IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PETITIONERS/PLAINTIFFS' REPLY TO DEFENDANTS/RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION (DKT. # 54) TO PLAINTIFFS/PETITIONERS' MOTION TO EXPEDITE BRIEFING SCHEDULE FOR PLAINTIFF/PETITIONERS' MOTIONS FOR PRELIMINARY INJUNCTION AND TO EXTEND ORDER STAYING REMOVAL (DKT. #50) AND MOTION TO EXPEDITE DISCOVERY OF CLASS MEMBER INFORMATION (DKT. #51)

The stakes in this case could scarcely be higher. Absent the stay issued by this Court, approximately 200 detained Iraqi nationals – many of whom have lived in the United States for decades and have U.S. citizen spouses and children – face immediate removal to Iraq, where there is a great likelihood that they will be persecuted, tortured, or even killed. Another estimated 1,200 Iraqis with final orders of removal face imminent arrest and removal. Given these extraordinary circumstances, this Court has already found that:

> the significant chance of loss of life and lesser forms of persecution that Petitioners have substantiated . . . far outweighs any conceivable interest the Government might have in the immediate enforcement of the removal orders, before this Court can clarify whether it has jurisdiction to grant relief to Petitioners on the merits of their claims.

Opinion, Dkt #32, Pg.ID# 501.

This Court has indicated that it views the jurisdictional issues as "complex." *Id*. at Pg.ID# 500. Defendants/Respondents nevertheless seek to pressure the Court to decide the jurisdictional issues by July 10, 2017. While Plaintiffs/Petitioners believe that the Court clearly has jurisdiction, they understood that the Court does not want to rush to judgment. Lives – potentially hundreds of them – are at stake, which counsels considered, deliberative and fully-informed decision-making. Under the circumstances, if the Court remains unsure whether it has jurisdiction after consideration of the emergency stay briefs, it may wish for and benefit from fuller preliminary injunction briefing, including on the Court's jurisdiction to grant the preliminary relief sought in this case.

There is no artificial 14-day deadline within which this Court must decide its jurisdiction. Rather, the Court has jurisdiction to decide its jurisdiction for the length of time it takes the Court to make a decision. *Cf.* Opinion and Order, Dkt. #32, Pg.ID# 502 (finding stay appropriate "**pending** the Court's determination regarding whether it has subject-matter jurisdiction") (emphasis added). *See, e.g. Am. Federation of Musicians v. Stein*, 213 F.2d 679, 689 (6th Cir. 1954) ("[T]hese

and other questions going to the jurisdiction of the district court to entertain the case were grave and difficult, and justified the district court in its issuance of the preliminary injunction in order to reserve its decision on jurisdiction to a time when, after a hearing, adequate study and reflection would be afforded properly to interpret and apply the law."). For example, in *Okoro v. Clausen*, 07-cv-13756, 2008 WL 253041, at *1 (E.D. Mich. Jan. 30, 2008) (Ex. A), the court resolved a jurisdictional question against the removable petitioner only after granting stay of removal that lasted over four months. *See Okoro v. Clausen*, No. 07-cv-13756, Order Granting Application to Proceed in Forma Pauperis and Directing Service Of Petition For Habeas Corpus (E.D. Mich. Sept. 12, 2007) (Ex. B). The Court's power includes the power to order full briefing of the issues on whatever schedule the Court deems appropriate, and to extend the stay of removal in the interim.

This Court's power also fully authorizes it to order expedited discovery so that the Plaintiffs/Petitioners will have the information needed to bring a prompt preliminary injunction motion and the Court will have the information it needs to decide upon the appropriate scope of relief upon finding (as it should) that it has jurisdiction. *See* Fed. R. Civ. P. 26(d) 1993 Advisory Committee Notes; *North Atlantic Operating Co. v. Huang*, 194 F. Supp. 3d 634, 637 (E.D. Mich. 2016); *Slate Rock Const. Co. v. Admiral Ins. Co.*, No. 2:10-cv-01031, 2011 WL 1641470,

at *4 (S.D. Ohio May 2, 2011) (Ex. C) (granting limited expedited discovery notwithstanding pending jurisdictional challenge).

