IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-WJM-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

Defendants RANDALL KLAMSER, in his individual capacity, and CITY OF FORT COLLINS, a municipality, (collectively "Defendants"), by and through their attorneys, Hall & Evans, L.L.C., submits the following as their Reply in Support of Motion to Stay Proceedings:

I. ARGUMENT

"Precedent amply demonstrates the Court has broad discretion to stay an action when a dispositive motion is pending" ***Robert W. Thomas & Anne McDonald Thomas Trust v. First W. Trust Bank***, 2012 U.S. Dist. LEXIS 114092 at *7 citing ***String Cheese Incident, LLC v. Stylus Shows, Inc.***, 2006 WL 894955 at *2 (D. Colo. Mar. 30, 2006). A stay of discovery is permitted upon a showing of good cause, in order to "protect a party from undue burden or expense…" ***Thomas***, 2012 U.S. Dist LEXIS at *6 citing ***Tr. Of Springs Transit Co. Emp.'s Ret. & Disability Plan v. City of Colorado Springs***, 2010 WL 1904509 at *4 (D. Colo. May 11, 2010) and Fed. R. Civ. P. 26(c). "Indeed, 'a court may decide that in a particular case it would

be wise to stay discovery on the merits until [certain challenges] have been resolved.'" ***Thomas***, 2012 U.S. Dist LEXIS at *7 (brackets in original) citing 8 Charles Allen Wright et al., *Federal Practice and Procedure* § 2040, at 521-22 (2d ed. 1994).

In this matter, the Defendants seek a stay of discovery because of the pending Motion to Dismiss ("Motion"), and because of Plaintiff's appeal of her criminal conviction. Due to the uncertainty of both, the *String Cheese* factors weigh in favor of imposing a stay of discovery.

A. A "preliminary peek" approach is improper.

Plaintiff argues the Court should consider adding a "preliminary peek" at the merits of the pending Motion to Dismiss, in order to determine the existence of "good cause". Any such approach is in addition to the *String Cheese* factors. While Plaintiff suggests certain courts in this District have used this approach in specific instances based upon the circumstances of the case, none of them are analogous to the central argument in this case that ***Heck v. Humphrey***, 512 U.S. 477 (1994) would completely bar Plaintiffs' claims as a matter of law if the Court adopts Defendants' arguments.[1] [*See* ECF 39 at p. 5, fn. 3.] Moreover, Defendants could locate no instance where the Tenth Circuit has expressly applied this additional factor, likely because doing so would unnecessarily raise Defendants' burden[2]. As urged in Defendants' brief, this

[1] For example, one of the opinions noted the pending motion to dismiss was solely based upon applicability of an arbitration clause, so regardless of the court's opinion on the proper venue for the parties' dispute (federal court or with an arbitrator), discovery would need to happen anyway. *See* ***Waisanen v. Terracon*** Consultants, Inc., No. 09-cv-1104-MSK-KMT, 2009 U.S. Dist. LEXIS 123427, *4 (D. Colo. Dec. 22, 2009). This bears no factual or analytical similarity to Defendants' argument here that this Court is barred from hearing this case at all as a matter of law.

[2] Plaintiff suggests, without proper citation, that a preliminary peek approach is akin to the approach used for a preliminary injunction or temporary restraining order (ECF No. 39 at 5 referring to ***Verlo v. Martinez***, 820 F.3d 1113, 1126 (10th Cir. 2016). But here, the Defendants'

District consistently relies solely on the factors enunciated in the ***String Cheese Incident,*** 2006 WL 894955 at *4 (D. Colo., Civil Action No. 05-cv-01934-LTB-PAC, March 30, 2006) citing FED. R. CIV. P. 26(c).

In promulgating a "preliminary peek" approach, Plaintiff encourages the Court to look only at the pending Motion to Dismiss while ignoring the underlying conviction. Notwithstanding the impropriety of a preliminary peak, any such argument necessarily entails consideration of the underlying conviction, and the crimes for which Plaintiff has been convicted. As argued in Defendants' Motion to Dismiss, because Plaintiff's underlying conviction has not been overturned, a determination in her favor on the excessive force claim would necessarily undermine one or both of her criminal convictions and be directly inconsistent with the conclusion already reached by the jury in the criminal matter, requiring dismissal of the civil tort claim pursuant to ***Heck.***

Pursuant to Colorado law, a person is guilty of obstructing a peace officer "when, by using or threatening to use violence, force, physical interference, or an obstacle, such person knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his or her official authority." C.R.S. § 18-8-104(a). A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest of the actor or another by either: (a) using or threatening to use physical force or violence against the peace officer or another; or (b) using any other means

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request for a temporary stay of discovery does not rise to the level of a temporary restraining order or preliminary injunction, and therefore application of the same approach unnecessarily "raises the bar" on Defendants' burden, and is improper.

which creates a substantial risk of causing bodily injury to the peace officer or another. C.R.S. § 18-8-103.

