IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

CITY DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY DISCOVERY

Defendants the City of Colorado Springs ("City"), B.K. Steckler, Jason S. Otero, and Roy A. Ditzler (collectively, "City Defendants") reply in further support of their motion to stay discovery pending resolution of their forthcoming motions to dismiss (the "Motion," Doc. 29).

Argument

The Court Should Issue An Order Staying Discovery Until The Court Rules On Defendants' Forthcoming Motions To Dismiss.

I. The Individual Defendants' Assertion of Qualified Immunity Requires a Stay.

In the Response, Plaintiffs do not dispute that when an individual defendant asserts the qualified immunity defense to a Section 1983 claim for money damages, *that* defendant is entitled to a stay of discovery on *that* claim pending a ruling on the immunity defense. (Doc. 36 at 3-5)[1] Plaintiffs nonetheless argue that a stay is not warranted in this case, even if the Officers assert qualified immunity to Plaintiffs' Section 1983 claims against them, because "Plaintiffs' claims against the City and FBI will remain …, as will Plaintiffs' claims under the Stored Communications Act and Colorado Constitution." (Id. at 4) In addition, because the entity defendants (the City and FBI) cannot claim qualified immunity, Plaintiffs argue that they are not entitled to a stay, and "discovery related to the City, the FBI, and these other claims," therefore, must go forward. (Id. at 5)

Plaintiffs err on both accounts. First, according to the Chief Judge of this District Court among others, the body of law based on Rome v. Romero, 225 F.R.D. 640 (D. Colo. 2004), on which Plaintiffs rely is "unavailing." Cook v. Whyde, No. 20-CV-02912-PAB-STV, 2021 WL 981308, at *2 (D. Colo. Mar. 15, 2021). In Cook, Chief Judge Brimmer explained that Rome predates String Cheese, which predates Iqbal, in which the Supreme Court made clear that all discovery should be stayed when an individual defendant asserts qualified immunity. Id. Based on Iqbal, Judge Brimmer overruled an objection to a magistrate judge's order staying all discovery

[1] City Defendants cite to the PACER pagination in the header of Doc. 36, rather than the page number in the footer.

where an individual defendant raised qualified immunity but two defendants did not. See also Lucero v. City of Aurora, No. 1:23-CV-00851-GPG-SBP, 2023 WL 5957126, at *6 (D. Colo. Sept. 13, 2023) ("agree[ing] with Cook and find[ing] that it reflects a proper application of Supreme Court precedent on the immunity/discovery question"); Tenorio v. Pitzer, No. CV 12-1295 MCA/KBM, 2013 WL 12178001, at *3 (D.N.M. July 27, 2013) (characterizing Rome and cases relying on it "non-binding, pre-Iqbal decisions"). Additionally, the court in Rome considered whether to stay discovery upon the assertion of qualified immunity in a motion for summary judgment, after discovery already had commenced. Rome, 225 F.R.D. at 642-43. It counseled that "the preferred practice is for the official to move to dismiss the claim on the grounds of qualified immunity before discovery is ordered," just as Defendants have done here. Id.

Second, the Officers' successful assertion of qualified immunity will dispose of some, and perhaps all, of Plaintiffs' claims. There are two ways that qualified immunity can protect an individual defendant sued under Section 1983: (1) the defendant did not violate a constitutional right, and (2) the constitutional right that the plaintiff seeks to enforce was not clearly established. See Clark v. Bowcutt, 675 Fed. App'x 799, 805 (10th Cir. 2017). Success on either prong of qualified immunity will dispose not only of Plaintiffs' Section 1983 claims for monetary damages against the Officers but also the Stored Communications Act claims. See 18 U.S.C. § 2707(e)(1) ("good faith reliance on a court warrant or order … is a complete defense to any civil or criminal action brought under this chapter or any other law"); John K. Maciver Inst. for Pub. Policy, Inc. v. Schmitz, 885 F.3d 1004, 1015 (7th Cir. 2018) ("qualified immunity is available to [Stored Communications Act] defendants"); Davis v. Gracey, 111 F.3d 1472, 1482 (10th Cir. 1997) (where

a valid warrant authorized seizure of computer equipment, the officers were entitled to "the statutory good faith defense [to the Stored Communications Act claim] as a matter of law").