The requested discovery is also important for class certification. Indeed, class action plaintiffs typically need such information in order to prove that their claims involve "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2); that the class representatives' claims "are typical of the claims and defenses of the class," Fed. R. Civ. P. 23(a)(3); that the class representatives will "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4); and that Defendants have "acted or refused to act on grounds that apply generally to the class…," Fed. R. Civ. P. 23(b)(2). To that end, courts routinely allow parties to conduct pre-class certification discovery. *See Pittman v. E.I. DuPont de Nemours & Co.*, 552 F.2d 149, 150 (5th Cir. 1977) (holding that "a certain amount of discovery is essential to determine the class action issue and the proper scope of a class action"). Such discovery is necessary since the party seeking class certification must "**affirmatively prove** his compliance" with Rule 23's requirements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (emphasis added). Here because Plaintiffs/Petitioners seek preliminary injunctive relief on a class-wide basis, they expect that the Court will want at least basic information on the nature and composition of the proposed class at the earliest

opportunity. That is precisely the information Plaintiffs/Petitioners seek through expedited discovery.

Respectfully submitted,

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July 2, 2017

* Application for admission forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
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PETITIONERS/PLAINTIFFS' REPLY TO DEFENDANTS/RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION (DKT. # 54) TO PLAINTIFFS/PETITIONERS' MOTION TO EXPEDITE BRIEFING SCHEDULE FOR PLAINTIFF/PETITIONERS' MOTIONS FOR PRELIMINARY INJUNCTION AND TO EXTEND ORDER STAYING REMOVAL (DKT. #50) AND MOTION TO EXPEDITE DISCOVERY OF CLASS MEMBER INFORMATION (DKT. #51)

Exhibit A: *Okoro v. Clausen*, 07-cv-13756, 2008 WL 253041 (E.D. Mich. Jan. 30, 2008)

Exhibit B: *Okoro v. Clausen*, No. 07-cv-13756, Order Granting Application to Proceed in Forma Pauperis and Directing Service Of Petition For Habeas Corpus (E.D. Mich. Sept. 12, 2007

Exhibit C: *Slate Rock Const. Co. v. Admiral Ins. Co.*, No. 2:10-cv-01031, 2011 WL 1641470 (S.D. Ohio May 2, 2011)

EXHIBIT A

2008 WL 253041
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Ralphael OKORO, Petitioner,
v.
Vincent CLAUSEN, Detroit Field Office Director, Bureau of Immigration and Customs Enforcement, Respondent.

No. 07-13756.
|
Jan. 30, 2008.

Attorneys and Law Firms
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Derri T. Thomas, U.S. Attorney's Office, Detroit, MI, for Respondent.

ORDER GRANTING MOTION TO VACATE STAY OF REMOVAL [17] AND DENYING PETITION FOR HABEAS CORPUS [1] AS WELL AS OTHER MOTIONS [13, 15, 16, 19, 21]

ARTHUR J. TARNOW, District Judge.

***1** On September 6, 2007, Ralphael Okoro, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. The government responded and petitioner replied. This court assumed jurisdiction over the case and stayed Okoro's deportation under 28 U.S.C. § 1651. The government later filed a motion to vacate the stay of removal, and petitioner responded.

Petitioner is a lawful permanent resident. He had been placed in removal proceedings in 2007 because of federal drug trafficking convictions. The Seventh Circuit affirmed those convictions.

Okoro's habeas petition asks this Court to enjoin ICE from removing him pending the outcome of a civil suit before Judge Borman, 05-70269, and a related appeal before the Sixth Circuit, 06-1816.

The government is correct that this Court does not have jurisdiction to enjoin the commencement of removal proceedings. *See* 8 U.S.C. § 1252(g) ("no court shall have jurisdiction to hear any cause or claim ... arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders, against any alien under this chapter.").

Since the time that Okoro filed the instant habeas petition, Immigration Judge Elizabeth Hacker issued an order of removal on November 6, 2007. If Okoro seeks judicial review of that order, a habeas petition before this Court is not the proper vehicle. For this reason, it is irrelevant whether Okoro's pending suits concern his underlying criminal convictions, because such suits would inevitably challenge petitioner's removability.

