

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

MICHAEL E. MANN, PH.D.,)	
)	Case No. 2012 CA 8263 B
Plaintiff,)	
)	Judge Frederick H. Weisberg
v.)	
)	
NATIONAL REVIEW, INC. <i>et. al.</i> ,)	
)	
Defendants.)	
)	

ORDER

This matter is before the court on Defendants’ Motion for a Protective Order to Enforce the Stay of Discovery Proceedings pursuant to D.C. Code § 16-5502(c). Given the procedural posture of the case, the court must first address whether Defendants’ interlocutory appeal from the court’s denial of their motions to dismiss divests the court of jurisdiction to grant the motion.

On July 10, 2013, Plaintiff filed his amended complaint. Thereafter, on July 19, 2013, the court (Combs Greene, J.) entered orders denying the Defendants’ motions to dismiss the original complaint under the Anti-SLAPP Act, D.C. Code §§ 16-5501–5505, and lifting the accompanying stay of discovery. On July 24, Defendants filed Anti-SLAPP Act motions to dismiss the amended complaint. In the interim, Plaintiff served Defendants with discovery requests. On August 22, Defendants filed a motion for a protective order staying discovery, arguing that their renewed Anti-SLAPP Act motions to dismiss the amended complaint triggered another automatic stay of discovery. On September 12, the court declined to certify for interlocutory appeal the July 19 orders denying the motions to dismiss. D.C. Code § 11-721(d).

Nonetheless, on September 17, Defendants appealed the court's July 19 orders to the Court of Appeals without a section 11-721(d) certification.¹

I. This Court's Jurisdiction During a Collateral Order Appeal

The general rule is that the filing of a notice of appeal “confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). However, for interlocutory appeals, in particular those under the collateral order doctrine, “the fact that the issues on appeal are separate from the merits of the case may mean that the pendency of the appeal does not oust the district court’s jurisdiction to proceed with the case.” 16A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3949.1, at 63 (4th ed. 2008). Indeed, one rationale for the doctrine is that collateral orders are immediately appealable precisely because they are ancillary to the central issues involved in the litigation. On the other hand, sometimes the very issue being appealed is the defendant’s right not to be sued, as is true in cases involving a claim of absolute or qualified immunity.² In such cases, there may be added reason for the trial court to stay its hand until the appellate court can decide whether the suit can proceed.

The Seventh Circuit addressed this issue in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (Easterbrook, J.). In that case, defendants appealed from a district court order denying

¹ It is not clear to the court why the appeal is not moot or, for that matter, why the motions to dismiss the complaint were not moot, because Plaintiff filed his amended complaint before Judge Combs Greene entered her order dismissing the original complaint.

² The protection afforded defendants under the Anti-SLAPP Act is technically not an absolute or qualified immunity because it is clear that speech defaming a public figure with knowledge of its falsity or reckless disregard of whether it is true or false is not protected by the First Amendment. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). Rather, the Anti-SLAPP Act places an extra burden on a defamation plaintiff to show the strength of his case **before** requiring the defendant to proceed with discovery, so as to give the widest possible berth to debate on issues of public interest, the protection of which is at the core of the First Amendment. However, for the purposes of determining this court’s power to act during the pendency of Defendants’ interlocutory appeal, the Act’s protections can be treated as analogous to a claim of qualified immunity.

summary judgment based on a claim of qualified immunity and from an order refusing to postpone the trial until the appeal was decided. The Seventh Circuit held that, with few exceptions, the trial court ordinarily should not act on the case during the pendency of a non-frivolous interlocutory appeal raising the issue of whether the defendant enjoys an absolute or qualified immunity from suit. *Id.* at 1338-39. “It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one. . . . It follows that a proper [qualified immunity] appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial.” *Id.* at 1338 (internal quotations omitted).

In this case, Defendants have appealed from the court’s denial of their special motions to dismiss under the Anti-SLAPP Act. D.C. Code § 16-5502. The purpose of that statute is to insulate certain defamation defendants from the burdens of discovery and trial. It is unclear whether the collateral order doctrine permits the appeals in this case. *See Newmyer v. Sidwell Friends School*, 2012 D.C. App. LEXIS 733, No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished). Even if the Court of Appeals ultimately concludes that orders denying Anti-SLAPP Act special motions to dismiss are not immediately appealable, the question remains open and Defendants’ appeals are not plainly frivolous or taken solely for purposes of delay. *See Apostol*, 870 F.2d at 1339; *Horton v. United States*, 591 A.2d 1280, 1283 n.7 (D.C. 1991). The court therefore concludes that discovery and related proceedings in the trial court should be stayed to await a ruling by the Court of Appeals on Defendants’ pending interlocutory appeals.

II. Defendants’ Motion for a Protective Order

Because the court has concluded that a stay of all proceedings in the trial court is appropriate, the separate question of whether to stay discovery pursuant to D.C. Code § 16-5502 (c)(1) is largely academic. If the Court of Appeals takes jurisdiction and reverses, there will be

no discovery except, perhaps, on the one new defamation claim that was added in the amended complaint. If the Court of Appeals denies jurisdiction or affirms,³ the case will proceed in the trial court. In that event, the court will rule promptly on the pending motions to dismiss and, if the motions are denied, another interlocutory appeal would be unlikely and discovery would proceed. A separate stay of discovery to cover the period between a ruling in Plaintiff's favor in the Court of Appeals and a ruling by this court on the special motions to dismiss the amended complaint would protect the Defendants temporarily from the burden of discovery while doing little harm to the Plaintiff's legitimate right to move his case forward if it is determined that he has a right to proceed.

Notwithstanding the pending appeals, the trial court is not prohibited from resolving ancillary matters that are not inextricably intertwined with the issues on appeal if it is more efficient to do so. *See Stebbins v. Stebbins*, 673 A.2d 184, 189 (D.C. 1996) (“[T]he issue is whether it is judicially efficient for the trial court to take a particular action in the face of the particular matter pending before the appellate court.”). Ruling on the section 16-5502(c)(1) motion to stay discovery will not affect the issues on appeal. As noted, discovery will be stayed in any event until the appeal is decided; and, if the Court of Appeals rules that the case should proceed, a further stay long enough for this court to rule on the second round of special motions to dismiss will not add any appreciable delay.

The question presented by Defendants' section 16-5502(c)(1) motion to stay discovery is whether the automatic stay provisions of the statute apply to the entire amended complaint or merely to the one new count Plaintiff added to those he plead in the original complaint. While the court presumably could decide that "undercard" question even as the "main event" is concurrently before the Court of Appeals, it is not significantly more efficient to decide it now

³ Alternatively, the Court could dismiss the appeal as moot. See note 1, *supra*.

rather than later; and, depending on the decision of the appellate court, it may be unnecessary to decide it at all.

Accordingly, it is this **2nd** day of **October, 2013**,

ORDERED that all other proceedings in this case are stayed pending the decision of the District of Columbia Court of Appeals on the Defendants' interlocutory appeals.

A handwritten signature in black ink, appearing to read "Frederick H. Weisberg". The signature is written in a cursive style with a large initial "F".

Judge Frederick H. Weisberg

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