In addition, the Officers intend to argue that Plaintiffs fail to allege that the Officers violated their constitutional rights. Success on the constitutional violation prong of qualified immunity will dispose of Plaintiffs' remaining claims against the City, their claims against the Officers under the Colorado Constitution, and Armendariz's claim to injunctive relief from the City Defendants. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (*per curiam*) (no municipal liability where the named individual defendant "inflicted no constitutional harm"). In sum, success on the clearly established prong of qualified immunity will dispose of the Section 1983 claims against the Officers and the Stored Communications Act claims. Success on the constitutional violation prong of qualified immunity will dismiss *all* of Plaintiffs' claims against City Defendants.

II. The String Cheese Incident Factors Weigh in Favor of a Stay.

A. Plaintiffs' Interests

In an attempt to show some particularized interest in proceeding with discovery now, Plaintiffs argue that "[t]his case must proceed expeditiously to end the ongoing violation of Armendariz's constitutional rights." (Doc. 36 at 7) Plaintiffs explain that "Armendariz is seeking an injunction against the Defendants to return or delete copies of her devices and files that were unlawfully obtained and kept." (Id.) But Defendants' alleged possession of copies of Armendariz's devices or files does not militate in favor of expediting discovery. First, Armendariz does not complain that she lacks possession of her devices and files. Second, destruction or return of the copies is the relief she ultimately seeks at the litigation's conclusion, just like any plaintiff who

believes they are entitled to relief. Third, Armendariz concedes that her claim to such relief depends on her ability to prove that the copies "were *unlawfully* obtained and kept." (Id. (emphasis added)) Defendants' forthcoming motions to dismiss will demonstrate that dismissal of *all* of Plaintiffs' claims is warranted. Fourth, Plaintiffs fail to cite any authority as support for the notion that a request for injunctive relief justifies expediting discovery. Fifth, Chinook does not even attempt to assert anything more than a general interest in proceeding with discovery now, which fails to overcome the other factors, which weigh in favor of a stay.

B. Defendants' Burden

In the Motion, Defendants argued that proceeding with discovery now would be unduly burdensome because (1) Defendants intend to move to dismiss all of Plaintiffs' claims, potentially obviating the need for any discovery ever to occur in this case; (2) the nature of Plaintiffs' claims (Armendariz v. Summey and Ditzler; Chinook v. Steckler and Otero; and a mix of federal and state law claims) makes it likely that at least certain parties will be excised from the case on Defendants' motions to dismiss, and (3) Plaintiffs' claims appear to lack merit, at least under Messerschmidt v. Millender, 565 U.S. 535, 546 (2012). (Doc. 29 at 10-12)

In the Response, Plaintiffs do not dispute any of these contentions. (Doc. 36 at 8-10) Plaintiffs wholly ignore Messerschmidt, incorrectly arguing that "Defendants do not provide any support for their belief that their motion to dismiss will be successful." (Id. at 8) It is Plaintiffs who fail to provide support for their belief that any of their claims will survive the motions to dismiss.

Plaintiffs also contend that "proceeding with discovery now will help both sides narrow the claims and issues." (Id. at 9) But Plaintiffs miss the point: Defendants' motions to dismiss will narrow the claims and issues more than engaging in discovery will—perhaps eliminating the need

to conduct discovery at all. The Court should hold discovery in abeyance until after rulings on the motions to dismiss so that the Court, parties, and non-parties can reap the benefits of the total elimination or narrowing of discovery that will come from those rulings.

Finally, Plaintiffs argue that because "the City and the FBI cannot assert a qualified immunity defense, … they are not entitled to a stay," and, thus, all parties will be required to participate in discovery on the claims to which the qualified immunity defense does not apply. (Id.) Plaintiffs' argument turns the Supreme Court's qualified immunity precedent on its head. It is the individual Officers who are entitled to be free of the burdens of discovery. Because, as Plaintiffs concede, discovery on Plaintiffs' remaining claims necessarily would require the Officers' participation, it all must be stayed. See Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009).

