UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ADRIANA AGUILAR, et al.,

Plaintiffs,

-against-

IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

----------x

DISCOVERY ORDER

07 Civ. 8224 (JGK) (FM)

FRANK MAAS, United States Magistrate Judge.

This is a putative class action brought by more than twenty plaintiffs ("Plaintiffs") who allege that officials of the Immigration and Customs Enforcement Division of the United States Department of Homeland Security ("ICE"), together with others, violated their constitutional rights by unlawfully searching their homes and targeting Latinos for arrest. In their Fourth Amended Complaint ("FAC"), Plaintiffs have added as defendants in their individual capacities four high-ranking officials within ICE or the Department of Homeland Security (DHS) at the time of the searches: Michael Chertoff, the former Secretary of DHS; Julie Myers, the former Assistant Secretary of ICE; John Torres, the former Director of ICE's Office of Detention and Removal Operations; and Marcy Forman, the former director of ICE's Office of Investigations (collectively, the "Officials").

I have been overseeing discovery in this case since July 2008, during which time there have been scores of discovery disputes. To date, the parties have conducted 127 depositions and also have exchanged more than 50,000 pages of documents. (See Defs.' Mem. at 8; Tr. of Dec. 17, 2010 Conf. at 5).

This Discovery Order addresses the Officials' motion to stay certain additional discovery involving them pending the resolution of their motion to dismiss the FAC. (ECF No. 217). Specifically, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the Officials seek a stay of "(i) all document discovery and written discovery directed against them; [and] (ii) their initial disclosures and interrogatory responses."[1] (See ECF No. 218 ("Defs.' Stay Mem.") at 5). The Officials contend that such a stay is appropriate because of the "substantial possibility" that they will prevail on their motion to dismiss (which relies heavily on the Supreme Court's decision in Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937 (2009)), the remote likelihood that discovery from the Officials will result in the production of any new documents, and the alleged lack of prejudice to Plaintiffs resulting from a stay. (Defs.' Stay Mem. at 8-9).

Plaintiffs oppose the motion on the grounds that (a) even if the motion to dismiss is granted, the Officials possess "highly relevant" information which Plaintiffs will be entitled to obtain through third-party subpoenas; (b) the Officials have not demonstrated "good cause" for a stay in light of the weakness of their motion to dismiss

---

[1] Although the Officials initially sought to stay their depositions as well, (see Defs' Stay Mem. at 5), Plaintiffs have agreed to "hold off" on taking their depositions until the motion to dismiss is decided. (See Tr. of July 30, 2010 Conf. at 4-5, 20).

and the reasonableness of Plaintiffs' discovery demands; and (c) a delay in discovery would adversely affect the quality of the testimony in this case, in which the witnesses' memories have already faded, thus prejudicing Plaintiffs. (See ECF No. 238 (Pls.' Stay Mem.")).

For the reasons set forth below, the Officials' motion for a stay is granted in part and denied in part.

I. Applicable Law

Rule 26(c) of the Federal Rules of Civil Procedure permits a court to stay discovery for "good cause." See Fed. R. Civ. P. 26(c); Johnson v. New York Univ. Sch. of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (Ellis, Mag. J.); Thrower v. Pozzi, No. 99 Civ. 5871 (GBD), 2002 WL 91612, at *7 (S.D.N.Y. Jan. 24, 2002); Siemens Credit Corp. v. Am. Transit Ins. Co., No. 00 Civ. 0880 (BSJ), 2000 WL 534497, at *1 (S.D.N.Y. May 3, 2000). In determining whether there is good cause to stay an action while a dispositive motion is pending, courts consider (a) the strength of the dispositive motion, (b) the breadth of the discovery sought and the burden of responding to it, and (c) the prejudice to the non-moving party should a stay be granted. See Niv v. Hilton Hotels Corp., No. 06 Civ. 7839 (PKL), 2007 WL 510113, at *1 (S.D.N.Y. Feb. 15, 2007); Johnson, 205 F.R.D. at 434; Integrated Sys. & Power, Inc. v. Honeywell Int'l., Inc., No. 09 Civ. 5874 (RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009); Anti-Monopoly, Inc. v. Hasbro, Inc., 94 Civ. 2120 (LMM) (AJP), 1996 WL 101277, at *3 (S.D.N.Y. Mar. 7, 1996).

The burden of establishing good cause falls on the moving party. See Am. Booksellers Ass'n v. Houghton Mifflin Co., No. 94 Civ. 8566 (JFK), 1995 WL 72376, at *1 (S.D.N.Y. Feb. 22, 1995). Courts in this Circuit consequently have denied stay applications when motions to dismiss are pending if the moving defendants would be subject to non-party discovery even if they were to be dismissed from the case. See Freund v. Weinstein, No. 08 Civ. 1469 (FB) (MDG), 2009 WL 2045530, at *3 (E.D.N.Y. July 8, 2009); Hollins v. U.S. Tennis Ass'n, 469 F. Supp. 2d 67, 79 (E.D.N.Y. 2006); Hachette Distrib., Inc. v. Hudson Cnty News Co. Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991). Indeed, at least three judges in this District have held that a stay is appropriate only when the underlying motion to dismiss disposes of the entire action. See Williston v. Eggleston, 410 F. Supp. 2d 274, 278 (S.D.N.Y. 2006) (Sweet, J.); Association Fe Y Allegria v. Republic of Ecuador, Nos. 98 Civ. 8650, 98 Civ. 8693, 1999 WL 147716, at *1 (S.D.N.Y. Mar. 16, 1999) (Jones, J.); In re Akropan Shipping Corp., No. 86 Civ. 4873, 1990 WL 16097, at *2 (S.D.N.Y. Feb. 14, 1990) (Keenan, J.).

