

NORTH CAROLINA
FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-4007

BB&T BOLI PLAN TRUST,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY and CLARK
CONSULTING, INC.,

Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO STAY
DISCOVERY AND FOR PROTECTIVE ORDER**

Plaintiff BB&T BOLI Plan Trust, ("BB&T Trust") hereby submits its Memorandum of Law in Opposition to Motion to Stay Discovery and for Protective Order, opposing both Defendant Massachusetts Mutual Life Insurance Company's Motion to Stay Discovery and for Protective Order and the Renewed Motion of Defendant Clark Consulting, Inc. for a Protective Order Staying Discovery (hereinafter, the "Motions to Stay Discovery").

I. Introduction

Defendants Massachusetts Mutual Life Insurance Company ("MassMutual") and Clark Consulting, Inc. ("Clark") (collectively, the "Defendants"), by their separate motions, seek to delay discovery in the instant action pending the resolution of their separate motions to dismiss. But a stay in discovery is not appropriate in the current action. First, Defendants' motions to dismiss are wholly without merit, as BB&T Trust will demonstrate in its responses to those motions. Second, even if there were some validity to the motions to dismiss (which there is not), it is certainly not "immediate and clear" that those motions to dismiss will result in the dismissal

with prejudice of every claim that BB&T Trust has alleged. As such, a stay in discovery will only serve to delay the progress of the lawsuit and prejudice BB&T Trust.

II. Procedural Background

BB&T Trust filed the instant lawsuit on May 9, 2009 asserting claims against the Defendants for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, negligent misrepresentation, breach of contract (against MassMutual only), fraud and violation of North Carolina's Unfair and Deceptive Trade Practices Act. Through its Complaint, BB&T Trust seeks to recover from Defendants substantial damages that it suffered in connection with its Bank Owned Life Insurance due to a series of wrongful actions and omissions by both Defendants.

On September 9, 2009, Defendants filed separate motions to stay discovery and for protective order, and on September 11, 2009 filed separate motions to dismiss BB&T Trust's First Amended Complaint under N.C.R. Civ. P. 12(b)(6). BB&T Trust submits this opposition to both Defendants' Motions to Stay Discovery.

III. Argument

On a motion to stay, the moving party bears the burden of showing good cause and reasonableness. *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988). Motions for a protective order which seek to prohibit or delay discovery are not favored. *Kron Med. Corp. v. Groth*, 119 F.R.D. 636, 637 (M.D.N.C. 1988) (citing *Medlin v. Andrew*, 113 F.R.D. 650, 652-53 (M.D.N.C. 1987)). This Court should deny Defendants' Motions to Stay Discovery because: (1) the likelihood that the pending motions will dispose of the entire case is very small, and (2) a delay in discovery will prejudice BB&T Trust.

A. A stay is inappropriate because it is very unlikely that resolution of the pending motions will dispose of the entire case.

Defendants contend that a stay is proper because each defendant has filed a dispositive motion as to each claim asserted by the plaintiff. Defendants both cite a number of cases in which the courts have found a stay to be “an appropriate exercise of the court’s discretion.” While Defendants are correct that “[t]he administration of discovery rules . . . is within the broad discretion of the trial court,”¹ a stay of discovery is not justified solely because a motion to dismiss is pending. *See Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, *1 (S.D. Fla. July 24, 2008) (stating that “courts have consistently rejected any *per se* requirement to stay discovery pending resolution of a dispositive motion”). In addition, “a request to stay all discovery pending resolution of a motion is rarely appropriate where resolution of the motion will not dispose of the entire case.” *Simpson*, 121 F.R.D. at 263.

In considering whether a stay of all discovery pending the outcome of a dispositive motion is warranted, a case-by-case analysis is required, since such inquiry is necessarily fact-specific and depends on particular circumstances and postures of each case. *United States v. A.T. Massey Coal Co.*, No. 2:07-0299, 2007 U.S. Dist. LEXIS 77501, *6 (S.D. W. Va. October 18, 2007). “[T]he Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery.” *Simpson*, 121 F.R.D. at 261. As such, it is “helpful to take a preliminary peek at the merits of the allegedly dispositive motion to see if on its face there appears to be an *immediate and clear* possibility that it will be granted.” *Id.* (emphasis added) (denying the Defendant’s motion for a protective order staying all discovery pending the ruling on their motions to dismiss

¹ *Global Furniture, Inc. v. Proctor*, 165 N.C. App. 229, 231, 598 S.E.2d 232, 234 (2004).

the complaint because the court “did not perceive an immediate and clear possibility that the motions to dismiss will be granted and that this will terminate the action”.)

Defendants both rely on the holdings from *Cleveland Constr., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 WL 903564 (W.D.N.C. March 31, 2009) and *Yongo v. Nationwide Affinity Ins. Co.*, No. 5:07-CV-94-D, 2008 WL 516744 (E.D.N.C. Feb. 25, 2008) for the proposition that this Court should stay discovery in the instant case because there are pending motions to dismiss for all of the claims. However, in both *Cleveland* and *Yongo*, there was strong support for the motions to dismiss and it was, therefore, likely that the motions to dismiss would be granted. As such, these cases bear little similarity to the instant case beyond the procedural posture.

In analyzing whether to stay discovery, the court in *Cleveland* noted that there was “strong support for [defendants’] motion to dismiss.” *Cleveland* at *2. In *Cleveland*, the defendants filed motions to dismiss asserting that the plaintiff had previously unsuccessfully sued the defendants in state court and that the state court had already dismissed the action with prejudice because the claims were subject to a dispute resolution provision. *Id.* at *1. A motion to dismiss under these facts and circumstances is a virtual certainty—it was immediate and clear that the motion would be granted and would dispose of the entire case.