Rather, Okoro would have to appeal the immigration judge's order to the Board of Immigration Appeals. From Okoro's January 18, 2008 letter, the Court understands that the BIA affirmed the immigration judge's order of removal. Even then, a habeas petition in this Court would only be viable if it challenged merely the fact or conditions of detention while the order of removal was being reviewed. *See Hernandez v. Gonzales*, 424 F.3d 42 (1 st Cir.2005) (citing 8 U.S.C. § 1252(a)(5)); *see also Kellici v. Gonzales*, 472 F.3d 416, 418 (6th Cir.2006). Any challenge to the underlying removability of the alien can only proceed through a petition for review with the U.S. circuit courts of appeals. *See* 8 U.S.C. 1252(a)(5) ("[n]othwithstanding any other provision of law (statutory or non-statutory), ... a petition for review filed with an appropriate court of appeals in accordance with this section shall be the *sole and exclusive means for judicial review of an order of removal* ...") (emphasis added). Therefore, this Court cannot vacate the BIA's "unintelligent 1-14-08 decision 'without opinion.' " Okoro Letter Dated January 18, 2008 at 1, ¶ 1.

Okoro does not challenge his detention pending the outcome of judicial review of the order of removal, though. Although he states that his legal papers have been illegally withheld from him, the Court does not understand this to be Okoro's stated basis for his habeas petition. If Okoro wants to file a habeas petition in this Court challenging the conditions of his detention, such as the withholding of his legal papers from him, without contesting the fact that he is removable, he may do so. The Court believes that Okoro's complaints about the nature of his confinement are ancillary to his real concern: that he will be removed.

***2** Because this court does not have jurisdiction over Okoro's petition, his other motions are denied as well. This includes his

- Letter requesting consideration of supplemental authority (docket entry 7). Okoro asks the Court to consider a couple of cases that he thinks would permit the Court to take jurisdiction over claims asking for injunctive relief. However, the cases he cites were decided before the jurisdiction-stripping provisions of the Real ID Act became effective in 2005.

• Letter dated October 11, 2007 asking the Court to declare the deportation proceeding unconstitutional (docket entry 11). Okoro says that Immigration Judge Hacker decided his motion objecting to his deportation without receiving his reply to the government's response. But any argument about the removal proceeding's failure to accord Okoro due process of law goes to the substance of Okoro's removability and is not properly before this Court.

• Emergency Motion to issue warrant (docket entry 13). In this motion, petitioner asks the Court to issue an arrest warrant against the respondent, the immigration judge, the magistrate judge in Judge Borman's case, and the assistant U.S. attorney defending the habeas petition. Okoro states that the immigration judge commenced removal proceedings and that the magistrate judge in his pending civil suit failed to enjoin the commencement of those proceedings, contravening this Court's stay of deportation. But this Court never said that removal proceedings could not be initiated against Okoro, and it never had the authority to do so. The Court had only stayed Okoro's actual removal.

• The same analysis applies to the letter dated October 18, 2007 (docket entry 12). Petitioner asks the Court to incarcerate Immigration Judge Hacker and the Assistant U.S. Attorney defending the habeas petition for commencing removal proceedings.

• Motion to introduce newly discovered evidence (docket entry 15). In this motion, Okoro argues that there is new evidence that shows that his underlying drug convictions were prosecuted improperly. In particular, Okoro presents an affidavit by Drug Enforcement Agency agent, which petitioner alleges was fabricated as part of a conspiracy of corrupt police officers. Again, these arguments attempt to undermine the basis of his removability, but this Court is without jurisdiction to entertain such a challenge.

• Motion to compel respondent to produce/secure petitioner's permanent resident card, Nigerian passport, driver's license and state ID (docket entry 16). Okoro alleges that corrupt police officers stole some of these items, along with a substantial amount of money, while he was being arrested on the underlying drug offenses. Once again, if Okoro merely wants these items back, he can file a habeas petition asking for that relief, but he may not attempt to present evidence undermining his drug convictions before this Court.

• Motion to vacate order of deportation (docket entry 19). Okoro filed this motion after Immigration Judge Hacker entered the removal order in November, 2007. He attacks Judge Hacker for refusing to consider his argument that he is innocent of the crimes for which he was convicted. But this Court cannot consider such an argument either.

***3** • Motion pursuant to the Eighth Amendment (docket entry 21). Here, Okoro protests the several jail transfers he has undergone, as well as the poor quality of the food, "food no man in his right mind would feed a dog." Mot. at 2. He also says that the MRSA bacteria is rampant in his current jail, and that his cellmate is infected. Okoro asks to be placed in a federal prison. This is the sort of challenge that this Court can properly consider. Okoro may present a habeas petition making this argument as long as he makes clear that he is not contesting the fact that he can be removed.

