

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,	)	Case No. 2016 09 3928
)	
Plaintiffs,	)	Judge James Brogan
)	
v.	)	<u>KNR DEFENDANTS’ MEMORANDUM IN</u>
	)	<u>OPPOSITION TO PLAINTIFFS’ NOTICE AND</u>
KISLING, NESTICO & REDICK, LLC, et al.,	)	<u>MOTION RE: THE NINTH DISTRICT’S</u>
	)	<u>DENIAL OF DEFENDANTS’ MOTION TO</u>
Defendants.	)	<u>STAY</u>

The KNR Defendants object to Plaintiffs’ Notice and Motion re: the Ninth District’s Denial of Defendants’ Motions to Stay for the same reasons set forth in their Motions to Stay filed on January 6, 2020, in the trial court, and on January 10, 2020 in the Ninth District Court of Appeals (Copy of Appellate Court filing attached as Exhibit A). For the sake of brevity, those arguments are incorporated by reference as if fully rewritten herein.

The Court previously indicated that it intended to address four issues during pendency of the appeal. KNR was not a party to the issue involving the *in camera* review of the deposition testimony of Julie Ghoubrial to determine if spousal immunity applied. Likewise, KNR is not the party who allegedly interacted with a represented party which is the subject of a second motion that the Court indicated it intended to address. The purpose of this filing is to object to the Court taking up (1) Plaintiff’s Motion to Compel Discovery of Defendants’ assets and net worth, and (2) Plaintiffs’ Motion for Sanctions related to the filing of counterclaims by KNR.

The issue of class certification is pending on appeal and Defendants’ financial records cannot be relevant absent class certification and a judgment. See, *KNR’s Memorandum in Opposition to Plaintiffs’ Motion to Compel Discovery of Defendants Assets and Net Worth* (May 13, 2019). Apparently agreeing with KNR’s position, the Court previously overruled the motion stating that such discovery was “premature prior to class certification.” *Magistrate’s Order* (June 7, 2019). “Discovery of Defendants’ assets and net worth shall be held in abeyance until after the Court rules upon the class certification issue.” *Id.* Given that class certification remains an

active issue in the Ninth District Court of Appeals, KNR submits that such discovery (and its cost) should not be permitted at this time as it would prove completely unnecessary if KNR prevails on appeal. As it relates to the issue of class certification, nothing has changed since June 7, 2019 – class certification remains a contested issue and there is no judgment against KNR that requires an examination of assets. See, e.g., *Non-Employees of Chateau Estates Resident Ass'n v. Chateau Estates, Ltd.*, 2006-Ohio-3742 (2nd Dist.), *Van-Am Ins. Co. v. Schiappa*, 132 Ohio App.3d 325, 332 (7th Dist. 1999).

Further, Plaintiffs presented no evidence that any assets were being “dissipated” to avoid attachment in the event Plaintiffs’ secured a judgment in excess of any insurance coverage. Plaintiffs’ counsel previously alleged – with no factual basis – that Mr. Nestico owned undisclosed companies in Canada forcing Mr. Nestico to incur costs and expenses to prove the fabricated allegations false. See, *KNR’s Memorandum in Opposition to Plaintiffs’ Motion to Compel Discovery on Defendants’ Assets and Net Worth* (May 13, 2019). Absent class certification and a judgment, there is no legitimate basis to proceed with this motion to compel during the pendency of the appeal.

Likewise, the Motion for Sanctions related to the counterclaims is premature because the issue of class certification is pending. KNR’s counterclaim was based, in part, on the allegation that the class claims were unfounded and frivolous and caused Defendants to incur substantial costs in defense. Thus, the outcome of the appeal is relevant to the inquiry. Defendants maintain that they had, and continue to have, a good faith basis to maintain those claims. Further, a hearing is required on this issue and the parties would necessarily desire to present witnesses and evidence. This would include the attendance of former Plaintiffs who abandoned their claims after the claims were demonstrated to be false from the outset. Current conditions do not permit such a hearing to fairly and/or reasonably take place given the limitations on personal attendance imposed by the COVID-19 outbreak.