In support of the preliminary peek approach, Plaintiff cites to ***Martinez v. City of Albuquerque***, 184 F.3d 1123 (10th Cir. 1999) as a "second bite at the apple" with respect to the Defendants' Motion to Dismiss (ECF No. 39 at 13). There is no indication in ***Martinez***, however, that consideration of the elements with respect to the underlying conviction were considered. In this matter, however, an affirmance of the criminal conviction necessarily establishes Plaintiff used or threatened to use physical force or violence, and the jury declined to apply her claim of self-defense. Plaintiff's claim would therefore be barred pursuant to ***Heck***.

The factual circumstances in ***Martinez*** are inapplicable to this matter. Specifically, in ***Martinez*** there was a specific delimitation between Plaintiff initially fleeing with the resultant chase, and the subsequent exercise of force to effectuate the ultimate arrest. Here, however, the entire sequence between Plaintiff and Officer Klamser, took 32-seconds to complete (ECF No. 1 at 5, ¶ 28). There is no reasonable ability to parse out the sequence of events and conclude some sort of separation exists between Plaintiff's resistance and Officer Klamser's use of force.

Plaintiff's arguments in her Response in this regard directly contradict the allegations of her Complaint. Plaintiff alleges the numerous cases cited by Defendants wherein courts of this District have repeatedly held that excessive force claims were subject to dismissal pursuant to ***Heck*** where the plaintiff had been convicted of resisting arrest or obstructing justice and the jury had received a "self-defense" instruction are distinguishable because Plaintiff alleges those cases all relate to "pre-arrest excessive force" but hers instead related to "post-arrest excessive force." [ECF 39 at 15.] This is simply wrong. Plaintiff's Complaint specifically identifies the alleged

acts of force – Officer Klamser grabbing her wrist as she argued with him and attempted to pull away and then him putting her to the ground – were all part of the arrest, occurring in sequence in a matter of seconds. There is no allegation of "post-arrest excessive force" in Plaintiff's Complaint; to the contrary, she articulates how the actions sequentially occurred within thirty-two seconds, resulting in her arrest. Moreover, Plaintiff's allegation that the cases cited by Defendants are distinguishable because they relate to "pre-arrest excessive force" is both inaccurate and glosses over the true holding of the cases – namely, that because the force was "inextricably intertwined" with the arrest and the criminal jury heard and necessarily rejected the arrestee's affirmative defense that their resistance or obstruction was necessary to defend themselves from the use of excessive or unreasonable force against them.[3] This is *exactly* what

[3] For example, ***Dye v. Colo. Dep't of Corr***., No. 120cv020601-PAB-KLM, 2013 U.S. Dist. LEXIS 42453, *16-22 (D. Colo. March 26, 2013), contains no distinction between "pre-arrest" and "post-arrest" use of force, instead stating that the case is distinguishable from ***Martinez***, because "Mr. Dye's conviction was not based on a separable series of events that occurred before the officers allegedly used excessive force[,]" and the fact that the civil court "cannot find in favor of Mr. Dye without invalidating the jury's verdict that he was resisting arrest and was not subject to unreasonable force."