• So also may Okoro's September 24, 2007 letter (docket entry 8) be considered in another habeas petition. In that letter, Okoro alleges that Monroe County jail guards were withholding his legal mail and had used "barbaric obscenities" and "threatened to 'fuck' [him] up" when Okoro told them that he had informed this Court about his inability to get legal mail.

• Okoro's allegations in a letter dated September 21, 2007 (docket entry 9) could also be a basis for another habeas petition. He complains of jail guards obstructing his mail and asks the Court to order the jail to provide him with materials and access to facilities, like a photocopier and law library, to pursue his litigation.

• Okoro's most recent allegations from his January 18, 2008 letter that his legal mail is obstructed and that his jailers turn the temperature in his cell so that it is inhumanely cold are also properly considered in another habeas petition.

Therefore, the Court GRANTS the government's motion to vacate the stay of removal and DENIES the habeas petition as well as Okoro's remaining motions without prejudice to the filing of a habeas petition that challenges only the conditions of his detention.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 25304

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RALPHAEL OKORO

Petitioner,

v.

VINCENT CLAUSEN, Detroit Field Office Director, Bureau of Immigration and Customs Enforcement,

Respondent.
_____/

Case No. 07-13756

Honorable Arthur J. Tarnow
United States District Judge

ORDER GRANTING APPLICATION TO PROCEED *IN FORMA PAUPERIS* [2] AND DIRECTING SERVICE OF PETITION FOR HABEAS CORPUS

On September 6, 2007, Petitioner, Ralphael Okoro, filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2241.

He also filed an application to proceed *in forma pauperis*, which the Court now GRANTS.

The Court has reviewed the petition for writ of *habeas corpus* and deems that it is not appropriate for summary dismissal. Therefore,

The Clerk of the Court is directed to serve photocopies of the petition and this order upon the United States Attorney via facsimile and first-class mail, and upon Respondent via first-class mail. Respondent shall file a response to this petition, along with relevant or supporting documentation, within three (3) days of the date of this order. Petitioner Okoro may reply within a week after he receives the government's response.

In order to preserve the Court's jurisdiction over this matter, it is ordered that Petitioner's removal or deportation is hereby stayed until further order of the Court. 28 U.S.C. § 1651. For good cause shown, the Government may move to vacate this stay.

The named respondent in a matter seeking review of a decision of the Bureau of Immigration and Customs Enforcement is the Director of that agency. Therefore, it is ordered

that the caption of this case is amended as shown above.

IT IS SO ORDERED.

S/ARTHUR J. TARNOW
Arthur J. Tarnow
United States District Judge

Dated: September 12, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 12, 2007, by electronic and/or ordinary mail.

S/THERESA E. TAYLOR
Case Manager

EXHIBIT C

2011 WL 1641470
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Eastern Division.

SLATE ROCK CONSTRUCTION COMPANY, LTD., Plaintiffs,
v.
ADMIRAL INSURANCE COMPANY, et al., Defendants.

Civil Action No. 2:10–cv–01031.
|
May 2, 2011.

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OPINION AND ORDER

ELIZABETH A. PRESTON DEAVERS, United States Magistrate Judge.

***1** This matter is before the Court for consideration of Plaintiff's Motion for Limited Relief under Fed. R. Civ. 26(d)(1). (ECF No. 243.) Specifically, Plaintiff requests that the Court allow it to seek limited discovery prior to conferring with opposing counsel pursuant to Federal Rule of Civil Procedure 26(f). For the reasons that follow, Plaintiff's Motion is **GRANTED** to the extent that the Court will allow Plaintiff to engage in expedited discovery to request the relevant insurance policies.

I. BACKGROUND

Plaintiff, Slate Rock Construction Company, Ltd. ("Slate Rock"), brings this action seeking declaratory and other relief against several Defendants including Defendant General Accident Insurance Company, n/k/a OneBeacon Insurance Company ("OneBeacon"). As it relates to this case, Slate Rock served as the general contractor on three construction projects in Pennsylvania. To complete these projects, Slate Rock entered into contracts with several subcontractors. Slate Rock maintains that these contracts required each subcontractor to obtain commercial general liability insurance; name Slate Rock as an "additional insured" under the relevant insurance policies; and file certificates of insurance with Slate Rock evidencing that it was as an additional insured under the relevant policies. (Compl.¶¶ 52–54.) Lawsuits have since been brought against Slate Rock in the three underlying construction projects. Slate Rock asserts that all of the insurance-company Defendants have failed or refused to defend Slate Rock in the underlying lawsuits.[1]

[1] The Defendants generally fall into the categories of insurance companies, insurance brokers, or subcontractors.

