



IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

2015 SEP 25 PM 2:42

GRAHAM B. SPANIER

Plaintiff,

v.

LOUIS J. FREEH, and
FREEH SPORKIN & SULLIVAN, LLP,

Defendants.

) Docket No. 2013-2707
)
) Type of Case: Defamation
)
) Type of Pleading: Supplemental
) Submission in Support of Motion to
) Modify the Stay and Motion to Join
) Additional Parties
)
) Filed on behalf of: Plaintiff
)
) Counsel of record for this party:

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motions and will stand on his March 18, 2015 Memorandum of Law in Support of Motion to Modify the Stay and March 18, 2015 Memorandum of Law in Support of Motion to Join Additional Parties as filed.¹ Dr. Spanier files this Supplemental Submission only to address and bring to the Court's attention several developments that have occurred in the interim since the March 18 motions and memoranda were filed.

First, at the time that Plaintiff filed his March 18, 2015 Motion to Join Additional Parties and Memorandum in Support of his Motion to Join Additional Parties, Plaintiff did not know of putative defendant Pennsylvania State University's ("PSU") position on joinder. PSU has since submitted a letter to the Court indicating that it opposes joinder. (July 29, 2015 Letter D. Booker to Hon. R. Eby) (Ex. A.) PSU argues that the contractual non-disparagement claims against PSU in the Proposed Complaint should not be joined with the defamation claims against Defendants Louis J. Freeh and Freeh Sporkin & Sullivan, LLP ("FSS") because the contractual claims will not require proof of actual malice, and because PSU intends to assert contractual defenses to these claims. (*See generally id.*)

However, these arguments do not really speak to the standard for joinder of defendants in Pennsylvania, which permits joinder of claims "in respect of or

¹ Hard copies of these briefs are being provided to the Court contemporaneously with this filing as required by the Court's September 15 Order.

arising out of the same transaction, occurrence, or series of occurrences if *any* common question of law *or* fact affecting the liabilities of all such persons will arise in the action.” Pa.R.C.P. No. 2229(b) (emphasis added); *see also* Pa.R.C.P. No. 2232(c). Plaintiff’s Memorandum in Support of his Motion to Join Additional Parties demonstrates in great detail how the claims against Freeh/FSS and PSU indisputably arise out of the same series of occurrences — indeed, many of the same statements are the subject of respective claims against both PSU and Freeh/FSS — how there will be a tremendous amount of factual overlap between these claims, and how the legal elements of the defamation and contract claims overlap as well. (See Mar. 18, 2015 Mem. of Law in Supp. of Mot. for Leave to Join Additional Parties at 4-18). All of the elements required for joinder of parties are satisfied here. PSU’s arguments that the defamation claims contain an additional legal element not present in the contract claims (actual malice), and that PSU plans to assert preliminary defenses to the contract claims, are irrelevant to the joinder analysis. At bottom, PSU’s letter opposing joinder fails to offer any meaningful reason why joinder is not entirely appropriate here.

Second, Plaintiff notes that Defendants Freeh and FSS have effectively conceded that joinder of the claims against PSU and Freeh/FSS is appropriate. As the Court is aware, Defendants Freeh and FSS successfully argued for recusal of Judge Grine and appointment of an out of county judge on the grounds that the