Therefore, for the reasons stated herein, KNR requests that Plaintiffs’ Motion be denied.

Respectfully submitted,

/s/ James M. Popson

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Counsel for Defendants Kisling, Nestico &

Redick, LLC, Alberto R. Nestico, and Robert

Redick

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *KNR DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' NOTICE AND MOTION RE: THE NINTH DISTRICT'S DENIAL OF DEFENDANTS' MOTION TO STAY* was filed electronically with the Court on this 7th day of April, 2020. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson

James M. Popson (0072773)

**IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, et al.,

Plaintiffs-Appellees,

v.

KISLING, NESTICO & REDICK, LLC, et
al.,

Defendants-Appellants.

Case No. CA-29630

**DEFENDANTS-APPELLANTS' MOTION
TO STAY PENDING APPEAL**

Appellants, Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick (collectively, "KNR") move this Court pursuant to App.R. 7(A) for an Order staying any further proceedings in this matter pending appeal of the trial court's Order of December 17, 2019, granting Plaintiffs' Motion for Class Certification as it relates to two putative classes of Plaintiffs. Pursuant to App. R. 7(B), Appellants further request that bond be waived.

I. Relevant Procedure

On December 17, 2019, the trial court issued an order finding the claims of Plaintiffs-Appellees Reid, Norris, and Harbour against Defendants-Appellants KNR for fraud, breach of fiduciary duty, and unjust enrichment as it relates to the cost of medical care provided by Defendant Dr. Ghoubril were appropriate for class certification (Class A). The Court also found the claims of Plaintiffs Williams, Reid, Norris, and Harbour relating to investigation fees paid by Plaintiffs were appropriate for class certification (Class C). Class certification was denied on a third class related to narrative fees paid to Defendant Dr. Minas Floros (Class B).

Pursuant to statute, the granting of a motion for class certification is a final appealable order. R.C. 2505.02(B)(5). KNR filed a timely Notice of Appeal with the Clerk of Courts as set forth in App.R. 3 and App.R. 4. Pursuant to App.R. 7, a party seeking a stay of proceedings pending appeal is ordinarily required to initially seek such leave from the trial court. KNR sought a stay from the trial court by Motion filed on January 6, 2019. (Attached as Ex. A).

Exhibit A

Counsel for Plaintiffs-Appellees immediately informed the trial court of Plaintiffs-Appellees' consent to the requested Stay. (Ex. B, Correspondence of counsel dated January 6, 2019).

The trial court disregarded the stipulation of the parties and denied the Motion to Stay. (Attached as Ex. C). The trial court Order denying the motion for stay states "there are four specific issues this Court held in abeyance pending the ruling on class certification," and goes on to state the trial court's intention to adjudicate these issues despite (1) the parties' agreement that further action in the trial court should be stayed during the appeal; and, (2) the fact that the ruling on class certification will be the subject of additional ruling by this Court.

II. Request for Stay of Trial Court Proceedings Pending Appeal

Consistent with longstanding precedent, the Common Pleas Court and judges patently and unambiguously lack jurisdiction to proceed on all claims that are affected by an appeal. *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, at ¶ 18. Parties may seek a stay to prevent unnecessary litigation. See generally, *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54, 59, 538 (1989). A stay is appropriate where issues are pending on appeal that could affect the liabilities of the parties. *Dzina v. Dzina*, 2009-Ohio-136, (Ohio App. 8 Dist. Jan. 15, 2009).

With the limited exception of Plaintiffs' claims related to Defendant Dr. Floros, all claims in this case will be affected by the instant appeal. In the event a cross-appeal is filed by Plaintiffs, those claims will likewise be affected. The parties should not be put in a position to pursue or defend piecemeal issues in the trial court while the predominant issue of class certification is pending on appeal.

