UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

MICHAELLA LYNN SURAT,	Case No. 19-cv-00901-WJM-NRN
Plaintiff,	
vs.	Alfred A. Arraj US Courthouse
	901 19th Street
RANDALL KLAMSER, et al.,	Denver, CO 80294
Defendant.	
	September 3, 2019
	9:30 a.m.

TRANSCRIPT OF PROCEEDINGS HELD BEFORE THE HONORABLE N. REID NEUREITER, UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	Kilmer Lane & Newman, LLP By: Andrew J. McNulty 1543 Champa Street Suite 400 Denver, CO 80202 (303) 571-1000
For the Defendant:	Hall & Evans, LLC By: Mark S. Ratner By: Christina S. Gunn 1001 Seventeenth Street Suite 300 Denver, CO 80202 (303) 628-3300
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(Time noted: 9:30 a.m.)

THE COURT: Good morning.

MR. MCNULTY: Good morning.

MR. RATNER: Good morning.

THE COURT: You may be seated. We're on the record in Surat v. Randall Klamser and the City of Fort Collins.

Could I have appearances please?

MR. MCNULTY: Yes, Your Honor. Good morning. Andy McNulty from Kilmer Lane and Newman on behalf of the plaintiff.

THE COURT: Thank you.

MR. RATNER: Good morning, Your Honor. Mark Ratner and Christina Gunn on behalf of the defendants.

THE COURT: Thank you. So, we're here on a motion to stay pending decision on the motion to dismiss; is that right?

MR. MCNULTY: Yes, Your Honor.

MR. RATNER: Correct, Your Honor.

THE COURT: And so it's defendants' motion and I'll hear argument.

MR. RATNER: Your Honor, actually --

THE COURT: Tell you what, why don't you just pull the mic down, so that we make sure we're on the record.

MR.RATNER: Better?

THE COURT: Yeah.

MR. RATNER: Your Honor, the motion to stay is actually based not only on the motion to dismiss, but also the fact that there's a pending appeal from the underlying criminal matter. And so in determining the motion to stay, it's our argument that you should look at both. Certainly, the factors that apply under String Cheese are argued that mostly for judicial efficiency and consistency of results.

And I think the consistency argument is probably more prevalent in this case because not only of the motion to dismiss but because of the criminal appeal. We argue that --

THE COURT: But don't they -- I mean I know they're appealing the underlying conviction, but -- and I understand that if she is acquitted after -- or the conviction is reversed then your Heck v. Humphrey argument doesn't apply, but their position seems to be that even if she was convicted of -- resisting arrest was it?

MR. RATNER: Correct.

THE COURT: -- that she she's not, in this case, challenging that and that there's no inconsistency between resisting arrest and making an allegation of excessive force. So even if the conviction were to stand, they still have a claim they say.

MR. RATNER: They argue that the basis for their appeal sort of somehow negates the Heck v. Humphrey argument,

and I think that's incorrect. There's no case law to suggest that you look at the basis for the appeal. Rather it's the appeal itself. And the fact remains that if the conviction is maintained the conviction based on the resisting arrest mostly contains those elements which would in fact negate their excessive force claim and their claims in the complaint.

THE COURT: Well, walk me through that. How if the conviction is sustained -- because I can imagine a situation where, and they describe it in their opposition, where someone is, you know, interfering with an arrest. "Officer don't mess with that guy, he didn't do anything; stay away." You know, like, "No, no, no, Officer, you need to leave the guy alone."

And then they say, "Stay away," and they grab the person and the person pushes away. You're now under arrest for interfering with an arrest. And they push away and say, "I haven't done anything," strike the officer. So they've committed resisting arrest. And then the officer takes the person down and punches them two or three times in the face.

So you could have a conviction for resisting arrest, because the person did resist arrest, and then you could have a legitimate excessive force claim because he got punched in the face.

Now I know those facts aren't exactly the same,

but that seems to be what they're suggesting happened. And so when somebody tries to defend the resisting arrest claim and is unsuccessful, and a jury convicts them, it doesn't -- I don't see that necessarily that eliminates the –- and so, in the context, because I'm not deciding the motion to dismiss -- in the context of a motion to stay where I tend to sort of accept the notion that I am allowed to take a little peak, I can't say that it's a slam dunk that you're going to win the motion to dismiss. You know it's a toss-up. Judge Martinez is going to have to decide it.

I think it's Judge Martinez, right?

MR. RATNER: Correct, yes.

