mich.2007), “scarcely judicial resources ... would be best used by staying this case in favor of the criminal case, which may ultimately reduce or eliminate the need for discovery or result in the settlement of this case if Defendants are convicted.” *See also Parker v. Dawson*, No. 07-CV-1268, 2007 WL 2462677 (E.D .N.Y. Aug. 27, 2007) (“the resolution of the criminal action will ultimately further this Court’s interest in the efficient disposition of the civil actions”); *Trustees of the Plumbers and Pipefitters National Pension Fund*, 886 F.Supp. at 1140 (“resolution of the criminal case may increase the possibility of settlement of the civil case due to the high standard of proof required in a criminal prosecution”). Again, a parallel action involving the same Defendants and

Not Reported in F.Supp.2d, 2008 WL 4185704 (E.D.N.Y.)
(Cite as: 2008 WL 4185704 (E.D.N.Y.))

arising from the same facts has already been stayed. Accordingly, this final factor also weighs in favor of a stay.

Each of the factors to be considered when making a determination whether to stay a civil action in favor of criminal proceedings weighs in favor of granting the stay in this action. Indeed, a conference is scheduled in a few weeks at which time the Court will be apprised of the status of the criminal proceedings against Mr. Geller. There is nothing to prohibit Plaintiffs in the future from moving to vacate the stay in the event a change in circumstances warrants such action.

III. CONCLUSION

For the reasons set forth above, I respectfully recommend to Judge Seybert that this action be stayed pending resolution of the criminal proceedings against Bert Geller.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within 10 days of service and failure to file objections within this period waives the right to appeal. *See* 28 U.S.C. § 636(b)(1)(c) (2006); Fed.R.Civ.P. 6(a), 6(e), and 72; *Beverly v. Walker*, 118 F.3d 900, 901 (2d Cir.), *cert. denied*, 522 U.S. 883 (1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir.1996). Therefore, the parties are directed to file any written objections to this Report and Recommendation with Judge Seybert not later than 10 days from the date of this Order.

SO ORDERED.

E.D.N.Y.,2008.
David Peyser Sportswear, Inc. v. Quality Payroll
Systems, Inc.
Not Reported in F.Supp.2d, 2008 WL 4185704
(E.D.N.Y.)

END OF DOCUMENT