The trial court states there are at least four issues it wishes to adjudicate during the pendency of this appeal. Two of the issues relate to pending motions for sanctions and two relate to discovery issues. Any motion seeking sanctions has the potential to affect the liabilities of the parties. The issue related to Julie Ghoubrial's deposition (a non-party) is the subject of a separate appeal. Even if that appeal is resolved, the discovery of that information is necessarily

related to the instant class claim against Dr. Ghoubril, which is the subject of this appeal. The final issue relates to discovery of Defendants' assets which is not appropriate absent a finding of liability, See, e.g. *Non-Employees of Chateau Estates Resident Ass'n v. Chateau Estates, Ltd.*, 2006-Ohio-3742 (2nd Dist.), ¶ 9, *Van-Am Ins. Co. v. Schiappa*, 132 Ohio App.3d 325, 332 (7th Dist. 1999), and will certainly be unnecessary if the KNR prevails on appeal.

Finally, the trial the court claims that discovery in this case "was plagued by unprofessional gamesmanship and obstruction resulting in significant delays and subsequently non-production of relevant and discoverable materials," and further asserts that "no party should benefit from such behavior." The record demonstrates unequivocally that KNR has complied with all discovery requests in this case by either producing the requested information or lodging appropriate objections, such as in the dispute regarding production of financial records. Some of KNR's objections have been overruled by the trial court and others have been sustained. In either case, KNR has produced all required discovery pursuant to the Civil Rules.

Regardless, the granting or denial of a stay pending appeal should not be punitive in nature. The trial court's statement that certain parties "should not benefit from this behavior" suggests punitive intent in denying the motion. Punishment of litigants is not a factor identified by our Supreme Court in determining whether a stay of proceedings is appropriate on appeal. The purpose of a stay is to allow for orderly administration of the appeal and to protect all litigants from trial court rulings that could affect liability while an appeal is pending, and from incurring any unnecessary litigation expenses in the trial court or in connection with new appeals that could unnecessarily arise absent a stay.

Upon properly putting aside any punitive considerations associated with the consequences of granting or denying the requested stay, it should be apparent that prudence, judicial economy, and the interests of the parties weigh in favor of granting this unopposed Motion to Stay Pending Appeal.

III. Request for Waiver of Bond

The trial court's order denying the requested stay states, "Defendants remain free to seek a stay in the Court of Appeals upon the posting of an adequate supersedeas bond." The appellate rules do not require an Appellant to post a bond in order to seek a stay from the Court of Appeals. Pursuant to App.R. 7(B), this Court may condition a stay upon the filing of a bond or other security.

The purpose of a bond is to secure the appellee's right to collect on the judgment during the pendency of the appeal. *Mahoney v. Berea*, 33 Ohio App.3d 94, 96, 514 N.E.2d 889 (8th Dist.1986). R.C. 2505.14 states:

A supersedeas bond shall be payable to the appellee or otherwise, as may be directed by the court, when the conflicting interests of the parties require it, and shall be subject to the condition that the appellant shall abide and perform the order, judgment, or decree of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of the appeal and subject to any other conditions that the court provides. When the final order, judgment, or decree appealed is for the payment of money, the bond may provide that, if the final order, judgment, or decree is not paid upon final affirmance, it may be entered against the sureties on the bond.

A supersedeas bond "protects a successful trial court plaintiff from damages that result from the appeal being taken." *Helfrich v. Madison*, 5th Dist. Licking No. 14-CA-111, 2015-Ohio-3462, ¶ 24. "If the purpose of a supersedeas bond is to compensate an appellee whose right to execute on a judgment is stayed thereby, then, logically, there is no need for a supersedeas bond when the underlying judgment confers no right on which the appellee can execute." *Union Savs. Bank v. Washington Twp. Bd. of Zoning Appeals*, 2d Dist. Montgomery No. 15858, 1996 Ohio App. LEXIS 4137, at *12 (Sep. 13, 1996). Thus, this Court of Appeals has held that an "adequate supersedeas bond" can reasonably be construed to mean no bond at all where none is necessary to protect a monetary judgment. *Irvine v. Akron Beacon Journal*, 147 Ohio App. 3d 428, 451, 2002-Ohio-2204, P108. (9th Dist.).