II. Discussion

In his dissent in Iqbal, Justice Souter suggests that the majority's decision "does away with supervisory liability under Bivens [v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)]." Iqbal, 129 S. Ct. at 1955 (Souter, J., dissenting). Plaintiffs disagree, contending that, "far from eliminating supervisory liability, Iqbal reaffirmed that a federal official may be held liable for his own failure to supervise subordinates, as that is 'his own neglect,' not mere respondeat superior." (ECF

No. 239 at 26) (citing id. at 1948; Dunlop v. Munroe, 11 U.S. (7 Cranch) 242, 269 (1812)).

The effect of Iqbal on Plaintiffs' ability to proceed against the Officials in their individual capacities is a matter that Judge Koeltl presumably will address in ruling on the Officials' motion to dismiss. The narrow issue before me relates to discovery. In that regard, however, I must consider the strength of the Officials' motion. Two judges in other districts recently have denied motions to dismiss made by defendants Myers and Torres in cases involving Fourth Amendment allegations substantially similar to those asserted in this action. See Diaz-Bernal v. Myers, No. 09 Civ. 1734 (SRU), 2010 WL 5211494, at *18-20 (D. Conn. Dec. 16, 2010); Argueta v. Immigration & Customs Enforcement, No. 08 Civ. 1652 (PGS), 2010 WL 398839, at *4-10 (D. N.J. Jan. 27, 2010). Accordingly, it appears that the Officials' motion may face an uphill battle insofar as the Fourth Amendment claims against these officials are concerned. Whether the FAC states a claim against defendants Chertoff and Myers – two higher officials – obviously presents a closer question. Nonetheless, the Court cannot say, as Plaintiffs suggest, that the likelihood of their success on the motion to dismiss is "speculative at best." (Pls.' Stay Mem. at 21).

Turning to the breadth of Plaintiffs' discovery requests and the burden of responding to them, Plaintiffs previously have propounded five sets of document requests and two sets of interrogatories to which the Officials might need to respond. (See id. at 9, 16 n.8). The Officials, however, already have conducted a search for documents

responsive to Plaintiffs' first and second discovery requests, thus mitigating the amount of additional work they would need to do now to respond to Plaintiffs' document requests in the absence of a stay. (See Tr. of Oct. 15, 2009 Conf. at 47). Additionally, as Plaintiffs correctly point out, the Officials' reliance on Iqbal's admonition against exposing "high-level officials" to the burdens of discovery is misplaced, because defendants Chertoff and Myers no longer work for the Government and defendants Torres and Forman no longer hold policy-making positions at the highest levels of government, as did the Attorney General and the Director of the Federal Bureau of Investigation in Iqbal. See Iqbal, 129 S. Ct. at 1953-54. Moreover, even if Judge Koeltl dismisses all of Plaintiffs' claims against the Officials, the case against the other defendants will proceed. The Officials therefore may be required to produce their documents to Plaintiffs in response to subpoenas issued pursuant to Rule 45 of the Federal Rules of Civil Procedure.

In these circumstances, it simply does not make sense to stay document discovery pending Judge Koeltl's ruling. The Officials therefore will be required to produce any additional documents responsive to Plaintiffs' requests that are in their possession, custody, or control.

The interrogatories are a different matter. If the Officials are required to respond to detailed interrogatories at this preliminary stage of the case against them, they might be engaging in an exercise that could not be required of them if the claims against them in their individual capacities are dismissed. Furthermore, given the scope of the discovery to date in this case, it is hard to fathom how the lack of interrogatory

answers from four of more than sixty defendants could in any way prejudice Plaintiffs. The same reasoning applies to the Officials' Rule 26(a) disclosures. For this reason, the motion to stay is granted with respect to Plaintiffs' interrogatories and the Officials' Rule 26(a) disclosures.

III. Conclusion

Accordingly, for the reasons set forth above, the Officials' motion for a stay of discovery, (ECF No. 217), is granted with respect to Plaintiffs' interrogatories and the Officials' Rule 26(a) disclosures, but denied with respect to Plaintiffs' document requests.

SO ORDERED.

Dated: New York, New York
January 11, 2011

FRANK MAAS
United States Magistrate Judge

Copies to:

Honorable John G. Koeltl
United States District Judge

Aldo Badini, Esq.
Dewey & LeBoeuf, LLP
Fax: (212) 649-0919

Ghita Schwarz, Esq.
Latino Justice PRLDEF
Fax: (212) 431-4276

Shane Cargo
United States Attorney's Office
Fax: (212) 637-2786