UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CLARK BAKER and THE OFFICE OF MEDICAL AND SCIENTIFIC JUSTICE, INC. Plaintiffs, v. JEFFERY TODD DESHONG, Defendant.	)	Civil Action No. 4:13-00552-C

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Introduction

1. Defendant DeShong filed a special motion to dismiss the state-law claims in this action (for defamation and trademark dilution) under the Texas anti-SLAPP statute, and a motion to dismiss both the federal-law and state-law claims both for lack of subject matter jurisdiction and failure to state a claim. The anti-SLAPP statute requires a stay of discovery unless plaintiffs can show good cause for limited discovery, demonstrating that the discovery is needed on discrete topics to oppose the special motion to dismiss. DeShong seeks a stay of discovery until the motions are decided.

2. The purpose of the anti-SLAPP discovery limitation is to protect citizens from abusive and expensive discovery tactics. Although plaintiffs knew about the statutory discovery limit, they served Defendant DeShong with significant discovery. Plaintiffs' conduct is troubling, because plaintiffs neither opposed DeShong's special motion to dismiss on the ground that discovery was needed, nor moved to postpone a ruling on dismissal so that discovery could be had. Further, a cursory review of plaintiffs' discovery requests, which are attached to the Sperlein Affidavit, shows that those requests range far beyond the issues set forth in DeShong's motions to dismiss. Instead,

the discovery seeks information to support plaintiffs' bizarre conspiracy theories about the AIDS medical establishment, as well as a raft of intrusive inquiries that invade DeShong's privacy.

3. Moreover, statements by plaintiffs and their counsel have indicated that obtaining discovery about those conspiracy theories may have been the reason why this lawsuit was filed in the first place. For all of these reasons, the Court should grant a protective order staying plaintiffs' discovery pending a ruling on the pending motions to dismiss.

4. Before filing this motion, DeShong's counsel conferred with plaintiff's counsel. Defense counsel offered several options to address the concerns addressed in this memorandum while avoiding prejudice to plaintiffs from a delay in ruling on plaintiff's complaint, including a stipulation to hold discovery until the Court rules on the outstanding motions, jointly requesting a hearing on the outstanding motions, or holding discovery pending an informal inquiry to the Court requesting guidance based on the Court's expected timetable for ruling on the outstanding motions. Plaintiffs' counsel rejected all these proposals. Sperlein Affidavit ¶ 3.

Background

5. Plaintiffs Clark Baker and his Office for Scientific and Medical Justice ("OMSJ") have sued defendant Jeffrey Todd DeShong, alleging claims about DeShong's blog criticizing plaintiffs for their outlandish positions, maintained in the face of well-established science, that HIV is unconnected to AIDS. The suit alleged claims for defamation, albeit almost entirely for statements made well over a year before suit was brought even though the statute of limitations for libel claims is one year, and for statements that are not actionable either because they are opinion, or because they are true. Plaintiffs also alleged infringement and dilution of their trademark "HIV Innocence Group," on the theory that the domain name for the blog, "hivinnocencegrouptruth.com," accurately

identifies plaintiffs as the subject of the non-commercial criticism on the blog. In fact, every circuit to have addressed the question, including the Fifth Circuit, has held that a non-commercial web site may properly use a trademark in its domain name truthfully to identify the trademark holder as the subject of the speech on the site, without running afoul of the trademark laws.

6. DeShong has filed a special motion to dismiss the state-law claims under the Texas Citizens Participation Act, as well as seeking dismissal of all the claims, state-law and well as federal-law, pursuant to Rule 12(b). Those motions are fully briefed and are awaiting decision.

ARGUMENT

7. It is well established in the Fifth Circuit that when a defendant has moved to dismiss the complaint, the Court has discretion to bar discovery pending a ruling on the motion. *Landry v. Air Line Pilots Ass'n*, 892 F.2d 1238, 1270 (5th Cir. 1990); *Collins v. Bauer*, 2011 WL 3874910, at *1 (N.D. Tx. Aug. 31, 2011). As the Fifth Circuit said in *Corwin v. Marney, Orton Investments*, 843 F.2d 194 (5th Cir. 1988), "It would be wasteful to allow discovery on all issues raised in a broad complaint when, for example, the case will not reach trial because of the expiration of a limitations period." *Id.* at 200. That reasoning is precisely applicable in this case where the statute of limitations is one reason for dismissal.