THE COURT: And in this district motions to dismiss take like a year to decide and it just puts everything off. And so if I'm -- and I am not saying that's necessarily going to happen. I just know we've lost two district judges who had -- two senior judges in the last two months who had big dockets. So the burdens on our district just are huge.

And so putting off -- if it looks like it's a 50/50 deal, putting this off for a year is justice delayed, justice denied. And so that's what I'm -- that's what's going through my mind is putting off a case like this for a year pending a decision. And you may well win and that's great, but taking a few depositions and producing discovery

in the interim seems to me like the normal path that we ought to go. So you got to convince me that -- you got to really convince me that there's a reason. And in a qualified immunity situation that's a little different because the Supreme Court has said, okay, an immunity situation you shouldn't have to go through even the process of discovery if there's a plausible argument for immunity.

So help me on that one. That's what I'm struggling with here.

MR. RATNER: So, there's a lot in that analysis.

THE COURT: Yeah, okay. And I'll let you talk. I talked a lot, but I just want to give you a sense of what I am thinking about.

MR. RATNER: Of course.

THE COURT: When people talk to judges and the judges are sort of up there and you don't know what's going through their mind, that's kind of what's going through my mind, so.

MR. RATNER: And I appreciate that. And I think if we were talking about a mere, not a mere, but a motion to dismiss based solely on the pleadings -- in other words, you have a complaint that doesn't meet the proper allegations, and that's why we filed, you know, a 12(b) motion to dismiss, say if it's something you got from a pro se.

I understand the Court's position that, you know,

the chances of granting that motion maybe are slim, but this situation is different. I mean here we're talking about -- and this sort of segues into the preliminary peak approach that plaintiff sort of posits. And there's no cases in the district that necessarily have glammed on to this preliminary peak approach. And I think that's because the factors to establish there's good cause for a motion to stay are set forth in the String Cheese matter.

So, understanding that it's acceptable to look at the motion to dismiss, I think the Court's comments about maybe you win, maybe you don't, are the reason why we filed the motion to stay. I mean if we do win the motion to dismiss, but have already gone through discovery, that sort of negates the idea of judicial efficiency and the burden on the defendant which is a consideration, in terms of having to go through and conduct discovery.

We tried not to address necessarily the arguments in the underlying motion to dismiss because that is part of a separate motion. And it's interesting, not interesting, but a little difficult because the one motion to dismiss is with Judge Martinez and the motion to stay is with you.

THE COURT: Right.

MR. RATNER: But when you look at -- I guess -- and this is why the analysis is a little consuming, but when you look at everything in terms of what Ms. Surat was

convicted of, the resisting arrest, and the elements that were set forth for resisting arrest, and the notion that a jury had to consider the use of force, you know, whether or not the force was reasonable, in conjunction with the jury instruction of self-defense submitted on Ms. Surat's behalf and -- which addresses the reasonableness of the force, right, for Ms. Surat. The Jury considering that affirmative defense if they've already determined that the force was somehow excessive in terms of the arrest then they would have found in favor of Ms. Surat, and they didn't.

THE COURT: But in the criminal case if -- help me understand how the excessiveness of the officer's action would have been taken into account and evaluated by her criminal jury.

MR. RATNER: Through the affirmative defense of self-defense. I mean if you look at the jury instruction of self-defense --

THE COURT: Why don't you read that to me?

MR. RATNER: Sure.

THE COURT: You attached that as --

MR. RATNER: We attached it as an exhibit.

THE COURT: All right.

MR. RATNER: And it's referenced in the brief on page 5. So, this for the record, is ECF number --

THE COURT: So motion to stay, docket 35. Okay.

Exhibit B is the criminal jury instructions.

MR. RATNER: Correct.

THE COURT: Thirty-three pages long.

MR. RATNER: And I'm referring to ECF number 35, Page 5, the first full paragraph. And the exhibit is instruction -- well the instruction that I believe was attached as instruction number 8. But what we cite is, quote, "Self-defense is an available defense against both charges when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer." That's citing Johnson versus Hanus, 2013 US District, Lexus 62342, it's starred 8-10.

So, the self-defense affirmative defense, which has been considered by other courts when determining Heck arguments and motion to stay, is that they are looking at unreasonable or excessive force. And that's the standard that we're looking at in the underlying complaint.

THE COURT: Isn't the -- doesn't the timing matter, though? I mean --

MR. RATNER: In what respect?

THE COURT: -- like in my hypothetical.

MR. RATNER: Sure.

THE COURT: Like if her reaction to the initial attempt at arrest was not legitimate because the jury doesn't find the initial actions of the police officer to be

excessive, but then she's handcuffed and somebody comes and kicks her in the head two or three times, you could have after-the-fact excessive force, right?