claims against Freeh/FSS and the putative claims against PSU all arise out of the same series of occurrences and factual background, and that the judges in Centre County had historically recused themselves from cases arising out of the “Sandusky/PSU” matter. (*See generally* Apr. 10, 2015 Defs’ Mem. in Supp. of Mot. for Assignment of an Out of County Judge.) Specifically, Defendants argued “Plaintiff’s Proposed Complaint *arises out of* the Gerald A. ‘Jerry’ Sandusky child abuse scandal (the ‘Sandusky/PSU matter’),” and that “Plaintiff’s proposed 139-page, 432-paragraph Complaint asserts purported claims that *arise out of* and touch upon virtually every aspect of the Sandusky/PSU matter.” (*Id.* at 1 (emphasis added).) Defendants have further argued that “[t]he *claims and defenses in this case will implicate* (i) the crimes committed by Jerry Sandusky, (ii) who knew of those crimes, and when, and (iii) *the conduct and findings of the Special Investigating Task Force commissioned by Penn State* to look into those subjects.” (*Id.* at 12 (emphasis added).) In short, in successfully arguing that this case could not be heard by a Centre County judge, Defendants repeatedly and emphatically emphasized that the claims against Freeh/FSS and the putative claims against PSU all arise out of the same series of occurrences and the same operative facts. Defendants cannot now be heard to argue that they do not.

Third, Plaintiff wishes to briefly address the questions posed by the Court during the September 15, 2015 hearing regarding Plaintiff’s proposed sequencing

of discovery. To be clear, Plaintiff is not asking for any “lopsided” discovery procedures or “one-sided” discovery that would shield Dr. Spanier from discovery. Rather, Plaintiff submits that two-way party- and non-party discovery should commence immediately upon the new complaint being filed and that, if the parties work together cooperatively in the manner pledged by both counsel at the hearing, virtually all discovery can be conducted without implicating the limited areas where a continued stay of discovery (or some sequencing of discovery) is necessary or appropriate.

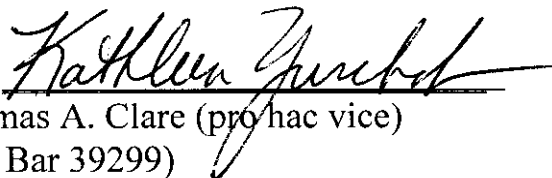
There are only three areas where Plaintiff presently contemplates a continuation of the previously entered stay or sequencing may be necessary: (1) discovery directed to third-parties who may wish to exercise their Fifth Amendment rights; (2) scheduling accommodations made necessary by proceedings or trial in the criminal proceedings; and (3) sequencing of document and deposition discovery to allow Dr. Spanier to obtain documents in Defendants’ exclusive possession before depositions are taken.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff’s Memorandum of Law in Support of his Motion to Join Additional Parties and Memorandum of Law in Support of his Motion to Modify the Stay, Plaintiff requests that the Court grant Dr. Spanier leave to file his Proposed Complaint, and

that the Court lift the stay currently in place to allow this action to proceed to discovery.

Dated: September 25, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the below counsel of record on September 25, 2015.

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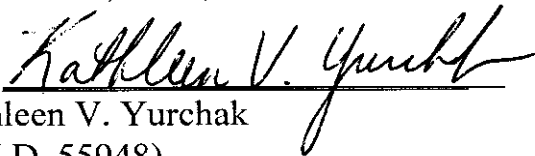
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EXHIBIT A



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July 29, 2015

Via UPS Overnight

Honorable Robert J. Eby
Lebanon County Court of Common Pleas
c/o Leslie Fillak
Deputy Court Administrator
District Court Administration
Room 311, Municipal Building
400 South Eighth Street
Lebanon, PA 17042

Re: Spanier v. Freeh, et al.
Centre County C.C.P., No. 2013-2707

Dear Judge Eby:

Our firm represents The Pennsylvania State University ("Penn State"). Penn State is not a party and does not believe it should become a party to this action. We are aware, however, that the Plaintiff has filed a motion for leave to join Penn State as a defendant, and I am therefore writing, at a time consistent with Your Honor's Order of June 30, to provide Penn State's view on the proposed joinder.

The proposed claims against Penn State are all breach of contract claims. They allege that Penn State has in various ways breached its obligations under the November, 2011 Separation Agreement between Plaintiff and Penn State, which set forth the terms on which Plaintiff's position as Penn State's President was terminated. These breach of contract claims differ significantly from the tort claims brought against the Freeh defendants.