8. Indeed, when the case is subject to dismissal pursuant to a state anti-SLAPP law, the statute's mandatory stay of discovery pending disposition of the special motion dismiss **requires** deferral of needless discovery, rather than only **permitting** a stay. TEX. CIV. PRAC. & REM. CODE § 27.003(c). Such discovery-limiting provisions apply in federal court under the *Erie* doctrine. *Godin v. Schencks*, 629 F.3d 79, 88-90 (1st Cir. 2010). *See also Henry v. Lake Charles Am. Press,* 566 F.3d 164, 170 (5th Cir. 2009) (citing discovery-limiting provision of Louisiana anti-SLAPP

statute before holding that the statute applies in federal court under *Erie*); *Louisiana Crisis Assistance Ctr.*, 827 F. Supp. 2d 668, 674-76 (E.D. La. 2011), *order vacated on other grounds*, 878 F. Supp. 2d 662 (E.D. La. 2012). In responding to DeShong's special motion to dismiss the state claims, plaintiffs did not deny that the Texas Citizens Participation Act applies to state-law claims brought in federal court.[1]

9. One circuit, the Ninth, has declined to apply discovery-limiting provisions of state anti-SLAPP statutes under *Erie* on the theory that such provisions conflict with Rule 56(d), which authorizes a trial court to defer ruling on a motion for summary judgment to permit discovery. *Metabolife Int'l v. Wornick*, 264 F.3d 832, 845-847 (9th Cir. 2001) (court cited Rule 56(f), but the cited provisions are now in Rule 56(d) instead). However, the Ninth Circuit's concerns do not apply in this case. Like Rule 56(d), anti-SLAPP laws generally authorize discovery relevant to the dispositive motion on a showing of good cause. *USANA Health Sciences v. Minkow*, 2008 WL 619287, at *2 (D. Utah Mar. 4, 2008); *Hoyt v. Goodman*, 2011 WL 6151511, at *7 (D. Minn. Dec. 12, 2011). In fact, Section 27.006(b) of the Texas Citizens Participation Act explicitly allows a plaintiff to seek "specified and limited discovery relevant to the motion" upon a showing of good cause.

10. Similarly, the Fifth Circuit, like other circuits, has held that Rule 56(d) places the burden on a party opposing summary judgment to file an affidavit or similar declaration making a proper showing that discovery is **needed** before summary judgment may be considered. *Access Telecom v. MCI Telecomm. Corp.*, 197 F.3d 694, 719 (5th Cir. 1999); *Nieves-Romero v. United States*, 715

[1]After DeShong's anti-SLAPP motion was filed, a federal court in Texas upheld the application of the Citizens Participation Act in a diversity action under the *Erie* doctrine. *Culbertson v. Lykos*, 2013 WL 4875069 (S.D. Tex. Sept. 11, 2013).

F.3d 375, 381-382 (1st Cir. 2013). To make a proper showing, the party seeking discovery must establish "why he needs additional discovery and how the additional discovery will create a genuine issue of material fact." *Krim v. BancTexas Group*, 989 F.2d 1435, 1442 (5th Cir. 1993). Under Rule 56, as under the anti-SLAPP laws, discovery may be denied "when the record shows that the requested discovery is not likely to produce the facts needed by the plaintiff to withstand a motion for summary judgment." *Williamson v. U.S. Dep't of Agriculture*, 815 F.2d 368, 382-383 (5th Cir. 1987). *See also International Shortstop v. Rally's Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991).

11. Even in the Ninth Circuit, discovery is denied when a motion to dismiss under an anti-SLAPP law can be granted applying a 12(b)(6) standard. *Foley v. Pont*, 2012 WL 2503074, at *4-*5 (D. Nev. June 27, 2012); *Moser v. Triarc Companies,* 2007 WL 3026425, at *2-*3 (S.D. Cal. Oct. 16, 2007). *See also Z.F. v. Ripon Unified Sch. Dist.,* 482 Fed. App'x 239, 241 (9th Cir. 2012) (to the extent that an anti-SLAPP motion is based on the complaint and documents properly considered under Rule 12, Rule 56 concerns do not apply). If the SLAPP dismissal motion is based on affidavits, plaintiff still cannot obtain discovery unless he shows that the discovery is needed to address the issues on which the motion turns. *Price v. Stossel*, 590 F. Supp.2d 1262, 1271 (C.D. Cal. 2008), *rev'd on other grounds,* 620 F.3d 992 (9th Cir. 2010). When the plaintiffs seek wide open discovery, however, the request for discovery may be denied. *A & B Asphalt v. Humbert Asphalt*, 2013 WL 3245751, at *2 (D. Or. June 26, 2013)

12. Federal procedural rules and anti-SLAPP rules are similar in another important respect. Although the Federal Rules authorize wide-ranging discovery from the outset of a case, policies that apply to specific kinds of litigation sometimes limit discovery when the burdens of litigation are deemed particularly intrusive. Thus, courts regularly impose limits on discovery pending the

outcome of early dispositive motions under the doctrine of qualified immunity, *Barrie v. Intervoice-Brite*, *Inc.*, 397 F3d 249, 256 (5th Cir. 2005), *on rehearing*, 409 F.3d 653 (5th Cir. 2005), or in securities litigation governed by the Private Securities Litigation Reform Act. *Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003). *Cf.* N. D. Tex. Loc. R. 10.2(c) (limiting merits discovery until discovery relevant to class certification is completed). Similarly, the State of Texas, whose substantive rights plaintiffs seek to enforce in this case, has determined that lawsuits attacking speech on matters of public concern should not proceed unless plaintiffs can present enough clear and specific evidence to support their claims at the outset of the litigation. TEX. CIV. PRAC. & REM. CODE § 27.005(c). "A stay of discovery is a crucial part of a defendant's relief because SLAPP lawsuits are purposely filed 'to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned.'" *Foley v. Pont*, 2012 WL 2503074, at *4 (D. Nev. June 27, 2012). Plaintiffs should not be able to evade that substantive protection by bringing suit in federal rather than state court; rather, the federal courts should reflect Texas' policy choice to protect citizens who speak on issues of public concern, just as they protect public officials and securities issuers based on similar policy choices about which classes of defendants need protection against the burdens of litigating particular kinds of claims.