MR. RATNER: Well, and I think Your Honor may be referring to the case -- cases such as Martinez where the court will parse out the different aspects of the situation. And I don't think Martinez or the other cases are applicable here because, for a few reasons: one, as admitted to in the complaint, the whole scenario took 32 seconds.

What plaintiff is suggesting by citing to those cases is that -- as an -- almost like an arm chair quarterback the court or parties would just sit back and parse out a scenario that is incapable of being parsed out, number one, and number two, doing something that the police officer on the scene certainly isn't required to do.

We know that these excessive force cases are reasonable force cases. The perspective is from almost like a reasonable police officer. What in the situation was the police officer doing and considered reasonable? And of course I'm paraphrasing.

But in your example, you're -- I think the Court is asking to again look at a situation that a police officer otherwise wouldn't have to do.

THE COURT: But is that something that should be decided on a motion to dismiss? I mean they've posited in

their complaint something close to the Martinez scenario. And don't we have to sort of accept that as reality for purposes of the motion to dismiss and then you file your motion for summary judgment?

MR. RATNER: And I would respectfully disagree. I think we're here for a motion to stay, not to argue the motion to dismiss. I understand that we're again we're sort of leaning into the preliminary peak approach. And I think the preliminary peak approach adds another burden to the defendant that isn't otherwise called for in this district. The district uses the String Cheese factors and seems to --

THE COURT: Yeah, but with all due respect, that was Judge Mix's decision. She's -- I'm an independent judicial officer.

MR. RATNER: Absolutely.

THE COURT: And I'm sometimes frustrated by the fact that, you know -- one reason why there may not be a preliminary peak approach is because the last thing I want to do as a magistrate judge, when the district judge has retained the motion to dismiss, is to be guessing what the district judge is going to do. And then if I guess wrong, then you know.

So that might be one reason as opposed to a district judge who doesn't have the time to deal with the motion to dismiss, but takes a quick look and says, "You know

what? This one I don't know how I'm going to come out on this, but it's like 50/50. So I'm going to deny the motion to stay because we need to move along with this case. And if it ends up being dismissed once I read the cases, so be it."

So you're right that the assignment of the motion to stay to me militates against the preliminary peak because I don't want to be ruling in advance of what the district judge is going to be doing. But I do think there is some merit. And I don't know if they cited in a footnote how many other districts have adopted that preliminary peak approach. It seems to be well accepted elsewhere.

MR. RATNER: And certainly I don't want to suggest that you absolutely can't recognize that there is a motion to dismiss and whether or not the motion to dismiss is valid. I think, though, that the extent -- I haven't read the litany of cases. I mean there was probably 50 or 60 cases cited there. But to adopt an absolute -- well let's consider the motion to dismiss before I actually rule on the motion to dismiss, places a higher burden on the defendant that's otherwise addressed by the String Cheese factors.

And certainly the Court in its exercise of its jurisdiction can consider sort of an overlap between the pending motion to dismiss and the motion to stay. But what I think is interesting is the Court is suggesting that it's not an absolute loser. It's not an absolute winner either.

THE COURT: Correct.

MR. RATNER: And I think those sort of factors weigh into granting a motion to dismiss until we have certainty.

THE COURT: Motion to stay.

MR. RATNER: Or motion to stay, I'm sorry. Because we want to avoid inconsistent results, notwithstanding the burden on either party probably what may be most paramount is the notion of having a consistent result. Plaintiff argues that well, you know, as time passes memories fade, things of that nature. And certainly that's a consideration.

Here we have, for good or bad, the benefit of not one but two criminal trials. I think there was -- I believe that there was a mistrial. But all that information is preserved.

THE COURT: Doesn't that reduce the burden of discovery, though, in some respects? Because people have -- people have testified as to what happened and so your depositions are going to be shorter and people can refresh their recollection with the trial testimony so it's, you know. I mean --

MR. RATNER: And I would suggest that -- I mean I'm not a criminal attorney, but I have been a civil attorney for a bit and I know that there's still going to be discovery

despite the fact that it maybe could be abbreviated by the existence of the criminal manner. Sometimes the criminal materials are incomplete; sometimes they're not accessible.

THE COURT: Did the plaintiff testify, by the way? Did she take the stand?

MR. RATNER: No

THE COURT: No. So you get to take her deposition which something in the criminal case they didn't get.