Here, there has been no finding on the issue of liability, and no monetary judgment exists. The underlying order on class certification confers no right on which Plaintiffs can execute, and Plaintiffs did not oppose the proposed motion to stay in any event. The requirement for a monetary bond under these circumstances would be punitive because there is no plausible interest of the Plaintiffs that requires the assurance of a supersedeas bond.

IV. Conclusion

For the reasons stated herein, the KNR appellants respectfully request that this Court issue an order staying all proceedings in this matter pending the outcome of the appeal on class certification, and that the filing of a bond be waived.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing *Motion to Stay Pending Appeal* was filed electronically with the Court on this 10th day of January, 2020. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson _____
James M. Popson (0072773)

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC,
et al.,

Defendants.

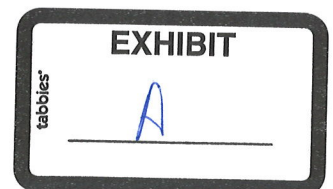
Case No. 2016 09 3928

Judge James Brogan

DEFENDANTS' MOTION TO STAY
PENDING APPEAL

Defendants, Kisling, Nestico & Redick, LLC, Alberto R. Nestico, and Robert Redick (collectively, "KNR") move this Court for an Order staying any further proceedings in this matter pending appeal of the Court's Order of December 17, 2019, granting Plaintiffs' Motion For Class Certification as it relates to two putative classes of Plaintiffs. A Notice of Appeal has been filed contemporaneously with the instant motion.

On December 17, 2019, this Court issued an order finding the claims of Plaintiffs Reid, Norris, and Harbour against KNR for fraud, breach of fiduciary duty, and unjust enrichment as it relates to the cost of medical care provided by Defendant Dr. Ghoubril were appropriate for class certification (Class A). The Court also found the claims of Plaintiffs Williams, Reid, Norris, and Harbour relating to investigation fees paid by Plaintiffs were appropriate for class certification (Class C). Pursuant to statute, the granting of a motion for class certification is a final appealable order. R.C. 2505.02(B)(5). KNR has filed a timely notice of appeal with the clerk of courts as set forth in App.R. 3 and App.R. 4. Pursuant to App.R. 7, a party seeking a stay of



proceedings pending appeal is ordinarily required to initially seek such leave from the trial court.

KNR respectfully asks this Court to stay any further proceedings in this matter pending KNR's appeal on the issue of class certification. Any further proceedings in the trial court are inherently dependent upon the outcome of the appeal. The scope of any further motion practice, discovery, and/or judicial orders that would need to be completed prior to trial cannot be determined until the appeal is resolved. In the interest of judicial economy, the Court should not be inclined to engage in ruling on potential discovery issues or further motion practice that would become moot if the appeal is successful. Likewise, the parties should not be required to endure the expense associated with continued proceedings in the trial court which would likely become wholly unnecessary in the event of a successful appeal.

For the reasons stated herein, the KNR defendants respectfully request that this Court issue an order staying all proceedings in this matter pending the outcome of the appeal on class certification.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

Pursuant to Civ.R. 5(B)(2)(f), the undersigned certifies that a copy of the foregoing *Motion to Stay Pending Appeal* was filed electronically with the Court on this 6th day of January, 2020. The parties, through counsel, may access this document through the Court's electronic docket system.

/s/ James M. Popson
James M. Popson (0072773)

James M. Popson

From: Peter Pattakos <peter@pattakoslaw.com>
Sent: Tuesday, January 07, 2020 11:58 AM
To: LeAnn Backer
Cc: James M. Popson; Patricia Himelrigh; Joshua Cohen; Shaun Kedir; Barmen, Brad; Mannion, Tom; ekennedy@weismanlaw.com; Dan Goetz; Dmb@dmbestlaw.com
Subject: Re: KNR - Motion to Stay Pending Appeal

Plaintiffs do not oppose Defendants' motion to stay pending appeal and do not intend to file a response. Thank you.

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On Tue, Jan 7, 2020 at 11:31 AM LeAnn Backer <LCBacker@cpccourt.summitoh.net> wrote:

Thank you.

