

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Derrick Thomas, *on behalf of himself and those
similarly situated,*

Plaintiff,

v.

Papa John's International, Inc., *et al,*

Defendants.

Case No. 1:17-cv-411

Judge Michael R. Barrett

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTIONS TO STRIKE OR STAY PLAINTIFF'S MOTION FOR
CONDITIONAL CERTIFICATION [DKT. 25]

1. Introduction

To be frank, Defendants' Motion is a large, multinational company's attempt to save a little money briefing an issue that, with one outlier, has never gone Defendants' way.¹ But their attempt comes at the expense of hundreds of their own low-wage workers, whose claims for unpaid wages will continue to expire if the Court grants their request. And, Defendants will have to respond to Plaintiff's Motion for Conditional Certification, regardless of whether this case ends up in White Plains, New York or stays here in Cincinnati.

The equities in this case could be easily balanced by an agreement among the parties to simply toll the statute of limitations for the workers, during which time Plaintiffs would agree to

¹ See Dkt. 19, Plaintiff's Opposition to Defendants' Motion to Dismiss, Transfer or Stay, PageID 220 (citing cases).

Defendants' proposed stay of briefing. But, PJI refused that reasonable solution, resulting in this briefing.

Without an agreement to protect Defendants' workers, the Court should deny PJI's Motion because it would impose substantial and undue prejudice on a vulnerable class.

2. Argument

2.1. Standard for a Stay

“‘The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants.’” *Ohio Envtl. Council v. U.S. Dist. Ct., S. D. Ohio*, E. Div., 565 F.2d 393, 396 (6th Cir. 1977), quoting *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). In considering a motion to stay discovery, the appropriate factors to consider are any prejudice to the non-moving party if a stay is granted, any prejudice to the moving party if a stay is not granted, and the extent to which judicial economy and efficiency would be served by the entry of a stay. *Hagwood v. GE*, No. 2:07-cv-548, 2007 WL 4287655, *2 (S.D. Ohio Dec. 4, 2007).

2.2. Even fully dispositive motions are not a basis to stay litigation; Defendants' non-dispositive motion certainly is not.

As a threshold matter, Defendants are not entitled to a stay of briefing simply because they have sought transfer of this action to the Southern District of New York. Courts in this district routinely deny motions to stay and require parties to continue litigating even when a dispositive motion has been filed. See, e.g., *Hogan v. Cleveland Ave Restaurant, Inc.*, No. 2:15-cv-2883, 2017

WL 5005422, *3 (S.D. Ohio Nov. 1, 2017) (denying protective order and requiring defendants to participate in discovery while motion to dismiss for failure to state a claim is pending).²

If the Court routinely denies motions to stay when a dispositive motion is pending, the case for a stay is even weaker here where, at most, this case will continue but in a different court. Even if things go PJI's way, at a bare minimum, the other franchisee Defendants in this lawsuit (the "It's Only" entities and Michael Hutmier) will need to respond (or agree to) Plaintiff's Motion for Conditional Certification.

2.3. Defendants' Motion to Stay attempts to obscure the standard for conditional certification of an FLSA collective action.

Putting aside for a moment that a stay is generally not appropriate, even in situations involving dispositive motions, Defendants' purported basis for the stay—that conditional certification turns on whether PJI is a "joint employer"³—is simply wrong. Certification is based on the similarity between *employees* (*i.e.*, were employees subjected to the same pay practices), not the identity of employers. If conditional certification is granted, "notice of the lawsuit will not be sent to individual companies, but to individual workers." *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2017 WL 3500411, *4 (S.D. Ohio Aug. 15, 2017).

Plaintiff's Motion does not set out to show who is responsible for the allegedly impermissible wage and hour practices, but whether other "It's Only" delivery drivers are

² See also *Bowens v. Columbus Metro. Library Bd. of Trs.*, No. 2:10-cv-00219, 2010 WL 3719245, *4 (S.D. Ohio Sept. 16, 2010) (denying motion to stay while dispositive motion was pending); *United States ex rel. Am. Sys. Consulting, Inc. v. Mantech Advanced Sys. Int'l*, No. 2:08-cv-733, 2011 WL 1667479, *9 (S.D. Ohio May 2, 2011) (denying motion to stay while dispositive motion was pending); *Dominion Transmission, Inc. v. Detweiler*, No. 2:11-cv-836, 2013 WL 941314, **5-6 (S.D. Ohio Mar. 11, 2013) ("In contending that it will be prejudiced by having to proceed with discovery, CLS relies solely on the notion that discovery may prove unnecessary if the dispositive motions are granted."); *City of Lancaster v. Flagstar Bank, FSB*, No. 10-cv-1041, 2011 WL 1326280, at *13 (S.D. Ohio April 5, 2011) (denying motion to stay while dispositive motion was pending).