Similarly, in ***Kennedy v. Golden***, No. 13-cv-00920-REB-KLM, 2014 U.S. Dist. LEXIS 106409, at *1 (D. Colo. Mar. 4, 2014), *adopted by* ***Kennedy v. Golden***, 2014 U.S. Dist. LEXIS 106408 (D. Colo., Aug. 1, 2014), the Court made no indication whether the force alleged during the course of the arrest was "pre-arrest" or "post-arrest", but instead focused Mr. Kennedy's affirmative defense of self-defense in finding "the ultimate entry of a judgment in favor of Plaintiff in this matter would negate the state court judge's determination that thee was no evidence that Defendants used unreasonable or excessive force during the arrest. Such would necessarily call into question the validity of the underlying conviction for resisting arrest in that the application of the affirmative defense would essentially be resurrected." Indeed, this very Court the same determination in ***Johnson v. Heinis,*** No. 11-cv-3135-WJM-KLM, 2013 U.S. Dist. LEXIS 62342, *8-10 (D. Colo. March 28, 2013), a*dopted by* ***Johnson v. Heinis***, 2013 U.S. Dist. LEXIS 62347 (D. Colo., May 1, 2013). See also, ***Agyemang v. City of Aurora Mun. Court***, No. 15-cv-734-LTB, 2015 U.S. Dist LEXIS 60628, *8 (D. Colo. May 8, 2015) (same); ***Agyemang v. City of Aurora Mun. Court***, No. 15-cv-734-LTB, 2015 U.S. Dist LEXIS 60628,

Ms. Surat argued to the criminal court and had presented to the jury in Instruction No. 10. [*See* ECF 35-2.] Plaintiff's position is a moving target. When before a criminal jury, she argued she had no choice but to defend herself from force used during the course of her arrest and, consequently, she could not have been resisting the arrest. Her Complaint in this case alleges "the entire encounter between Ms. Surat and Defendant Klamser happened in thirty-two seconds." [ECF 1 at ¶28.] Now, when confronted with her own defenses and allegations, she conspicuously ignores precedent which has repeatedly held individuals in her exact position -- who directly challenged the use of force within their criminal prosecution by asserting their right of self-defense -- may not undermine that conviction through a subsequent civil lawsuit.

B. Even considering a modified *String Cheese* analysis, a stay of discovery benefits all parties.

The Plaintiff argues the imposition of a stay "could delay the proceedings" and significantly impact Plaintiff's right to pursue her case (ECF No. 39 at 7). But any such argument is merely speculative. Likewise, Plaintiff argues that the longer she must wait to obtain discovery, the more likely its value will be diluted (ECF No. 39 at 7). Plaintiff's argument again ignores the fact a criminal prosecution was undertaken, resulting in two jury trials. Based upon information contained in Plaintiff's initial disclosures, significant discovery was already conducted for the criminal matter. In this matter, the parties have the benefit of video evidence (surveillance and body-cam), as well as written police reports, eye-witness

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*8 (D. Colo. May 8, 2015), a*dopted by* ***Oates v. Patella***, 2012 U.S. Dist. LEXIS 22716 (D. Colo., Feb. 22, 2012) (same).

statements and trial testimony. The likelihood of "memories fading" is no greater than any other litigated matter and perhaps less because of the previous two trials.

Plaintiff also argues the Defendants have "shown no particularized facts" demonstrating they will suffer a clearly defined and serious harm associated with moving forward with discovery. The argument ignores that discovery efforts take time, money and judicial resources, all of which would be conserved, should a stay be imposed. Avoiding the expense of discovery is a legitimate basis to impose a stay. ***Thomas***, 2012 U.S. Dist LEXIS at *6 citing ***Tr. Of Springs Transit Co. Emp.'s Ret. & Disability Plan v. City of Colorado Springs***, 2010 WL 1904509 at *4 (D. Colo. May 11, 2010) and Fed. R. Civ. P. 26(c).

Additionally, as argued in the initial Motion to Stay, it is axiomatic that *consistent* results would support judicial economy and obviate the necessity of further litigation to clarify issues. *See e.g.*, 8 Moore's Federal Practice, sec. 42.10(4) (3d ed. 2018) (considering the factor of inconsistent results when looking at consolidation of lawsuits); ***Dutcher v. Bold Films, LP***, 2018 U.S. Dist. LEXIS 192314 at *2-3 (D. Utah, November 8, 2018, Case No. 2:15-cv-00110-DB-PMW) (considering inconsistent results as a factor for lifting stay due to bankruptcy of party). The specter of inconsistent results stemming from consideration of the Motion to Dismiss and the pending criminal appeal, lean in favor of imposing a stay on discovery.

II. CONCLUSION

WHEREFORE, for all the foregoing reasons, Defendants respectfully request this Court stay all proceedings until determination of (1) Plaintiff's pending appeal in her criminal proceedings, and (2) the Defendants' pending Motion to Dismiss [ECF 23].

Dated: August 19, 2019

Respectfully submitted,

s/ *Mark S. Ratner* _____

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on this 19th day of August, 2019, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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