Consequently, Slate Rock seeks declaratory judgments from the Court finding that each insurance company who provided an insurance policy to the subcontractors, including OneBeacon,[2] is obligated to defend it, as an additional insured, in the underlying construction lawsuits. (*See* Compl. ¶¶ 94–231.) In the alternative, Slate Rock brings promissory estoppel and negligent misrepresentation claims against each insurance broker for issuing certificates of insurance stating that Slate Rock is an additional insured on the relevant insurance policies. (*See* Compl. ¶¶ 232–391.) Multiple Defendants have

moved to dismiss Plaintiffs' claims based on lack of personal jurisdiction, improper venue, and failure to state a claim. (*See, e.g.*, ECF Nos. 159, 169, 171.) Additionally, OneBeacon and several other Defendants have moved the Court to transfer venue pursuant to 28 U.S.C. § 1404(a). (*See* ECF No. 167.)

[2] Slate Rock brings its claim against OneBeacon maintaining that it provided insurance policies to Defendants Ryco, Inc. and Phoenix Framing, LLC, which included Slate Rock as an additional insured. (Compl.¶ 160.)

Before and during this lawsuit, Slate Rock requested that each of the insurance company Defendants provide it with certified copies of the relevant insurance policies. OneBeacon, however, declined to provide Slate Rock copies of its insurance policies with Defendants Ryco, Inc. and Phoenix Framing, LLC.[3] Consequently, Slate Rock now seeks the Court's permission to engage in expedited discovery pursuant to Fed.R.Civ.P. 26(d)(1).[4] Slate Rock contends that permitting early discovery will streamline the case. Specifically, Slate Rock maintains that if the insurance policies include it as an additional insured, it intends to dismiss its alternative claims against the insurance broker Defendants. Slate Rock asserts that it requires certified copies of the complete policies to determine whether the policies include Slate Rock as an additional insured.[5] Moreover, Slate Rock emphasizes that its requests are narrow in scope and involve documents that OneBeacon will eventually have to produce. Finally, Slate Rock contends that granting limited early discovery will not prejudice OneBeacon.

[3] It appears at this time that the remaining insurance company Defendants have provided Slate Rock copies of the other relevant insurance policies.

[4] The Court held an informal telephone conference on March 25, 2011 with the hope that it could resolve this issue without the need for comprehensive briefing. Before and during the conference, however, OneBeacon stressed that it desired to fully brief the issues involved. Accordingly, the Court allowed the parties a full opportunity to brief the issues.

[5] In response to Slate Rock's earlier requests, instead of providing a certified copy of the entire document, OneBeacon provided Slate Rock with a copy of an endorsement, which indicated Slate Rock is an additional insured. (*See* ECF No. 266–1.)

***2** OneBeacon opposes Slate Rock's Motion for Limited Relief. OneBeacon asserts that Slate Rock has failed to demonstrate good cause for lifting the discovery moratorium embedded in Rule 26 of the Federal Rules of Civil Procedure. Additionally, OneBeacon maintains that it would be inappropriate for the Court to allow discovery involving the merits when motions challenging venue and jurisdiction are pending. Finally, OneBeacon contends that even if the Court would permit discovery pursuant to Rule 26(d), to the extent Slate Rock seeks to compel discovery, its motion is premature.

II. STANDARD

Pursuant to Federal Rule of Civil Procedure 26, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized by these rules, by stipulation, or by court order." Fed.R.Civ.P. 26(d) (1). Thus, Rule 26(d) vests the district court with discretion to order expedited discovery. *Lemkin v. Bell's Precision Grinding*, No. 2:08–CV–789, 2009 WL 1542731, at *1 (S.D. Ohio June 2, 2009) (citing *Qwest Communs. Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003)).