Similarly, in *Yongo*, one of the defendants filed a motion to dismiss on the grounds of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process and the court stated that “there is substantial support in the record for the motion.” *Yongo* at *2. Further, the other defendant filed a motion to dismiss because the complaint expressly alleged wrongdoing by his “organization” but not by him personally. *Id.* at *3. The court again found that there was a “substantial basis” for the motion. *Id.*

Defendants attempt to draw a comparison between *Cleveland* and *Yongo* and the instant case by boldly asserting their belief that this Court will dismiss BB&T Trust's claims. However, unlike in *Cleveland* and *Yongo* where dismissal of all claims was a near certainty, BB&T Trust has proffered a well-pled complaint in which it is very unlikely that Defendants' motions to dismiss will be successful as to any claim, let alone as to all claims. Unlike in *Cleveland* and *Yongo*, there is not an *immediate and clear* possibility that the motions to dismiss in the instant case will be granted as to all claims, thus terminating the action (indeed, very much to the contrary).² Rather, there is a much greater likelihood that the current action will move forward in litigation and that discovery will be necessary to resolve the current dispute. A stay in the instant case is not appropriate and would only serve to unnecessarily delay the progress of the current action.

B. The Court should not stay discovery because it will prejudice the plaintiff by reducing the time available within the discovery period and by creating an unnecessary delay.

Courts do not ordinarily "favor staying discovery pending resolution of dispositive motions or motions to dismiss because of the delay such a stay may occasion in obtaining a timely resolution of the matter." *Hall v. Witteman*, No. 07-4128-SAC, 2008 WL 1743439, 2 (D. Kan. April 14, 2008); *see also Simpson*, 121 F.R.D. at 263 (same) (*citing Kron*, 119 F.R.D. at 636). As the U.S. District Court for the Middle District of North Carolina has explained:

Disruption or prolongation of the discovery schedule is normally in no one's interest. A stay of discovery duplicates costs because counsel must reacquaint themselves with the case once the stay is lifted. Matters of importance may be mislaid or avenues unexplored. A case becomes more of a management problem to the Court when it leaves the normal trial track. While time may

² Further, a request to stay discovery pending resolution of a motion to dismiss should be denied where resolution of the pending motion, even if valid as to each claim, is not necessarily dispositive because the pleading easily may be amended to correct the alleged pleading deficiencies. *See, e.g., Howard v. Galesi*, 107 F.R.D. 348, 352 (S.D.N.Y. 1985).

heal some disputes, in others it merely permits more opportunity for festering.

Kron, 119 F.R.D. at 638 (refusing to grant a stay of discovery even though discovery was not relevant to the motion before the court). Further, courts need to “remain mindful of [their] responsibility to expedite discovery and minimize delay.” *Id.* at 637; *see also Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 203 (D. Md. 2006) (quoting *Hachette Distrib., Inc. v. Hudson County News, Co.* 136 F.R.D. 356 (E.D.N.Y. 1991) (stating that a stay of discovery may be improper where the court determines that granting it “would not serve the interest of the just and speedy administration of [a] lawsuit”).

In the instant case, BB&T Trust would be greatly prejudiced should the Court stay discovery until the resolution of the pending motions to dismiss. In the Case Management Report filed jointly with the Court on July 29, 2009, the parties agreed to a period of seven (7) months for fact discovery and that expert discovery should last for two (2) months following the close of fact discovery. Having taken into consideration the parties’ recommendation, on August 25, 2009, this Court ordered that the parties “shall have until 24 March 2010 to conduct fact discovery and until 24 June 2010 to conduct expert discovery.”³

In its Brief, Clark incorrectly asserts (at page 5) that “the Court has yet to set a discovery or trial calendar, and therefore, the temporary stay requested will not alter any court-ordered deadlines.” To the contrary, however, the Court has set the period for discovery, and a stay could greatly affect court-ordered deadlines. In addition, should this Court grant Defendants’ Motions to Stay Discovery, it would limit the amount of time for discovery within the discovery

³ Notably, at the time of the Case Management Report, as they do now, the parties disagreed as to when the discovery period should commence. Defendants contended that discovery should be stayed until the Court ruled on Defendants’ pending rule 12(b)(6) Motions to Dismiss.

period that has been ordered by the Court. A shortened discovery period would certainly prejudice BB&T Trust.

In addition, as discussed above, the motions to dismiss in this case are not of the type and kind in which it is *immediate and clear* from the face of the Complaint that Defendants' motions will be granted. Rather, it is more likely that Defendants' motions will *not* be granted and that the instant case will continue beyond the motion to dismiss stage. As such, a stay of all discovery will not limit costs, as the Defendants contend, but will only serve to delay and prolong the inevitable progress of the current action. Defendants argue that even if all of BB&T Trust's claims are not dismissed, dismissal of some of the claims will serve to at least limit the scope of discovery. However, as the Defendants argue repeatedly in their motions to dismiss, BB&T Trust's claims are interrelated and arise out of the same events, actions and omissions by the Defendants. Accordingly, dismissal of less than all of the claims will not limit the scope of discovery or litigation costs. Defendants have failed to meet their burden of showing good cause and reasonableness. Rather, BB&T Trust has a right to have its case proceed forward without being prejudiced by the unnecessary delay that a stay of all discovery would create.

Conclusion

Based on the foregoing, BB&T Trust respectfully requests that the Court deny Defendants' Motions to Stay Discovery.

Respectfully submitted, this 29th day of September 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Mark Vasco, certify that the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO STAY DISCOVERY AND FOR PROTECTIVE ORDER** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Mark Vasco
Mark Vasco

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO STAY DISCOVERY AND FOR PROTECTIVE ORDER** was served on all parties to this action this 29th day of September, 2009, via the Business Court's electronic filing system and electronic mail, as follows:

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