Whether or not the Court grants Plaintiff's motion to modify or lift the stay that Plaintiff himself requested in 2013, Penn State believes that the Court should exercise its discretion under Pa. R.C.P. 2232(c) and require Plaintiff's breach of contract claims against Penn State to be brought, if at all, in a separate action. The tort claims against the Freeh defendants and the contract claims against Penn State do not, as Plaintiff contends, "all arise from the same series of transactions or occurrences" and judicial economy would not be served by aggregating the various claims in one lawsuit.

The claims against the Freeh defendants are primarily defamation claims, governed by a set of unique legal principles which differ fundamentally from the legal issues in a breach of contract action. The claims against the Freeh defendants all turn on whether statements they made were made with "actual malice" or other tortious intent. These claims will require delving into what the Freeh defendants allegedly knew and whether they acted with reckless disregard for the truth. Adjudication of the proposed breach of contract claims against Penn State on the other hand, would turn largely on the

application and/or interpretation of contract language. Plaintiff, for example, argues that Penn State's Trustees were required under the contract to refrain from making "any negative comments" about Plaintiff. But the agreement says no such thing. Rather, it says that Penn State will "use reasonable efforts to cause [its]...Trustees" not to make such comments. The contract also specifies that the restraints on the making of "negative comments" by Penn State or its trustees are entirely inapplicable where such comments are required "to comply with legal obligation" or constitute "truthful information in connection with ongoing or forthcoming investigations." Further, the language Plaintiff relies on to allege a breach does not apply to statements by third parties such as the Freeh defendants.

Penn State anticipates that it would respond to Plaintiff's breach claims, wherever, and if, they may be brought, by filing preliminary objections based on these contract provisions, on grounds having nothing to do with the viability of the tort claims against the Freeh defendants. If such claims were to survive preliminary objections, we expect Penn State will deny and dispute multiple factual and legal bases of Plaintiff's contract claims. Penn State's efforts with respect to the Trustees, the various "ongoing or forthcoming investigations" Penn State has faced, and the extent to which Plaintiff has received administrative support from Penn State over the past four years all involve legal and factual matters and discovery separate and apart from the Freeh defendants' statements and their state of mind. Moreover, if Penn State were to be added as a party, it would be required to consider all reasonable defenses and responsive pleadings. These could include, based on further analysis and due diligence, claims and defenses that the Separation Agreement is unenforceable because of Plaintiff's conduct relating to duties he owed the University and acts and omissions in connection with the Separation Agreement itself. Facts relevant to those issues would have little or no overlap with the issues in the pending defamation claims against the Freeh defendants.

To the extent Plaintiff seeks to conflate the claims against the Freeh defendants and those against Penn State by purporting to make Penn State liable for statements made in the Freeh report (*See* Counts VI and VII of the proposed Complaint), that effort has no merit. Penn State retained Judge Freeh and his law firm as counsel to do an independent investigation. Statements by the Freeh defendants in their Report or in press conferences do not fall within the plain meaning of the language in the Separation Agreement on which Plaintiff relies in alleging a breach by Penn State. And to the extent Plaintiff is now seeking to hold Penn State liable for publishing in 2012 statements made by the Freeh defendants, such claims are simply a repackaging of defamation claims barred by the one-year defamation statute of limitations.


Rule 2232 gives the Court discretion as to whether a single plaintiff's claims against different parties raising different causes of action, and different responsive pleadings should be allowed to proceed in a single lawsuit. Plaintiff would not be unfairly prejudiced by having to file a separate breach of contract action against Penn State. The proposed claims against Penn State -- coming almost

Honorable Robert J. Eby
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two years after Plaintiff decided to sue the Freeh defendants -- are sufficiently different in nature and in the proof required that the Court can, and should, exercise its discretion and require that any such claims, if Plaintiff chooses to bring them, be litigated in a separate action.

Respectfully,



Daniel I. Booker

DIB:lmh

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