³ See Dkt. 25-1, PageID 424.

subject to the same wage and hour practices as Plaintiff. As such, the presence of the franchise defendants in this case renders the joint employer question irrelevant to Plaintiff's motion for conditional certification. Plaintiff can make (and has made) the "modest factual showing" necessary for conditional certification of his proposed FLSA class *without making any showing with respect to PJI*.

On the other hand, in *Durling*, the only way for the plaintiffs to show that their proposed class is "similarly situated" is by reference to PJI's policies and practices, because they did not name any franchise defendants, and have broadly defined their class to include employees at all franchise locations—even franchises from which they have no plaintiff. Further, from what Plaintiff can glean, Defendants will claim to have no involvement whatsoever in setting the compensation policies at the "It's Only" franchises. As such, PJI's suggestion that consideration of Plaintiff's Motion for Conditional Certification necessarily requires the Court to decide the joint employer question is little more than an effort to confuse the issues before the Court.

Plaintiff's Motion will require adjudication, regardless of whether it is in this Court or another. PJI's position regarding whether it is a "joint employer" does not play into that adjudication. Accordingly, taking as true that the "joint employer" issue is identical in both *Durling* and this case (and it is not), a stay in this case does nothing more than delay briefing that must be done, one way or the other.

2.4. Defendants' proposed stay will substantially prejudice the putative class in this case.

Whether a stay is appropriate usually comes down to a balance of prejudices. Here, in one corner, we have a vulnerable class of minimum wage workers whose claims are diminishing by the day, and therefore any delay in briefing/decision on conditional certification unquestionably

causes them harm. They will not learn of the case and their right to join it until the Court grants Plaintiff Thomas's Motion.

In the other corner, we have a publicly-traded, multinational corporation claiming they will be prejudiced if they have to file a brief that their counsel could put together in half-a-day. The prejudice, they claim, is that they will be forced to defend what they insist is the same issue in two different venues—that issue being whether Papa John's International, Inc. is a joint employer to delivery drivers who work for Papa John's franchisees.⁴ However, no matter how this Court ultimately rules on PJI's motion to dismiss, transfer, or stay, neither PJI nor the "It's Only" franchise defendants will be able to avoid responding to Plaintiff Thomas' Motion for Conditional Certification—*i.e.*, even if his case is transferred, Defendants cannot force Plaintiff Thomas to simply join the *Durling* class and not pursue his claims for, for example, tip credit notice violations and uniform deductions. Since they must answer to Plaintiff Thomas eventually, they suffer no harm in having to do so now.

This prejudice could be easily managed if Defendants were willing to agree to toll the statute of limitations for the putative class in this case. Defendants are unwilling to do so. And, for purposes of this Response, Plaintiff will assume what Defendants argue to be true—that the Court cannot equitably toll the statute of limitations of absent class members at this time. This means that for each week Defendants can delay briefing, hundreds of workers lose out on a substantial portion of a week's pay. This is highly prejudicial. Defendants' absurd argument that the delay could have been avoided if Plaintiffs did not sue PJI in the first place (and sued only the

⁴ As discussed in Section 2.3, above, PJI overstates the relevance of the joint employer question to Plaintiff's Motion for Conditional Certification.

franchisee defendants) is the equivalent of a schoolyard bully's taunt of "why do you keep hitting yourself?"

Considerations of prejudice weigh heavily in favor of denying PJI's request for stay.

2.5. Judicial economy is not served by a stay.

Judicial economy is not served by a stay. Plaintiff recognizes that the Court should rule on PJI's motion to dismiss, transfer, or stay before it reaches the question of whether Plaintiff Thomas is "similarly situated" to other delivery drivers under the "It's Only" franchise umbrella. However, if the parties brief Plaintiff Thomas' Motion while awaiting the Court's decision on the motion to dismiss, transfer, or stay, then no matter the outcome, the court where this action is ultimately heard (here or White Plains, NY) will have a fully-briefed motion for conditional certification to consider, instead of having to wait 1-2 months for it. Moreover, this Court may elect, in the interest of efficiency, to rule upon both motions at the same time. This course places no additional burden on the courts, and potentially preserves months of unpaid wages for putative delivery drivers.

3. Conclusion

Based on the foregoing, Plaintiff Derrick Thomas asks that the Court deny PJI's Motion to Strike or Stay Plaintiff's Motion for Conditional Certification.

Respectfully submitted,

/s/ Andrew Kimble

Andrew R. Biller

Andrew P. Kimble

Markovits, Stock & DeMarco LLC

3825 Edwards Road, Ste. 650

Cincinnati, Ohio 45209
Phone: (513) 665-0213
Fax: (513) 665-0219
akimble@msdlegal.com
abiller@msdlegal.com

www.msdlegal.com

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing was served upon counsel for Defendants through the Court's ECF system.

/s/ Andrew Kimble
Andrew Kimble