C. The Court's Convenience

Plaintiffs counter Defendants' contention that the rulings on their motions to dismiss could render discovery here wasteful and, thus, inconvenient to the Court (Doc. 29 at 12), by arguing that " 'motions to dismiss are denied far more often than they result in the termination of a case.' " (Doc. 36 at 10, quoting Peterson v. City & Cty. of Denver, Colo., No. 21-cv-01804-RMR-SKC, 2022 WL 1239327, at *3 (D. Colo. Apr. 27, 2022)) But Plaintiffs' contention rings hollow considering that Plaintiffs fail to address Messerschmidt or otherwise support the merits of their claims, even preliminarily.

D. Interests of non-parties

In the Motion, City Defendants identified *many* non-parties who would be drawn into discovery in this case. (Doc. 29 at 13-14) Tellingly, Plaintiffs do not dispute Defendants' contention; they don't assert that the non-parties the City Defendants identified would not be

subjected to discovery. Instead, Plaintiffs contend that because Defendants did not "show the *extent* to which the nonparties' interests will be affected by discovery" this factor "does not support an imposition of a stay." (Doc. 36 at 12 (emphasis added))

Plaintiffs err. As argued in the Motion, identifying just " 'two anticipated third-party deponents' " is sufficient to tip this factor in favor of a stay. (Doc. 29 at 14, quoting Adamson v. Volkswagen Grp. Of Am., Inc., No. 22-cv-00740-CMA-MDB, 2022 WL 4767573, at *4 (D. Colo. Oct. 3, 2022)) All of the many individual non-parties identified could be subjected to being deposed, and considering Plaintiffs' allegations in the Amended Complaint, City Defendants specifically anticipate Commander Koch, Lieutenant Chacon, and Officer Alamo to be deposed regarding the motivation to arrest Armendariz and others. In addition, the anticipated deposition of (former) Deputy District Attorney R. Short would be particularly burdensome to everyone, as Mr. Short is understood to be retired and living out of state. This factor weighs in favor of a stay.

E. Public Interest

In the Response, Plaintiffs emphasize the public interest in resolving "matters of public importance" promptly. (Doc. 36 at 11) They also argue that there is nothing unfair about requiring government employees to participate in discovery while their motion to dismiss is pending, just like non-governmental witnesses. (Id. at 12) That is because these Defendants, Plaintiffs contend, allegedly searched and seized Plaintiffs' devices and data "without justification." (Id. at 11)

By Plaintiffs' own admission, then, the public interest disfavors a stay here only to the extent that Plaintiffs' claims are meritorious—i.e., that the Officers sought and executed the search warrants "without justification." (Id.) But as discussed herein, Plaintiffs have done nothing to show that there is merit to their claims where, as here, neutral judges issued the search warrants.

Furthermore, speedy resolution of the litigation is not the public's only interest. In addition to a just resolution, the public also favors an efficient and "inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Defendants are governmental entities and employees, paid with the public's dollars and charged to continue serving the public during this litigation. They will be moving to dismiss all claims in Plaintiffs' complaint. Staying discovery while their motions to dismiss are pending conserves the Court's, the parties', and, ultimately, the public's resources. This factor favors a stay.

Conclusion

The Court should stay discovery in this case until the Court rules on Defendants' forthcoming motions to dismiss.

Respectfully submitted this 3rd day of November, 2023

OFFICE OF THE CITY ATTORNEY OF THE
CITY OF COLORADO SPRINGS, COLORADO
Wynetta P. Massey, City Attorney

/s/ Anne H. Turner
Anne H. Turner, Assistant City Attorney
30 S. Nevada Ave., Suite 501
Colorado Springs, Colorado 80903
Telephone: (719) 385-5909
Facsimile: (719) 385-5535
anne.turner@coloradosprings.gov

Attorneys for Defendants City of Colorado Springs,
B.K. Steckler, Jason S. Otero and Roy A. Ditzler

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 3rd day of November, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

jackie.roeder@dgslaw.com
theresa.benz@dgslaw.com
elise.reecer@dgslaw.com
tmacdonald@aclu-co.org
sneel@aclu-co.org
akurtz@aclu-co.org
msilverstein@aclu-co.org
Attorneys for Plaintiffs

thomas.isler@usdoj.gov
Attorney for Defendant Federal Bureau of Investigation and Detective Daniel Summey

/s/Terry JoHansen
Terry Johansen
Litigation Paralegal