Courts considering motions for expedited discovery typically apply a good cause standard. *Lemkin*, 2009 WL 1542731, at *2 (citations omitted). The burden of demonstrating good cause rests with the party seeking the expedited discovery. *Id.* (citation omitted). The moving party may establish good cause by demonstrating that "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *See id.* (quoting *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.Cal.2002)). In determine whether good cause exist, the Court will also consider whether the scope of the proposed discovery "is appropriately narrow and targeted." *Id.*

III. LEGAL ANALYSIS

In this case, the Court finds that Slate Rock has met the good cause standard underlying Rule 26(d). Three basic reasons support this conclusion. First, under the circumstances of this case, efficiency interests favor allowing limited early discovery. Slate Rock brings this action against over thirty Defendants, many of whom are insurance brokers on Slate Rock's alternative claims. In

seeking the relevant insurance policies at this time, Slate Rock maintains that it is attempting to decide whether it can dismiss its alternative claims against the insurance broker Defendants and rely solely on its claims for declaratory judgment. The Court finds no reason to doubt this assertion. Furthermore, the Court credits Slate Rock's assertion that it must examine the complete insurance policies, as opposed to the isolated endorsements OneBeacon has provided, before making decisions to dismiss Defendants. As Slate Rock points out, another endorsement to the policies may remove it is as an additional insured. Moreover, OneBeacon denied in its Answer that Slate Rock was an additional insured under the policies. (*See* Answer ¶ 160, ECF No. 166.)

***3** Because of the numerous parties currently involved in this case, the interests of judicial economy, and efficiency for the parties will be promoted if the issues and participants are narrowed at an early stage in the proceedings. If Slate Rock is able to dismiss parties from this case at this early stage, the future proceedings in this case will be simplified, regardless of whether the Court ultimately transfers the action.

Second, the narrow scope of the discovery Slate Rock seeks weighs heavily in favor of a determination of good cause in this case. As indicated above, the Court is more likely to find good cause under Rule 26(d) when a party's expedited discovery requests are narrow and targeted. Here, in requesting early discovery, Slate Rock is merely seeking permission to obtain copies of two insurance policies. The normal time frame and schedule under Rule 26 will apply to the remainder of discovery.

Third, OneBeacon will endure little, if any, prejudice if the Court allows limited discovery to proceed at this time. In assessing whether good cause exists, at least within the context of Rule 26(d), the Court balances the need for early discovery with the potential prejudice to the responding party. It is clear to the Court that Slate Rock will inevitably submit discovery requests for these insurance policies. In opposing Slate Rock's Motion, OneBeacon does not identify any prejudice that it will endure if Slate Rock is allowed to request the two insurance policies at issue before the parties confer pursuant to Rule 26(f). Rather, because Slate Rock's requests are limited in scope, any potential prejudice will be minimal at best. Additionally, for the reasons described below, the Court does not construe Slate Rock's Motion as one to compel discovery. Therefore, to the extent OneBeacon objects to Slate Rock's discovery requests, it may utilize the normal protections of the Federal Rules of Civil Procedure and this Court's Local Rules to obtain relief. Consequently, although the need for exigency may not be overwhelming in this case, it still outweighs the negligible prejudice to OneBeacon in turning over two documents.

The Court finds nothing inappropriate in allowing limited discovery to take place at this stage. The United States Court of Appeals for the Sixth Circuit has routinely held that the "conduct of discovery [is] committed to the sound discretion of the district court." *Medison Am., Inc. v. Preferred Med. Sys., LLC*, 357 F. App'x 656, 661 (6th Cir.2009) (quoting *In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir.1996)). OneBeacon, however, cites *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30 (3rd Cir.1970) and *Investment Properties Intern., Limited v. IOS, Limited*, 459 F.2d 705 (2nd Cir.1972) to support its assertion that the Court should not allow any merits discovery to occur when venue and jurisdictional challenges are pending. In addition to being forty-year old non-binding authority, these cases are easily distinguishable from the current facts. In *Polin*, a district court "held that all matters of discovery should be fully completed before any action is taken on the [motion to transfer venue] ...." *Polin*, 429 F.2d at 30. The United States Court of Appeals for the Third Circuit held that it was improper for the district court to postpone its decision on the motion to transfer venue, and directed the district court to use its "wise discretion" to prevent "discovery from leading into the merits of the claim."[6] *Id.* In this case, the Court is not putting off the jurisdictional and venue challenges. These matters are currently under advisement by the District Judge. And, the Court never intended when it held an informal conference to allow, and is not now permitting, Slate Rock to engage in a full array of merits discovery. Rather, the Court is allowing the production of two documents, which will assist in simplifying future proceedings before either this or the transferee court.

6 The Court of Appeals did not, as OneBeacon represented in its "Notice of Reservation of Rights," issue the writ of mandamus. (ECF No. 250.)

