NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: ***Heejung Heidi Son, et al. v. Johnny W. Benson, et al.,***
Case No. CL-2024-1568

Dear Counsel:

The Court has authority to stay discovery pending the resolution of potentially dispositive motions. The issue before the Court is what factors should the Court consider in exercising such authority.

The Court holds it should use modified preliminary injunction factors when it considers staying discovery pending resolution of potentially dispositive motions. Those factors are: (1)

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will the movant suffer significant[1] harm by the continuation of discovery and, if so, (2) is the movant likely to succeed on the merits, (3) does the balance of the hardships favor a discovery stay, and (4) does any public interest support the stay?

The parties argued Plaintiffs' Motion to Compel and Defendants' Motion for a Protective Order May 31, 2024. The same day, the Court entered an Order granting Plaintiffs' motion and denying Defendants' motion. The Court now issues this Opinion Letter to revise and extend the rationale it announced at the hearing.

I. BACKGROUND.

Plaintiffs filed a Complaint containing five causes of action, to wit: (1) false advertising under Virginia Code §§ 18.2–216, 59.1–68.3, (Compl. at 12 ¶¶ 76–81); (2) actual fraud in the inducement, (*id.* at 13 ¶¶ 82–87); (3) constructive fraud in the inducement, (*id.* at 14 ¶¶ 88–92); (4) common law conspiracy to commit conversion, (*id.* at 15 ¶¶ 93–98); and (5) negligent retention, (*id.* at 16 ¶¶ 99–105). Briefly stated, Plaintiffs allege Defendants made a series of intentional or negligent false misrepresentations about the quality of a contractor's work to induce Plaintiffs into entering two contracts in a residential real estate transaction. (*See id.* at 2 ¶ 7.)

Among other things, Defendants each filed responsive pleadings setting forth grounds for pleas in bar and demurrers. They argue, *inter alia*, that (1) Plaintiffs' fraud counts fail to establish reliance since the plain language of the contract contravenes the contention that Plaintiffs could have relied on Defendants representations, (2) Plaintiffs fail to allege the misrepresentation of a present existing fact, and (3) Plaintiffs' tort claims are barred by the source of duty and economic loss rules.[2]

Prior to Defendants noticing their responsive pleadings for a hearing, Plaintiffs propounded their first Requests for Production of Documents, Interrogatories, and Requests for Admissions on Defendants on April 1, 2024. (*See* Defs.' Mot. Protective Order, filed on April 22, 2024, at 1–2 ¶ 3.) As a result, Defendants' responses to these requests and interrogatories were due April 22, 2024. *See* VA. SUP. CT. R. 4:8(d), 4:9(b)(ii), 4:11(a).

On that deadline, Defendants collectively filed a Motion for a Protective Order,[3] arguing that the Court should use its discretion to stay discovery under Supreme Court of Virginia Rule 4:1(d)(2), since doing so would prevent both parties from incurring unnecessary expenses. (Defs.' Mot. at 3 ¶ 10.) Defendants contend that Plaintiffs will not be prejudiced by a temporary stay pending the adjudication of their dispositive motions, as this matter has only been active for

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[1] See fn.10, *infra*, for the reason why the Court uses "significant" harm in place of "irreparable" harm. *Compare* VA. SUP. CT. R. 3:26 *with* the factors enumerated herein.

[2] Each of the Defendants' responsive pleadings raise substantially the same arguments, although they are not derived *in haec verba* from each other.

[3] Defendants filed an Opposition to Plaintiffs' Motion to Compel on May 24, 2024, which lays out their arguments in more detail.

two months, and there is currently no trial date set.[4] (*Id.* at 3 ¶ 11.) Other than Defendant Johnny Benson's Demurrer, none of Defendants' other pending dispositive motions have even been noticed for a hearing.

Frustrated, Plaintiffs filed a Motion to Compel April 25, 2024, primarily responding to the arguments made in Defendants' Motion for a Protective Order.[5] Plaintiffs argue that Supreme Court of Virginia Rule 4:1(d)(2) mandates that discovery continue pending the resolution of dispositive motions as a default rule, absent the issuance of an order for a discovery stay in the Court's discretion. (Pls.' Mem. in Supp. of Mot. to Compel at 2.) Citing *Ticonderoga Farms v. Knop*, Case No. 109324, 2018 Va. Cir. LEXIS 1817 (Loudoun Feb. 28, 2018), Plaintiffs assert that Rule 4:1(d)(2) "'requires some additional basis for granting a stay of discovery' other than the 'general claims of expense and burden' pending a demurrer which are present in every case." (*Id.* (quoting *Ticonderoga Farms*, 2018 Va. Cir. at **1–2).) Thus, Plaintiffs assert that Defendants failed to proffer an additional basis for granting this stay beyond their claims that doing so would mitigate potential expenses to be incurred on both sides.[6]

