1997 WL 33559328
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan.

Linda NUNN, et al., Plaintiffs,
v.
Kenneth MCGINNIS, et al., Defendants.

No. 96–CV–71416. | Sept. 17, 1997.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR STAY PENDING APPEAL

OMEARA, J.

***1** Before the court is Defendants' motion for a stay pending appeal, filed August 11, 1997. Plaintiffs submitted a response August 21, 1997; Defendants have not filed a reply. Pursuant to LR 7.1(e)(2), the court has decided Defendants' motion on the briefs, without oral hearing. For the reasons expressed in this opinion, Defendants' motion is DENIED.

BACKGROUND

Defendants are appealing this court's July 28, 1997 order denying their second motion to dismiss or for summary judgment and are seeking a stay of this action pending the outcome of that appeal. Defendants filed their first motion to dismiss pursuant to Rule 12(b)(6) and 12(b)(1) on September 17, 1996, alleging, in part, that they were entitled to dismissal based upon qualified immunity. The court rejected that claim in its February 4, 1997 opinion and order granting in part and denying in part Defendants' motion. Defendants filed neither a motion for reconsideration nor an appeal of that order.

Defendants filed a second motion to dismiss or for summary judgment on July 7, 1997, again raising the qualified immunity defense. On July 28, 1997, the court entered an order denying Defendants' second motion to dismiss with prejudice because it had already ruled upon the 12(b)(6) issues, including the qualified immunity defense. The court also denied Defendants' motion for summary judgment without prejudice as premature, because the motion raised factual issues and discovery has barely begun in this case.

Defendants filed a notice of appeal of the court's July 28 order on August 7, 1997, and filed a motion for stay pending appeal the next day.

LAW AND ANALYSIS

In considering whether to grant a stay pending appeal pursuant to Fed. R.App. P. 8(a), the court is to balance "the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir.1991). The factors are:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Id. (citations omitted). As the Sixth Circuit explained, "In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal" unless the movant can show that it will suffer irreparable harm absent a stay; "Simply stated, more of one excuses less of the other." *Id.* In evaluating the harm that will occur in the absence of a stay, the court must examine three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Id.* at 154 (citation omitted). When considering the degree of injury, "[t]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Id.* (quoting *Sampson v. Murray,* 415 U.S.

61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)).

***2** Defendants argue that “[t]his Court’s refusal to recognize Defendants’ right to judgment, or alternatively qualified immunity, will unnecessarily require the expenditure of substantial and unrecoverable State funds” and that “Defendants will also have to spend considerable time and disruption to prison administration to respond to various discovery devices.” Defs.’ Mot. at 1–2. As the Sixth Circuit has explained, however, “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Id.* (quoting *Sampson v. Murray,* 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)). Further, Defendants have not presented any facts supporting their assertion that they will suffer irreparable harm in the absence of a stay, nor have they provided any analysis demonstrating that they are likely to succeed on the merits of their appeal. Defendants’ brief is devoid of the necessary showing or analysis required under Fed. R.App. P. 8(a). *See id.* at 154 (“[I]n order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist.”).

ORDER

Accordingly, IT IS HEREBY ORDERED that Defendants’ August 11, 1997 motion for a stay pending appeal is DENIED.