

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 capacity, *et al.*,
Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STAY EXPEDITED
DISCOVERY**

Defendants, collectively the "State Officials," submit the following response to Plaintiff's Motion to Stay Expedited Discovery, Doc. 121, as follows.

BACKGROUND

Plaintiffs filed this case on August 14, 2018. Even though their complaint requested preliminary relief, they waited 70 days to file their first motion for preliminary injunction. Plaintiffs then filed a second version of their motion for preliminary injunction. Doc. 57. They proceeded to a hearing on December 18, 2018, where they expressed *no* interest in putting forth any testamentary evidence in support of their request for preliminary relief and certainly did not seek nor attempt to present any evidence regarding communications of the Commission. The Court denied Plaintiffs' motion, with leave for Plaintiffs to refile, and reiterated that it needed to receive evidence prior to granting extraordinary relief. Doc. 90; Doc. 96-1, p. 86. Another 30 days passed before Plaintiffs filed their third motion for preliminary injunction. Doc. 104.

On January 15, 2019, the Magistrate Judge entered a scheduling order that provided for expedited discovery, which was in anticipation of a preliminary injunction hearing set for March

14 and 15, 2019. Doc. 99. Relevant here, the expedited discovery schedule provided each side with four depositions, to be completed by February 28, 2019. The parties agreed amongst themselves to extend slightly the deadline for depositions, to March 5, 2019. Doc. 121, p. 3.

On February 5, 2019, the Magistrate Judge held a hearing to resolve a number of discovery disputes. The Magistrate Judge denied the Plaintiffs' request to depose individual Commissioners. Doc. 112, p. 2. But the Magistrate Judge permitted the Plaintiffs to take a Fed. R. Civ. P. 30(b)(6) organizational deposition of the Commission.

Plaintiffs waited nearly two weeks after the Magistrate Judge's order to file to their objection to the Magistrate Judge's ruling. Doc. 120. In the meantime, Plaintiffs did little to move the expedited discovery forward. On February 14, 2019, counsel for the State Officials attempted to confer with Plaintiffs' counsel regarding scheduling of depositions. Doc. 130-1, p. 2. At that time, Plaintiffs' counsel indicated they had made no decision regarding whom they wished to depose. *Id.* Plaintiffs were further unable to provide dates for which they were available to sit for deposition. *Id.* Counsel for the State Officials followed up via email the next day, again asking to confirm dates for Plaintiffs' depositions. *Id.* Again, Plaintiffs failed to provide availability for depositions.

Finally, counsel for the State Officials made multiple requests for a list of anticipated topics for Plaintiffs' Fed. R. Civ. P. 30(b)(6) deposition of the Commission, so that the State Officials could adequately and timely prepare a designee. As of the date of their Objection, Plaintiffs had neither provided a list of topics nor requested the Magistrate-approved Fed. R. Civ. P. 30(b)(6) deposition of the Commission. Further, they had not provided the name of any individual witnesses whom they sought to depose pursuant to Fed. R. Civ. P. 30. Only after the

State Officials sent a letter to Plaintiffs on February 21, 2019, Doc. 130-2, did Plaintiffs finally provide a list of 30(b)(6) deposition topics on Friday, February 22, 2019, at 4:31 p.m. Moreover, even though the Scheduling Order permits each party only *four* depositions during this expedited discovery period, Doc. 99, p. 7–8, Plaintiffs supplied *seven* notices of alternative depositions: two pursuant to Fed. R. Civ. P. 30(b)(6) and five pursuant to Fed. R. Civ. P. 32. The latter set includes notices for three individual Commissioners (contrary to the Magistrate Judge’s Order), the Division Director, and a former Division employee. The notices fail to comply with the 14-day notice provision in D.C.COLO.LCivP 30.1 and exceed the previously agreed-to expedited discovery window.

For their part, the State Officials have properly and timely sought to avail themselves of the narrow expedited discovery window set by the Magistrate Judge. After hearing nothing in response to the State Officials’ multiple conferral attempts for deposition availability, the State Officials issued notices of depositions and subpoenas for Plaintiff Jack Phillips, as well as three fact witnesses. Following additional conferrals with Plaintiffs’ counsel and counsel for the proposed intervenor, Autumn Scardina, those depositions are currently scheduled to occur between February 28 and March 5, 2019. The State Officials have thus been using all reasonable efforts to timely complete expedited discovery within the timeframe contemplated by the Magistrate Judge’s Scheduling Order and agreed to by the parties.

Despite Plaintiffs’ failure to likewise timely avail themselves of the available expedited discovery, they now ask this Court to impose a stay on expedited discovery.

ARGUMENT

I. Plaintiffs' failure to timely avail themselves of available discovery should not be rewarded with a stay of expedited discovery.

A preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citation omitted). Further, a "hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules." *Id.* Recognizing the obvious, the *Heideman* court stated "that when a district court holds a hearing on a motion for preliminary injunction it is not conducting a trial on the merits."

Here, Plaintiffs have repeatedly delayed in seeking a preliminary injunction. *See Roda Drilling Co.v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) ("delay in seeking preliminary relief cuts against finding irreparable injury") (quotations omitted). And even though they have been provided with the privilege to conduct expedited discovery in advance of the preliminary injunction hearing, Plaintiffs have failed to diligently pursue the discovery available to them. Only now, at the eleventh hour, do the Plaintiffs seek depositions—both depositions properly available to them under the Magistrate Judge's orders, and depositions that are specifically barred by the Magistrate Judge. In both instances, however, the deposition notices are untimely and beyond the expedited discovery window.

The gravamen of the Plaintiffs' argument for a stay is that they must be able to depose the individual Commissioners before the preliminary injunction hearing. But they provide no authority for this claim. Indeed, there is none. Often witnesses are called at a preliminary injunction hearing by parties who have not yet had the benefit of deposing them. This is a

function of the limited time constraints under which these types of emergency proceedings occur. *See Heideman*, 348 F.3d at 1188. This, of course, assumes individual Commissioners are appropriate witnesses for the hearing, which they are not.

Plaintiffs' requested stay of expedited should also be denied because it would prejudice the State Officials, who have properly and timely sought to complete expedited discovery before the March 5, 2019, cutoff. The State Officials' efforts include noticing four upcoming depositions. Rewarding Plaintiffs' dilatory actions with a stay of expedited discovery would thwart the State Officials' diligent efforts to complete expedited discovery within the carefully-structured parameters contemplated by the Magistrate Judge.

Finally, Plaintiffs suggest the date for the preliminary injunction hearing could be moved if this Court grants the requested stay. The State Officials object to delaying the preliminary injunction hearing any further. It has now been more than six months since Plaintiffs filed this case. The continued delay by Plaintiffs only reinforces that they were never entitled to preliminary injunctive relief in the first place. The continued delay also prejudices the State Officials by diverting their attention away from their official duties to attend to the work that is necessary to properly defend against this litigation.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Stay Expedited Discovery should be denied.

Respectfully submitted this 25th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, I served a true and complete copy of the foregoing **Defendants' Response to Plaintiffs' Motion to Stay Expedited Discovery** via upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

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