II. ANALYSIS.

The question presented to the Court is a purely legal question of statutory interpretation. The Court's primary objective in interpreting a court rule is to give effect to the intent of the Supreme Court of Virginia as evidenced by the plain language of the rule. *See Berry v. Bd. of Sup'rs of Fairfax Cnty.*, 302 Va. 114, 127–28 (2023); *see also Sidar v. Doe*, 80 Va. App. 579, 585 (2024) (citing general principles of statutory construction when interpreting Supreme Court Rules). Words in a rule are construed by giving effect to their ordinary meaning, considering the context in which they are used, unless the rule provides for a specific, alternate definition. *Id.* (quoting *City of Va. Beach v. Bd. of Sup'rs*, 246 Va. 233, 236 (1993)). "When the language of a [rule] is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the [Supreme Court] did not mean what it actually has stated." *Williams v. Commonwealth*, 265 Va. 268, 271 (2003).

Virginia Supreme Court Rule 4:1(d)(2) provides that:

> Discovery continues after a demurrer, plea or dispositive motion addressing one or more claims or counter-claims has been filed and while such motion is pending decision—unless the court in its discretion orders that discovery on some or all issues in the action should be suspended.

The plain language of Rule 4:1(d)(2) is clear and unambiguous. Rule 4:1(d)(2) sets forth a default rule, to wit: discovery continues even while dispositive motions are pending. The Rule

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[4] By proxy, there is no date set for the close of discovery at this point.
[5] Plaintiffs filed a Memorandum in Support of their Motion to Compel May 17, 2024.
[6] Plaintiffs also argue that discovery is necessary for them to defend against Defendants' pending Pleas in Bar, and that Defendants are otherwise improperly using their Motion for a Protective Order to circumvent discovery deadlines. These issues are not addressed by this Opinion Letter.

then goes on to grant discretion to the Court to suspend discovery on some or all issues while it considers any pending dispositive motions. Despite the Rule's clarity, however, the Rule does not provide a governing standard or principle to guide the Court in exercising this discretion. A modern trend is for the General Assembly and courts to identify factors judges should or must consider when exercising otherwise broad discretion. *See, e.g.*, VA. SUP. CT. R. 3:26 (factors to use when considering preliminary injunctions); VA. CODE ANN. § 20-107.3 (factors to consider when performing equitable distribution of a marital estate during a divorce). So, unsurprisingly, circuit courts grasp at factors to help guide the exercise of discretion. *See, e.g.*, *Rudolph v. Commonwealth*, 100 Va. Cir. 481 (Fairfax 2017) (identifying factors to consider when restoring firearms rights); *Dwoskin v. Dwoskin*, Case No. CL-2019-3494, 2021 Va. Cir. LEXIS 40 (Fairfax Mar. 5, 2021) (cataloguing factors to consider when awarding attorney fees).

Despite the "factorization" of trial court discretionary authority, scant authority exists interpreting Rule 4:1(d)(2) to guide a court's broad exercise of "its discretion" to stay discovery pending adjudication of potentially dispositive motions. The Supreme Court affirmed a trial court for staying discovery until it decided if there was probable cause to proceed with litigation under the *Noerr-Pennington* doctrine. *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 306–07 (2002).[7] Similarly, the high court has suggested, in *dicta*, that a trial court does not abuse its discretion by denying a stay of discovery under Rule 4:1(d)(2) pending the resolution of dispositive motions where the dispositive motion at issue has facial merit. *Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 250 (2012) (citing *id.*).

The few circuit courts to publish opinions on this issue lean heavily on the default rule, denying discovery stays pending resolution of potentially dispositive motions. *See, e.g.*, *Lady J. Farms, Inc. v. Sirkin*, Case No. CL-2022-879, 2023 Va. Cir. LEXIS 29, at **4–5 (Culpeper Mar. 9, 2023) ("The court notes the use of 'continues' in the plural form in the rule."); *Ticonderoga Farms v. Knop*, Case No. 109324, 2018 Va. Cir. LEXIS 1817, at **1–2 (Loudoun Feb. 28, 2018) ("Instead the Rule begins with 'discovery shall continue . . .' as the default rule under the circumstances, and logically requires some additional basis for granting a stay of discovery."). The Chesapeake County Circuit Court denied a motion for a discovery stay for judicial economy. *DuPuy-German v. Perwaiz*, 106 Va. Cir. 279, 284–85 (Chesapeake 2020) (denying a motion to stay discovery in consideration of whether the stay would create additional discovery disputes on fact issues not stayed, and the availability of measures to resolve potential discovery disputes).

