

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

HENRY D. MCMASTER, in his official)
capacity as the SECURITIES)
COMMISSIONER for the State of)
South Carolina)

Civil Action No.: 2007-CP-40-3116

RICHLAND COUNTY
FILED
2007 AUG 15 PM 2:56
DANIELA A. SCOTT
C.C.C. & G.S.

Plaintiff,

-vs-

ORDER

Capital Consortium Group, LLC; 3 Hebrew)
Boys, LLC; Tony Pough a/k/a Tony)
Bernard Pough; Tim McQueen a/k/a)
Timothy McQueen; Joseph Brunson;)
a/k/a Joseph B. Brunson; Daniel)
Development Group, LLC; First)
Citizens Bank and Trust Co., Inc.,)
Defendants.)

This matter came before the Court on a Motion to Stay heard on July 20, 2007. Present representing the Plaintiff were Warren V. Ganjehsani, Tracy A. Meyers and Thomas Parkin Hunter. Representing Capital Consortium Group (“Consortium Group”); 3 Hebrew Boys (“3 Boys”); Tony Pough a/k/a Tony Bernard Pough (“Tony Pough”); Tim McQueen a/k/a Timothy McQueen (“Tim McQueen”); Joseph Brunson a/k/a Joseph B. Brunson (“Joseph Brunson”) was Hemphill P. Pride, II and representing First Citizens Bank and Trust Co., Inc. was Stanley H. McGuffin. Thomas Parkin Hunter submitted a memorandum in opposition to the Motion to Stay on behalf of the Plaintiff and Hemphill P. Pride, II submitted a memorandum in support of the Motion to Stay on behalf of Defendants Consortium Group, 3 Boys, Tony Pough, Tim McQueen and Joseph Brunson. First Citizens Bank and Trust Co., Inc. is simply a stakeholder that has deposit accounts titled in the name of certain of the Defendants and no memorandum was submitted on its behalf. For the reasons set forth below, this court denies the Defendants’ Motion to Stay.

BACKGROUND

This civil action was filed by the Plaintiff on or about May 21, 2007. In the complaint, it is alleged that the Defendants violated the South Carolina Uniform Securities Act of 2005, by selling

and #1

unregistered securities and by depositing the proceeds of such sales into several accounts with Defendant, First Citizens Bank. Additionally, it is alleged that the Defendants made fraudulent or misleading statements to investors. The Plaintiff seeks to enjoin the Defendants from violations and to enforce compliance with the Securities Act, to appoint a receiver for the assets and other relief requested in the Complaint.

On June 15, 2007, the Defendants Tony Pough, Tim McQueen and Joseph Brunson were arrested by agents of the South Carolina Law Enforcement Division for violations of S.C. Code § 35-1-301 (Rev. 1987). The alleged actions of the Defendants that give rise to the criminal case are the same alleged actions that give rise to the civil case. The Defendants seek to stay the current civil action until the pending criminal investigation and proceeding concludes. The Plaintiff objects to the Defendant's Motion to Stay.

ANALYSIS

The granting or refusing of a stay is discretionary and should be exercised with caution after balancing competing interest. Carolina Water Service Inc. v. Lexington County Joint Municipal Water and Sewer Commission, 367 SC 141, 153, 625 S.E.2d 227, 233 (Ct. App. 2006).

The Defendants' memorandum states two main reasons that the Defendants are seeking a stay of the civil proceedings. The Defendants first argue that proceeding with the parallel civil and criminal cases makes this civil action duplicative and unnecessary. The Defendants cite no cases that stand for the proposition that a stay should be granted when there is pending parallel civil and criminal cases because of the fact that proceeding with the both cases would be duplicative in nature or unnecessary. In addition, the mere fact that proceeding with the civil case after the conclusion of the criminal case may make it easier on any of the parties or that any of parties' case may be furthered or enhanced does not warrant the staying of the civil proceedings. This court does not find that a stay should be ordered based on the mere assertion that proceeding with the civil case is duplicative and unnecessary.

The Defendants next argue that proceeding with the parallel civil and criminal cases makes the Defendants' participation in discovery and other aspects of their defense impossible, impracticable, and inherently unfair. The Defendants assert that they may use the constitutional privilege against self-incrimination in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and that by the Defendants asserting their Fifth Amendment rights, the

ad
#2

normal full development of facts through the discovery process will be hindered and justice would not be served.