***4** Furthermore, the Court finds OneBeacon's reliance on the Second Circuit's *Investment Properties* decision to be misplaced. *Investment Properties* is inapposite and adds little value to this case. In that case, the Second Circuit granted a petition for writ of mandamus directing a district judge to allow limited discovery relevant to whether the district court had jurisdiction and standing. *Investment Properties*, 459 F.2d at 708. The Court of Appeals did not address the relevant issue here, namely the propriety of a court allowing limited discovery prior to a Rule 26(f) Conference while jurisdictional or venue challenges were pending.

It is also telling that this Court has refused to stay discovery pending a motion to dismiss for lack of subject matter jurisdiction.[7] *Charvat v. NMP, LLC*, No. 2:09–cv–209, 2009 WL 3210379, at *2–3 (S.D.Ohio Sept.30, 2009). In doing so the Court reasoned:

> [R]equests for a stay of discovery pending the resolution of an initial Rule 12 motion are not limited to motions brought under Rule 12(b)(6). Parties commonly move for stays of discovery pending a variety of Rule 12 motions, including motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, or improper venue. However, the impact of these types of motions on the issue of whether discovery should proceed is not substantially different. In fact, it could be argued that because these types of motions do not go to the merits of the case, but only to the forum in which it proceeds, there is even less reason to stay discovery pending their outcome. Any discovery taken while such a motion is pending would, of course, be available for the parties to use if the case is dismissed other than on the merits and then refiled in a Court where subject matter or personal jurisdiction is proper.
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> *Charvat*, 2009 WL 3210379, at *2–3. The logic applies equally to this case. Even assuming OneBeacon is successful in its motion to transfer, Slate Rock will ultimately have a right to request the insurance policies at issue while the case is before the transferee court. Accordingly, the Court finds little reason to delay this discovery until after disposition of the pending jurisdictional and venue motions.

Finally, OneBeacon contends that even if the Court finds expedited discovery appropriate, it should not treat Slate Rock's Motion as one to compel discovery. On this point, the Court agrees.[8] Under S.D. Ohio Civ. R. 37. 1, a party must first exhaust all extrajudicial means for resolving discovery disputes before filing a motion to compel. In this case, Slate Rock has requested on numerous occasions that OneBeacon provide the insurance policies. Nevertheless, although professional courtesy may have suggested different behavior, because the discovery period had not yet begun pursuant to Rule 26, OneBeacon had no discovery obligation to provide any documents, even those that will be discoverable. Accordingly, at this time, the Court grants Slate Rock's Motion only to the extent Slate Rock seeks expedited discovery pursuant to Rule 26(d) in order to request copies of the relevant insurance policies. If the parties disagree as to whether the insurance policies are discoverable, they are entitled to resort to the protections afforded under the Federal Rules of Civil Procedure as well as this Court's Local Rules.[9]

[7] As OneBeacon emphasizes, this matter is before the Court on a motion for expedited discovery and not on a motion to stay discovery. Nevertheless, because the Court finds that Slate Rock has demonstrated good cause for limited expedited discovery pursuant to Rule 26(d), the circumstances are analogous.

[8] For this reason, the Court will refrain from deciding whether Slate Rock is actually entitled to these documents at this time.

[9] Slate Rock suggests that if the Court does not compel the production of the documents, it will lead the Court right back to a similar motion. (*See* Reply 7, ECF No. 275.) Although the Court would expect that the parties could resolve any dispute through extrajudicial means, Slate Rock may ultimately be correct. If the parties are not able to resolve potential conflicts regarding discovery of the insurance policies, Slate Rock is certainly entitled to bring a motion to compel pursuant to Federal Rule of Civil Procedure 37. If Slate Rock were to succeed on such a motion, of course, it would be entitled to its reasonable expenses including attorney's fees. Fed.R.Civ.P. 37(a)(5).

IV. CONCLUSION

***5** For the above reasons, the Court **GRANTS** Slate Rock's Motion for Limited Relief under Fed. R. Civ. 26(d)(1) (ECF No. 243) to allow Slate Rock to conduct limited expedited discovery in order to seek production of the two insurance contracts at issue in this dispute. Nothing in this Opinion and Order may be construed as a decision to permit full-merits discovery in this action.

At this time, the Court also informs all parties that it will set a preliminary pretrial conference, if necessary, following the resolution of the pending motions to transfer venue.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1641470