This Court recently opined on the factors and principles that guide the authorization of a stay of a judgment pending an appeal. It distinguished the concept of judicial stays from injunctions. *See generally Washington Gas Light Co. v. Zinner*, Case Nos. CL-2022-2942, -3061, 2024 Va. Cir. LEXIS 20 (Fairfax Feb. 14, 2024). As noted in *Zinner*, "a stay operates upon the judicial proceeding itself . . . either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* at *5 (quoting *Nat'l Ass'n for Advancement of Colored People v. Commonwealth* ex rel. *Virginia State Water Control Bd.*, 74

[7] "To allow claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' to reach discovery . . . would directly contravene the Supreme Court's holding in [*Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)]." *Titan Am.*, 264 Va. at 307 (citation omitted).

Va. App. 702, 713 (2022)) (contrasting injunctions with stays). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Primov v. Serco, Inc.*, 296 Va. 59, 67 (2018) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936)). However, this Court nonetheless applied injunction consideration factors to guide its decision whether to issue a stay pending appeal. *Zinner*, 2024 Va. LEXIS at **10–12, 12 n.4. Because the Supreme Court of Virginia had then not clearly embraced a particular set of injunction factors, the Court enumerated factors it gleaned from common law.[8] The Court thus determined that, in granting a stay, the Court should consider: (1) the nature and circumstances of the case at bar, (2) the likelihood of irreparable harm if no stay is issued, (3) the veracity and magnitude of the asserted harms resulting from not granting a stay, and (4) where the public interest lies. *Id.*

As it happens, this Court's February 14, 2024, *Zinner* opinion had a remarkably short "shelf-life." On June 5, 2024, the Supreme Court of Virginia promulgated Rule 3:26 setting forth clear injunction consideration factors. Rule 3:26 is not mandatory authority vis-à-vis the issuance of a discovery or appeal stay since injunctions and stays serve different purposes and stem from different sources of judicial power.[9] Nonetheless, the Court is persuaded to consider the Rule 3:26 factors in determining whether to grant a stay because our federal step-sibling courts use "remarkably similar" balancing tests for both stays and injunctions. *Zinner*, 2024 Va. Cir. at *8 ("The *Winter* test mirrors the *Hilton* test—insofar as both tests feature the mechanical application of facts to a discrete set of remarkably similar factors . . . ."). Rule 3:26 reads, in relevant part:

> (c) Threshold Requirement for Preliminary Injunctions. — A court may issue a preliminary injunction only if it first determines that the movant will more likely than not suffer irreparable harm without the preliminary injunction.
>
> (d) Additional Requirements for Preliminary Injunctions. — If the irreparable-harm threshold has been met, the court must determine whether the following factors support the issuance of a preliminary injunction:
>
> > i. whether the movant has asserted a legally viable claim based on credible facts (not mere allegations) demonstrating that the underlying claim will more likely than not succeed on the merits;
> >
> > ii. whether the balance of hardships—that is, the harm to the movant without the preliminary injunction compared with the harm to the nonmovant with the preliminary injunction—favors granting the preliminary injunction; and
> >
> > iii. whether the public interest, if any, supports the issuance of a preliminary injunction.

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[8] The Court separately considered the injunction factors gleaned from *Loudoun Cnty School Bd. v. Cross*, Record No. 210584, 2021 WL 9276274, at **2-3 (Va. Aug. 30, 2021), and those enumerated in *Winter v. NRDC*, 555 U.S. 7, 22 (2008), *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987).

[9] *See Zinner*, 2024 Va. Cir. at **4–5.

> A preliminary injunction may be issued only if it is supported by factors (i) and (ii), and it is not contrary to the public interest in factor (iii).
>
> (e) Exceptional Cases. — Notwithstanding subsection (d)(i), in rare cases in which the likely irreparable harm to the movant is severe and any corresponding harm to the nonmovant is slight, a preliminary injunction may be issued upon a clear showing that the underlying claim has substantial merit warranting interim relief, even if the court cannot determine at the time that the movant will likely succeed on the merits.

Distilled and applied to discovery stays, the factors are: (1) will the movant suffer significant[10] harm by the continuation of discovery and, if so, (2) is the movant likely to succeed on the merits, (3) does the balance of the hardships favor a discovery stay, and (4) does any public interest support the stay?

As to the first factor, a movant must demonstrate significant harm by the progression of discovery. In some cases, discovery is a minor annoyance; in others it could involve hundreds of thousands of dollars and hours of client time. It is not enough for a litigant to baldly claim that the parties will have to expend attorney fees and client time that may be unnecessary, though. A movant must demonstrate that it explored compliance with discovery, estimated the true breadth and cost, and shows that the expense or effort will be significant.