13. The reasoning behind the policy of holding discovery pending the ruling on an anti-SLAPP motion is particularly relevant here, where plaintiffs appear to have significant resources and the defendant is a non-commercial blogger with limited means. It would be fundamentally unfair to require DeShong to respond to discovery requests relating to claims that may be dismissed in the very near future.

14. Here, plaintiffs have opposed both the special motion to dismiss under the Citizens

Participation Act and the motion to dismiss for lack of jurisdiction and failure to state a claim, but they did not, by analogy to a Rule 56 motion, avail themselves of their Rule 56(d) remedy by arguing that they need to discovery to oppose dismissal. Indeed, review of the discovery requests themselves show requests for information that have no apparent relationship to plaintiffs' grounds for opposing dismissal or, indeed, to plaintiffs' legal claims. Surely, for example, plaintiffs can respond to the pending motions to dismiss without receiving four years of DeShong's tax returns, Document Request No. 9, five years of DeShong's bank records, Document Request No. 7, email records and telephone records, Document Request Nos. 5-6 and 8, and information about DeShong's employment. Document Request No. 16. Similarly, plaintiffs can respond (indeed have responded) to the pending motions to dismiss without obtaining discovery regarding DeShong's associations within the HIV/AIDS community and regarding other individuals that host, comment, or visit websites, when those associations and individuals are wholly unrelated to a single claim in this litigation. *See*, *e.g.*, Admission Requests 1-24; Document Requests Nos. 1-4, 21-28.

15. The breadth of plaintiffs' discovery requests shows the harassing nature of the litigation. Even if such discovery could be justified on the merits, discovery does not expire until December 5, 2014. If any part of this litigation survives the dispositive motions, there will be ample time for discovery.[2]

16. Indeed, extra-judicial statements by plaintiffs and their counsel suggest that obtaining discovery in support of plaintiffs' conspiracy theories about the "AIDS establishment" may well have

[2]However, denial of an anti-SLAPP motion, or even a failure to rule on an anti-SLAPP motion within thirty days of a hearing on an anti-SLAPP motion, is subject to an immediate interlocutory appeal. Section 27.008. The Fifth Circuit has upheld appellate jurisdiction over anti-SLAPP appeals. *Lake Charles Am. Press,* 566 F.3d at 169-181.

been the reason why plaintiffs filed this lawsuit. For example, in a series of interviews, Baker has proclaimed his frustration about the unwillingness of leading scientific researchers to answer his questions, and his desire to force "Robert Gallo, [Anthony] Fauci, or any of these leading global HIV experts to testify on the stand." DeShong Affidavit ¶ 3. Baker claims to have created OMSJ to try to get sufficient involvement "in related criminal cases so that we can compel . . . HIV expert witnesses to testify under oath." *Id.* ¶ 2. In another interview, Baker said that, although he has occasionally managed to get a state court subpoena issued to Dr. Gallo, the National Institutes of Health had refused to allow Gallo to appear, and that he had learned the lesson that "our future subpoenas to them will be Federal Subpoenas, [because] federal courts don't let the NIH ignore such things." *Id.* ¶ 4. Indeed, in a telephone conversation with DeShong after the UDRP panelist rejected Baker's trademark claim, but before he filed this lawsuit, Baker warned DeShong that he was going to have to sue DeShong because that was how Baker was going to get to force Dr. Gallo to sit for a deposition. *Id.* ¶ 5. And, during a meet-and-confer with defendant's local counsel, Neal Hoffman, plaintiff's lead counsel, Mark Weitz, described the discovery that he planned to conduct in support of the contention that DeShong has some sort of relationship with Dr. Gallo and other pillars of the scientific community who have developed medications to deal with the scourge of AIDS. Hoffman Affidavit ¶¶ 4-5. Notably, the discovery requests include several paragraphs specifically related to these scientists. Hoffman Affidavit ¶ 6; Admission Requests ¶¶ 1-24; Document Requests Nos. ¶¶ 21-28.

17. Accordingly, both as a matter of law and as a matter of discretion, the Court should grant a protective order quashing plaintiffs written discovery requests, without prejudice subject to a proper motion for leave to pursue discovery based on a showing of good cause as provided by law.

CONCLUSION

18. The motion for a protective order should be granted.

Respectfully submitted,

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