MR. RATNER: Correct. And that's -- and I hate to go back to time and energy because this is -- it's almost the cost of doing business, in my opinion. And I understand that. But I think -- and the reason why there is a number of factors under String Cheese is because it's not just time and money. It's burden. It's consistency. It’s the whole package. And that's why I started out by saying this isn't just a motion to stay because of the fact that there is a missed something or other in the pleadings or because there's a motion to dismiss based on the fact they didn't plead the proper words.

It's a motion to dismiss based on a substantive argument, Heck v. Humphrey, as well as a pending appeal. So I think when you consider all of those factors together, a motion to stay would effectuate the most consistent results and of course conserve time and energy that may not otherwise be required.

THE COURT: All right. Why don't I hear from --

MR. RATNER: Of course.

THE COURT: -- Plaintiff's counsel. And I guess one question I have is: If your client didn't testify the first time around and the case is on appeal, the criminal case is on appeal, if the motion to stay is denied, presumably there -- one for the first things they're going to do is notice the deposition of your client. And is she going to take the Fifth?

MR. MCNULTY: You know, Your Honor, I can't say at this juncture --

THE COURT: I mean that's a big deal.

MR. MCNULTY: -- whether she would. I agree.

THE COURT: I mean the last thing I want to do is deny the motion to stay and then they issue a deposition notice for your client, and you're like, "Nope. She's going to take the Fifth because the case is on appeal and if there's a retrial she doesn't necessarily want to testify." Right? I mean that's -- I have to ask you.

MR. MCNULTY: That's a fair point, Your Honor.

THE COURT: I mean that's like the best argument they have, is stay this pending the appeal and that's one that your client probably, unless she's absolutely going to testify in the retrial.

MR. MCNULTY: I don't know that that decision has

been made. I honestly haven't been on the criminal team, Your Honor. Mr. Lane has been doing that.

THE COURT: Do you agree that that's an issue? That --

MR. MCNULTY: That could be. That could be an issue. I agree.

THE COURT: Okay. So, you're telling -- you want the motion to stay denied; you want to proceed with discovery.

MR. MCNULTY: Correct.

THE COURT: What are you going to do when they send out the deposition notice for your client?

MR. MCNULTY: You know, I think that we -- that's a bridge we'll cross when we get there. That's --

THE COURT: No, no. I have to cross that bridge today. So, let's say we're crossing the bridge. What are we going to do?

MR. MCNULTY: I don't know what our position is going to be on whether we're going to let Ms. Surat testify or not, sitting here right now.

THE COURT: Well that's not fair to the defendant. You take their depositions, but she doesn't testify?

MR. MCNULTY: I'm just telling you that I don't have a position as of right now on whether we will let Ms. Surat testify or not, but I think, Your Honor, your other

points about the motion to stay are well taken. And I'm kind of confused by Mr. -- defense counsel's argument. He, in his motion, argues against the preliminary peak and then basis his entire motion on you taking a preliminary peak at the motion to dismiss.

The entire motion is based on the motion to dismiss. So I think that, number one, I think that based on that this court should take a preliminary peak at the motion to dismiss. Also I don't think that a preliminary peak is problematic for you to take because the motion hasn't been referred to you. It's called a preliminary peak. It's not called a preliminary parse.

It's not asking you to look at the entire merits of the motion. It's asking you to look and see, hey is this motion likely to succeed looking at it just on its face. And I think your analysis of the 50/50 shot is right. And I think that weighs in favor of not granting a stay in this case.

THE COURT: Was my articulation of your argument correct that you have to -- the timing is everything in this and --

MR. MCNULTY: Certainly. And Your Honor --

THE COURT: And am I correct that your view is that even if the conviction is sustained, you still have an excessive force claim?

MR. MCNULTY: That's right. And I think if you look at the cases that are cited in our motion, the Martinez case of course, but the Martinez case relies on a Third Circuit case that is even more illustrative of what our point is, and that is if the conviction wasn't based on -- we're not bringing a wrongful arrest claim. We're bringing an excessive force claim. Those are two different issues. And under Heck, bringing an excessive force claim is not precluded by a resisting arrest conviction.

THE COURT: But what about that jury instruction which seems to indicate that you asked for a self-defense jury instruction and self-defense is available when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer? So wouldn't the jury have necessarily decided that the peace officer was not using unreasonable or excessive force when they rejected the self-defense defense?

MR. MCNULTY: Your Honor, I think that talks about the pre-arrest force and it's not talking about, as you stated, the force that was used after her arrest was effectuated. And that's what our case is based on. Also the burdens in a criminal case and for a self-defense instruction are obviously much higher than they are for a civil case.

The other thing that I think is important for this court to note, I went to a talk last week by Judge Hegarty

about the time and the statistics of cases in this district.