LeAnn Backer

From: James M. Popson <jpopson@sutter-law.com>
Sent: Tuesday, January 7, 2020 11:31 AM
To: LeAnn Backer <LCBacker@cpccourt.summitoh.net>; Patricia Himelrigh <phimelrigh@cpccourt.summitoh.net>
Cc: Peter Pattakos <peter@pattakoslaw.com>; Joshua Cohen <jcohen@crklaw.com>; Shaun Kedir <shaunkedir@kedirlaw.com>; Barmen, Brad <Brad.Barmen@lewisbrisbois.com>; Mannion, Tom <Tom.Mannion@lewisbrisbois.com>; ekennedy@weismanlaw.com; Dan Goetz <dgoetz@weismanlaw.com>; Dmb@dmbestlaw.com
Subject: KNR - Motion to Stay Pending Appeal

Ms. Backer and Magistrate Himelrigh,



Attached is KNR's Motion to Stay Pending Appeal for the Court's consideration. This motion was filed yesterday along with KNR's Notice of Appeal, docketing statement, and a praecipe for the court reporter.

Jim Popson

James M. Popson
Shareholder

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

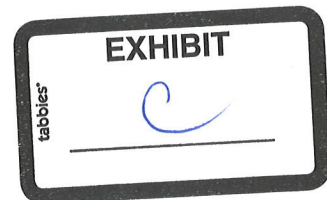
MEMBER WILLIAMS, et al.)	CASE NO.: CV-2016-09-3928
)	
Plaintiffs	)	JUDGE JAMES A. BROGAN
-vs-	)	(Sitting by Assignment)
)	
KISLING NESTICO & REDICK	)	<u>ORDER</u>
LLC, et al.)	
)	
Defendants)	

- - -

This matter comes before the Court upon the KNR Defendants' Motion to Stay Pending Appeal.

On December 17, 2019, this Court issued a final and appealable order resolving Plaintiffs' Motion for Class Certification and Appointment of Counsel pursuant to Civ.R. 23. That Order however does not dispose of all matters at issue in this litigation and there are four specific issues this Court held in abeyance pending the ruling on class certification:

1. Plaintiffs' Motion for Sanctions against the KNR Defendants based on the KNR Defendants' previously filed counterclaims (See March 19, 2019 Order, ¶3);
2. Discovery rulings compelling production of an existing deposition transcript and providing separately for an *in camera* review of non-party Julie Ghoubril's deposition transcript. These discovery orders and rulings were made far in advance of class certification and the discovery sought has already been found to be relevant and discoverable in this case. (See June 18, 2019 Order to produce document). There is presently a writ action pending in the Ninth District Court of Appeals (Case No. 29458, filed June 25, 2019). The Court has held in abeyance any further action on the order compelling production and *in camera* review pending the resolution of the writ action in the Ninth District Court. However, as soon as that matter concludes, the matters at issue in this Court shall proceed;
3. Plaintiffs' Motion for Sanctions/Show Cause Hearing with Tijuan Carter and Defendant Floros for improper communications with represented third parties (see July 29, 2019 Magistrate's Order); and,

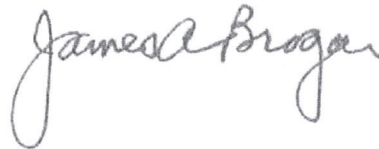


4. Plaintiffs Motion for discovery of Defendants' assets and net worth (See June 7, 2019 Order, ¶2).

The majority of the above issues are discovery-related and it is the Court's opinion that discovery of certain topics can and should proceed. The discovery process in this litigation was plagued by unprofessional gamesmanship and obstruction resulting in significant delays and subsequently non-production of relevant and discoverable materials. No party should benefit from such behavior and further delay will not serve the interests of justice in this litigation. Due to all of these pending issues and the potential for a considerably lengthy stay of these proceedings, this Court is not inclined to stay this case pending appeal.

Defendants remain free to seek a stay in the Court of Appeals upon the posting of an adequate supersedeas bond.

IT IS SO ORDERED.



JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

The Clerk of Courts shall serve all parties/counsel of record.