The limited liability company defendants, consisting of 3 Hebrew Boys, Consortium Group and Daniel Development, do not have a Fifth Amendment privilege to invoke. The United States Supreme Court in U.S. v. White stated, “[t]he privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.” U.S. v. White, 322 U.S. 694, 699-700, 64 S.Ct. 1248, 1251-52 (1944). It is clear that the limited liability company defendants cannot assert a Fifth Amendment privilege and any discovery process will not be hindered by proceeding against the limited liability company defendants.

While the individual defendants, consisting of Tony Pough, Tim McQueen, and Joseph Brunson, may assert their Fifth Amendment rights, substantial case law concludes that a Defendant’s assertion of Fifth Amendment rights does not warrant a stay of the civil proceedings while the related criminal investigation and proceeding concludes. The South Carolina Court of Appeals in South Carolina Department of Social Services v. Walter held that the Family Court’s refusal to hold the action in abeyance did not deprive third individual of his constitutional rights. S.C. Dep’t of Social Services v. Walter, 369 S.C. 384, 631 S.E.2d 913 (Ct. App. 2006). Cases from other jurisdictions hold the same. See, United States v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed 2d 1 (1970) (holding that simultaneous civil and related criminal proceedings do not constitute “unfairness and want of consideration of justice” requiring reversal of a criminal conviction); Peiffer v. Lebanon Sch. Dist., 848 F.2d 44, 46 (3rd Cir. 1988) (holding there was no constitutional requirement that the administrative hearing be postponed pending disposition of the criminal charges); Wimmer v. Lehman, 705 F.2d 1402, 1406-07 (4th Cir. 1983), cert. denied, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed.2d 681 (1983) (same); Hoover v. Knight, 678 F.2d 578, 581 (5th Cir. 1982) (“Many cases have held that parallel criminal and civil trials or investigations do not raise questions of constitutional magnitude with respect to the privilege against self-incrimination.”); Diebold v. Civil Serv. Comm’n of St. Louis County, 611 F.2d 697, 700-01 (8th Cir. 1979) (holding that the Fifth Amendment presents no obstacle to parallel criminal and administrative proceedings); Arthurs v. Stern, 540 F.2d 477, 478-80 (1st Cir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978) (holding that a physician accused of writing illegal prescriptions was not entitled, by virtue of his right to be free of coerced self-incrimination, to continuance of disciplinary proceedings

and #3

until the criminal charges arising out of the same conduct were resolved); Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978) (holding that the fact that parallel proceedings force a defendant to make a difficult choice as to whether to testify does not of itself violate the constitution); U.S. v. Rubinson, 543 F.2d 951, 961-62 (2nd Cir. 1976), cert. denied, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976) (holding that the Fifth Amendment right against self-incrimination was not prejudiced by a prior administrative proceeding based on the same facts); State ex rel. Okla. Bar Ass'n v. Gasaway, 863 P.2d 1189, 1195-98 (Okla. 1993) (holding a continuance of lawyer disciplinary proceedings pending resolution of related criminal proceedings is not constitutionally required); Giampa v. Ill. Civil Serv. Comm'n, 89 Ill. App.3d 606, 44 Ill. Dec. 744, 411 N.E.2d 1110, 1116 (Ill. App. 1980) (holding there is nothing inherently repugnant to due process in requiring a party to choose between giving testimony at a disciplinary hearing and keeping silent, even though giving testimony at the hearing may damage his criminal case and keeping silent will most likely lead to loss of his employment). This court concludes that a Stay is not legally required and that allowing the civil case to continue does not violate any of the Defendants' constitutional rights.

The Defendants do not cite in their memorandum any reason that simultaneously proceeding with the civil case and the criminal case will make participation in discovery and other aspects of their defense impossible, impracticable and inherently unfair except for the assertion that the Defendants' Fifth Amendment rights would not allow for a full and fair disclosure between the parties. In none of the cases cited above did the courts grant a stay where the possibility of hindrance to the discovery process existed due to potential Fifth Amendment assertions by the Defendants. This court does not find that proceeding with the civil case while criminal charges arising out of the same conduct are pending makes the Defendants' participation in discovery and other aspects of their defense impossible, impracticable and inherently unfair.

ed
84

ORDER

Based upon the foregoing, **IT IS ORDERED** that the Defendant's Motion to Stay is denied.
AND IT IS SO ORDERED.



ALISON RENEE LEE
Circuit Court Judge

Columbia, South Carolina
August 15, 2007