If the movant establishes significant harm from continued discovery, a court should then look at whether the movant's allegedly dispositive motions are just that. Do the pending dispositive motions at issue appear to have merit on their face? *See Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 250 (2012); *Titan Am. v. Riverton Inv. Corp.*, 264 Va. 292, 306–07 (2002). Is the movant likely to succeed on its motions, terminating the case? This factor may be the most important one. Even courts that could not consider applying the new Rule 3:26 mentioned consideration of this factor. Sometimes, a dispositive motion has clear, facial merit. For example, if a plea in bar challenges the statute of limitations, a court might be able to readily see from the pleadings and attachments that a lawsuit is untimely. It would be unfair to make a defendant produce discovery in such a circumstance. When a trial court sees merit to a potentially dispositive motion, it should consider a stay to save the parties time and money.

A court should also look at the balance of the hardships and compare how a cessation of discovery could affect each of the parties.

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[10] The Rule 3:26 injunction factors are useful guidance for deciding whether a court should stay discovery, but they are tailored to the extraordinary nature of injunctions. Discovery schedules are not so extraordinary. If the Court were to require a movant to prove "irreparable harm" by the continuation of discovery, there would be almost no cases where a court would grant a stay. To reasonably apply Rule 3:26 to discovery stays, looking for "significant" harm makes more sense than "irreparable" harm.

Finally, a court should look at any public interest. Rule 3:26 permits a court to set aside this factor if the dispositive motion is likely to succeed, the balance of hardships favor a stay, and the stay is not contrary to the public interest.

Applying these factors to the present motion to stay discovery, the Court clearly should deny the stay.

A. Significant Harm.

In the present case, Defendants have not demonstrated significant harm to them if discovery proceeds. They merely assert, without objective reasons, that a stay would save both parties money. While it is true that all discovery compliance has a cost, Defendants' bald statement is far from a proffer of significant harm. The Court cannot conclude that a stay prevents significant harm to the Defendants.

B. Likelihood of Success on the Merits.

Defendants fully briefed only one pending dispositive motion. Their respective Pleas in Bar are a mere two paragraphs, pending the submission of a memorandum of law. (*See* Defs.' Mots. Craving Oyer, Plea in Bar, and Demurrer, both filed on February 29, 2024.) To this end, Plaintiffs have had no opportunity to respond to these Pleas in Bar because they have no way of knowing the scope or depth of Defendants' arguments unless and until Defendants file their full briefing. The Court cannot glean from the face of Defendants' perfunctory pleadings that their arguments on the Pleas in Bar have merit.

As for Defendants' Demurrers, only Defendant Benson filed a memorandum of law on his Demurrer, and the Court cannot say, from its face, that the Demurrer appears to have inherent or significant merit. Taking the facts of Plaintiffs' Complaint as true, it is entirely likely that the Court could conclude that Plaintiffs have adequately pled the causes of action they purport to plead. Hence, this case is distinguishable from *Murayama 1997 Trust v. NISC Holdings, LLC*, where the Supreme Court opined that "the allegations in [the] complaint, taken as true, established that [plaintiff] did not reasonably rely upon the defendants in determining the value of the stock it sold to NISC." 284 Va. 234, 250 (2012). In this case, the Court cannot conclude *ex ante* that Plaintiffs have so clearly failed to meet their burden in pleading their case.

From what the Court knows in this case, it cannot conclude Defendants are likely to succeed on their dispositive motions to the degree that this case dies in the cradle.

C. Balance of Hardships.

Defendants failed to carry their burden that proceeding with discovery disproportionately harms them over the Plaintiffs. The Court does not know the extent of any hardship to Defendants due to normal discovery obligation compliance.

D. Public Interest.

The Circuit Court of Fairfax is Virginia's "rocket docket." It prides itself on promptly adjudicating disputes for the 1.2 million people in its circuit, usually within a year. It manages this by setting preferred procedures regarding motions practice, trial scheduling, and by limiting continuances. This works best if parties engage in discovery early and vigorously litigate their case soon after filing. There is a public interest in encouraging parties to be on track to go to trial within a year so that the Court may be an efficient, predictable forum for all cases filed here.

Applying the slightly modified injunction factors to Defendants' Motion for a Protective Order, the Court concludes they failed to show that the Court should grant their Motion.

III. CONCLUSION.

The Court holds that discovery generally continues pending the resolution of potentially dispositive motions. VA. SUP. CT. R. 4:1(d)(2). The Supreme Court of Virginia's rule on injunctions is a helpful list of factors for courts to use when deciding whether to stay discovery or not. VA. SUP. CT. R. 3:26. Defendants failed to persuade the Court that it should stay discovery in this case under a modified version of those factors. The Court now avouches its Order denying their Motion for a Protective Order and granting Plaintiffs' Motion to Compel discovery responses.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia