

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation, et al.,
Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities, et al.,
Defendants.

**STATE OFFICIALS' *FORTHWITH* MOTION FOR STATUS CONFERENCE RE:
THE DECEMBER 18, 2018 HEARING ON THE STATE OFFICIALS'
RULE 12(b)(1) MOTION TO DISMISS AND PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

Defendants, collectively referred to as the State Officials, submit this *forthwith* request for a status conference in advance of the upcoming December 18, 2018 hearing on the State Officials' Rule 12(b)(1) Motion to Dismiss and Plaintiffs' Motion for a Preliminary Injunction, as follows.

D.C. COLO. Civ. R. 7.1(a) CERTIFICATION

Undersigned counsel conferred in good faith with Plaintiffs' counsel regarding the relief requested by this Motion. Plaintiffs' counsel stated they do not oppose the request for a *forthwith* status conference, although they oppose the relief that the State Officials ultimately seek through the status conference.

INTRODUCTION

The State Officials request a *forthwith* telephonic status conference to address the scope of the upcoming December 18, 2018 hearing based on Plaintiffs' recent conferral about their intent to file a motion for leave to conduct limited expedited discovery to overcome the State

Officials' *Younger* abstention defense, to be conducted only *after* the hearing in the event this Court agrees that Plaintiffs have not met their burden of alleging a prima facie case of bad faith on the part of the State Officials through their First Amended Verified Complaint [Doc. 51].

BACKGROUND

On November 27, 2018, this Court set a motions hearing for December 18, 2018 to address both Plaintiffs' Motion for Preliminary Injunction [Doc. 57] and the State Officials' Motion to Dismiss under Rule 12(b)(1) [Doc. 64]. *See* Doc. 82. It did so after the parties submitted their Joint Report to the Court regarding scheduling for and the scope and nature of the hearing. *See* Doc. 80. As required by the Court's November 15, 2018 minute order [Doc. 76], the parties' Joint Report both proposed dates for the hearing, indicated the amount of time each side anticipated needing, and disclosed whether each side would be presenting evidence and/or argument at the hearing. Plaintiffs stated in the Joint Report that they anticipated needing "a one-hour hearing for oral arguments (30 minutes per side) on Plaintiffs' motion for preliminary injunction." Doc. 80, p. 2. The State Officials responded that "*if the hearing is to present oral argument only,*" then a two-hour hearing (one hour per side) was needed due to their intent to ask the Court to entertain oral argument on their Motion to Dismiss. *Id.* (emphasis added). Plaintiffs replied that they "do not oppose combining oral argument on the two motions or extending the hearing time," and made no reservation of their right to present evidence to overcome the State Officials' *Younger* abstention defense either at or after the hearing. *Id.* Thus, all parties agreed through submission of their Joint Report that the December 18, 2018 hearing would consist of oral argument *only*, that no pre-hearing discovery would occur, and that no testimony or

evidence would be taken at the hearing. This Court scheduled the December 18, 2018 hearing based on that same understanding.

Now, with one week to go before the hearing, Plaintiffs' position has shifted. On December 10, 2018, their counsel conferred with counsel for the State Officials regarding a Motion for Limited Discovery, even though the Magistrate Judge previously ruled that discovery would be stayed pending the outcome of the State Officials' Motion to Dismiss. *See* Doc. 79, p. 2. Plaintiffs did not object to the Magistrate Judge's stay order within the prescribed 14-day time limit. *See* Fed. R. Civ. P. 72(a). Nor did they promptly follow the Magistrate Judge's express direction at the November 20, 2018 discovery motions hearing that, if limited expedited discovery was needed to prove bad faith to overcome *Younger* abstention, then they must file a F.R.C.P. 56(d) motion seeking such discovery. *See* Doc. 85-1, pp. 39, ll. 18-25 through 40, ll. 1-13; 46, ll. 8-25 through 47, ll. 1-7; *see also* Doc. 85-1, p. 16, ll. 20-25 through 17, l. 1; 31, ll. 23-25 through 32, ll. 1-25 (objecting to Plaintiffs' moving target and pointing to the availability of F.R.C.P. 26(d) as a mechanism through which they may seek limited expedited discovery to prove bad faith); p. 26, ll. 3-11 (noting Plaintiffs' failure to file a F.R.C.P. 26(d) motion to do so).

During conferral on their newly-contemplated discovery motion, Plaintiffs' counsel stated that they wished to seek discovery on the topics of the State Officials' alleged bias and bad faith regarding both (1) the State Officials' enforcement practices in other public accommodations cases, and (2) comments made by the State Officials regarding either Mr. Phillips or Masterpiece Cakeshop, Inc. Plaintiffs' counsel stated that they do *not* seek to vacate or delay the upcoming December 18, 2018 hearing, but rather intend to ask the Court to permit

such discovery to be conducted *after* the hearing if the Court believes that Plaintiffs' Amended Complaint does not, on its face, establish the bad faith exception to *Younger* abstention applies. Plaintiffs' counsel did not explain either why their discovery motion was being filed so belatedly or why, in light of their belated request, they previously agreed to present oral argument *only* at the December 18, 2018 hearing on the State Officials' Motion to Dismiss. *See* Doc. 80.

The State Officials' counsel relayed that they oppose Plaintiffs' Motion for Limited Discovery, stating that its timing is highly procedurally irregular, contravenes the parties' prior representations in the Joint Report, and prejudices the State Officials' preparation for oral argument at the upcoming hearing on *both* motions. With respect to the latter concern, the State Officials' counsel explained that, had Plaintiffs not agreed that the Court's decision on the Motion to Dismiss would be based solely on the briefing and oral argument presented at the hearing, the State Officials, in turn, would not have agreed to Plaintiffs' Motion for Preliminary Injunction being decided based solely on the same. Instead, they would have reserved the right to present evidence in the form of affidavits or testimony to overcome Plaintiffs' Motion for Preliminary Injunction. The State Officials' counsel also stated that they wished to seek a forthwith status conference with the Court to address both Plaintiffs' eleventh-hour request to conduct discovery only *after* they fail to carry their heavy burden of alleging bad faith, and its impact on the December 18, 2018 hearing. In response, Plaintiffs' counsel stated they would not file their Motion for Limited Discovery at this time, but would *not* represent that they would refrain from seeking *post*-hearing discovery either at or after the December 18, 2018 hearing.

MOTION

The State Officials thus seek a forthwith status conference with the Court to address Plaintiffs' contemplated request for discovery, its impact on the December 18, 2018 hearing, and the prejudice caused to the State Officials by the belated request. Plaintiffs are essentially asking for two bites at the same apple: (1) proceed to the December 18, 2018 hearing and argue that the Amended Complaint's allegations establish bad faith sufficient to overcome *Younger*, and (2) if the Court disagrees, seek discovery *after* the hearing in an attempt to (again) establish the bad faith exception to *Younger*. Plaintiffs cannot have it both ways and should not be allowed two bites at the same apple. After all, a plaintiff asserting bad faith as an exception to *Younger* abstention bears the burden of alleging specific facts to support an inference of bad faith. *See Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986). Conclusory allegations that are *not* supported by specific well-pled facts are insufficient. *See Phelps v. Hamilton*, 122 F.3d 885, 890 (10th Cir. 1997). Simply put, the narrow bad faith exception to *Younger* is not an invitation to go on a fishing expedition in the hopes of uncovering "bad faith" through discovery.

Here, Plaintiffs' allegations of bad faith are wholly conclusory. The Amended Complaint does not allege they have been treated differently than similarly-situated bakeries. As discussed in the State Officials' Reply in support of their Motion to Dismiss, the three other Denver-area bakeries mentioned in the Amended Complaint declined to make certain requested cakes containing words and imagery that they would not have made for *anyone*. Doc. 86, pp. 11-12. In stark contrast, the Amended Complaint fails to allege that Plaintiffs would not bake a blue and pink cake for *anyone*. *See* Doc. 51. Nor could it given Mr. Phillips's sworn statement in support of his Motion for Preliminary Injunction that he and the bakery *will* bake a blue and pink cake

for *other* customers, or for Ms. Scardina if she had refrained from disclosing what the chosen colors mean to her and that it was to celebrate her birthday which coincides with the date on which she came out as transgender. Doc. 83-1. This significant factual omission establishes a “legitimate, articulable, objective reason[] to justify the decision to initiate” the state administrative proceeding to determine whether Plaintiffs did, in fact, violate Colorado’s Anti-Discrimination Act (“CADA”) by denying service to Ms. Scardina, which rebuts Plaintiffs’ conclusory allegations of bad faith and sustains the State Officials’ facial attack on the Amended Complaint. *Phelps II*, 122 F.3d at 889-90 (quotations omitted); *Cf. Masterpiece Cakeshop v. Colo. Civil Rights Comm’n (“Masterpiece I”)*, 138 S. Ct. 1719, 1733 (Kagan, J., concurring) (“In refusing that request, the bakers did not single out [Mr.] Jack...but instead treated him in the same way they would have treated anyone else—just as CADA requires.”).

Thus, Plaintiffs have failed to allege any unequal treatment or bad faith on the part of the State Officials; they are thus not entitled to initiate a fishing expedition to hunt for such evidence in the mere hope that something will turn up. *See Thompson v. Florida Bar*, 526 F. Supp. 2d 1264, 1280 (S.D. Fla. 2007) (quoting *United States v. Bass*, 536 U.S. 862 (2002)) (dismissing complaint under *Younger* abstention and stating plaintiff was not entitled to discovery on bad faith because he “failed to submit relevant evidence that similarly situated persons were treated differently”). This is especially true where, as here, the defendants have asserted a qualified-immunity defense. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery.” (quotations omitted)); *see id.* (litigation and discovery “exact[] heavy costs in terms of efficiency and expenditure of valuable time and resources that

might otherwise be directed to the proper execution of the work of the Government”). Indeed, at the forthwith status conference, the State Officials intend to discuss whether, *before* considering and deciding Plaintiffs’ Motion for Discovery to prove bad faith, the Court should order that Mr. Phillips sit for a deposition for the limited purpose of allowing the State Officials’ to inquire about the basis for his August 14, 2018 and October 22, 2018 “DECLARATION[S] UNDER PENALTY OF PERJURY,” verifying that the allegations of bad faith in both the original and Amended Complaints were “true and correct to the best of [his] knowledge” as of those dates.

Plaintiffs’ attempt to invoke a belt-and-suspenders approach to the December 18, 2018 hearing should be rejected for yet another reason—Plaintiffs had full knowledge long ago that it was incumbent upon them to timely seek discovery on bad faith to overcome *Younger*. Yet they elected to sit idly by until the eve of the scheduled hearing. This is evident from:

- Plaintiffs’ initial Verified Complaint, filed on August 14, 2018, which repeatedly references “bad faith” on the part of the State Officials and requests a preliminary injunction. Doc. 1, pp. 4, 30, 39, 48-50
- The State Officials’ initial Motion to Dismiss under Rule 12(b)(1), filed on October 10, 2018, that asserted that Plaintiffs bore the “heavy burden” to establish bad faith beyond mere conclusory allegations and mounted only a facial attack on the Amended Complaint to deliberately foreclose their ability to engage in a fishing expedition for evidence of bad faith. Doc. 43, p. 13 n.4.
- Plaintiffs’ Combined Response to the State Officials’ Motion to Stay Discovery and Motion for Order Prohibiting Plaintiffs’ Use of Open Records Laws to Circumvent Discovery (“Response”), filed on November 7, 2018. Doc. 65. Authority cited in

Plaintiffs' Response illustrates the importance of a plaintiff seeking timely discovery well in advance of the preliminary injunction hearing. Specifically, Plaintiffs' Response at page 6 relied on *Sica v. Connecticut*, 331 F. Supp. 2d 82 (D. Conn. 2004), where the court permitted limited discovery into bad faith where a timely and proper motion for expedited discovery was made under Rule 26(d). Unlike here, the plaintiff's discovery motion in *Sica* was made well *in advance* of the preliminary injunction hearing and contemplated a three-week discovery window that was scheduled to close over two weeks *before* the hearing. No such timely motion has been made here.

- The Magistrate Judge's ruling staying all discovery on November 20, 2018; it provided an explicit roadmap to Plaintiffs, stating that they could seek limited discovery on bad faith through an appropriate and timely motion. *See* Doc. 85-1, p. 40, ll. 5-10 ("And in doing so, [Plaintiffs] can detail why exactly they need ... the limited discovery ... and what exactly the discovery that they need is. That hasn't been filed at this point. If it is, I will address that once it's filed if it's referred to me.").

These pleadings and court orders thus make clear that Plaintiffs had full knowledge long ago that it was their responsibility to timely seek discovery on the issue of alleged bad faith if they believed it was necessary to overcome *Younger* abstention. They did not. They should not now be permitted to disrupt the Court's scheduled December 18, 2018 hearing by belatedly seeking discovery. Nor should they be permitted to have two bites at the apple by seeking discovery *after* the hearing if the Court determines that their Amended Complaint fails to establish *prima facie* bad faith. Even Plaintiffs' *own* authority recognizes that this type of "tails I win, heads you lose" approach to civil discovery is not permitted. *See Lugo v. Alvarado*, 819

F.2d 5, 7 (1st Cir. 1987) (using estoppel principles to reject appellant’s discovery-related arguments where appellant “acquiesce[d] to the discovery schedule established by the district court after consultation by the parties”) (cited in Plaintiffs’ Response, Doc. 65, at page 7).

CONCLUSION

In sum, the State Officials’ oppose Plaintiffs’ contemplated request for discovery—whether it is made before, during, or after the December 18, 2018 hearing. The State Officials request that this Court hold a forthwith status conference to address this concern, determine whether the December 18, 2018 hearing should proceed as scheduled, and if so clarify the parameters of such hearing, including whether motions for discovery will be entertained and whether the State Officials must be permitted to withdraw or amend their representations regarding the nature of the presentation to the Court on Plaintiffs’ Motion for Preliminary Injunction (*i.e.*, to reserve the right to submit evidence in the form of affidavits or testimony). In the event Plaintiffs file a motion seeking such discovery, the State Officials reserve their right to respond following their review and evaluation of the substance of the motion.

DATED: December 12, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, I served a true and complete copy of the **STATE OFFICIALS' FORTHWITH MOTION FOR STATUS CONFERENCE RE: THE DECEMBER 18, 2018 HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND THE STATE OFFICIALS' RULE 12(b)(1) MOTION TO DISMISS** upon counsel of record in this matter through ECF or as otherwise indicated below:

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