THE COURT: Yes, I was there, too.

MR. MCNULTY: Yeah.

THE COURT: So just so there's no -- there was communication about the statistics and it's 24 to 28 months maybe.

MR. MCNULTY: Thirty-four months in 2018. It's a 20 percent jump from 2017.

THE COURT: Right.

MR. MCNULTY: Almost three years from filing of a case until you get to trial.

THE COURT: And he listed some of the factors including the loss of the two senior judges, sadly, that has put an excess burden on the district judges.

MR. MCNULTY: So, I don't think that our assertions about timing are speculative as the defense said in their motion. In fact there's statistics to back us up and there's some case law that talks about how long it takes.

The only burden that defendants raise is the burden of having to participate in discovery. That's all I heard them talking about. And there's a lot of case law in this district talking about how the burdens of engaging in routine discovery are not enough to warrant a motion to stay.

The other factors of course weigh in favor. You know, judicial economy is advanced by allowing cases to go

through the trial process and through the litigation process. There's public interest in seeing whether Ms. Surat's claims have merit.

THE COURT: So, here's the deal: If the criminal appeal weren't pending, you'd win. I'd deny the motion to stay because the principles articulated over and over again are that we need to move forward. My job as a magistrate judge is to get the case ready for trial. And where it's a toss-up, it's not an obvious winner on the motion to dismiss, I'm going to go with the plaintiff.

The problem is that criminal appeal. And I -- it is not fair if they try and notice your -- you know you want to notice the police officers and you're going to confront them with their trial testimony, they're going to notice your client. And if you take the Fifth, that's just not fair.

And so I need you to -- I'll tell you what, here's what I need you to do. I need you to go and consult with the criminal team and file something by this Friday and tell me whether you're prepared to allow your client to testify if the other side gave a motion -- issued a notice.

So, by the 6th. And I'm not forcing you to make that decision. And if the criminal team says, "You know what, we're going to play it by ear. We think we're going to win on appeal, and we think we're going to have a retrial," then just say not going to waive the Fifth. In which case,

I'm going to grant the motion to stay because it's not fair for you to go forward and not put your client up. If on the other hand, in consultation with client -- and if you need more time and you have to talk to the client, that's fine. If you need more time and you have to talk to the client and have a real discussion about that then -- you know, why don't I give you until next week? Why don't I give you until the 11th? So that's a week and a day of September. You submit a statement as to whether you would allow your client -- you're going to waive your Fifth Amendment rights and she's testifying at a deposition.

Because I think that's -- I just can't impose the burden on them to go forward with discovery unfairly and allow you to shield yourself, but she's totally entitled to shield herself in which case the civil case is going to have to wait until after the criminal appeal is over. That's how I'm coming down on this. I'm in agreement and with all due respect to defense counsels' arguments the general -- I am concerned about the delay. And cases just take too long. And it would put it off for a year.

I don't think -- when was this filed? The motion to dismiss? It was filed on --

MR. RATNER: July, I believe, June or July.

THE COURT: Yeah, June. So it doesn't get on the six-month list until next March. And, you know, the

individual district judges -- I can't say how Judge Martinez would -- whether he'd get to it quickly or not, but there's no urgency to get to something like this because he's got a stack of motions, and some of them are on the six-month list.

So that's how I'm coming out. So, by September 11th -- so I'm going to take it under advisement. By September 11th you need to file a notice of whether your client has made a decision on waiving her Fifth Amendment rights in the context of the civil case. And if that's the case, then I'm likely to deny the motion to stay and allow discovery to proceed.

If on the other hand, she wants to wait and see what the criminal appeal decision is and whether there's a retrial and she wants to reserve her right to keep her Fifth Amendment rights -- because I just -- it's not fair otherwise. It's not fair to the defense for you all to shield her from discovery and make them to go forward.

MR. MCNULTY: I appreciate your consideration, Your Honor.

THE COURT: Okay? So, unless there's anything else from the defendant, that's how I'm coming out on this one.

MR. RATNER: Nothing else, Your Honor.

THE COURT: All right. Thanks very much. So, let's just get something in by next Wednesday. Okay?

MR. MCNULTY: Will do, Your Honor. Thank you.

THE COURT: And you know if she's out of town or wants to think about it more and you need a little more time, file something, but file something by next Wednesday. All right?

MR. MCNULTY: Will do, Your Honor.

THE COURT: We'll be in recess. Thank you.

(Time noted: 9:58 a.m.)

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CERTIFICATE

I, RANDEL RAISON, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my ability.

_____ September 13, 2019

Randel Raison