

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

BRITNEE KENYON,

Plaintiff,

v.

BOARD OF EDUCATION OF TOWNSHIP  
HIGH SCHOOL DISTRICT 113, DANIEL  
STRUCK, THOMAS KRIEGER, MICHELLE  
HAMMER BERNSTEIN,

Defendants,

and

J.L.,

Respondent in Discovery

Case No. 1:24-cv-09878

Judge Sharon Johnson Coleman

Magistrate Judge Beth W. Jantz

**DEFENDANT MICHELLE BERNSTEIN'S MOTION TO STAY DISCOVERY  
PENDING THE COURT'S RULING ON DEFENDANT'S 12(B)(6) MOTION TO  
DISMISS**

Defendant Michelle Bernstein, by and through undersigned counsel, hereby moves that the Court exercise its authority to stay discovery as to the claims against her. In particular, Bernstein moves for an order staying discovery in this matter, as to the claims against her, until the Court has ruled upon her Motion to Dismiss (ECF No. 25). Defendant Bernstein makes this request in the interest of conserving the resources of the parties and the Court by avoiding unnecessary discovery. In support of her motion, Defendant Bernstein states as follows:

Defendant Bernstein filed a Motion to Dismiss Plaintiff's case against her, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Illinois Citizen Participation Act, 735 ILCS 110/1 *et seq.*, on November 18, 2024. ECF No. 25. The Response to that Motion to Dismiss was filed on December 23, 2024 (ECF No. 45), and Defendant's Reply is due by January 13, 2025, after which the Court will take the matter under advisement. ECF No. 36.<sup>1</sup>

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<sup>1</sup> Counsel for Defendant Bernstein conferred with counsel for Plaintiff regarding a stay of discovery ahead of the parties' submission of the Joint Status Report filed on December 4, 2024. (ECF No. 38) Plaintiff's counsel did not agree to stay discovery.

This Court has entered a preliminary discovery schedule, under which the next significant deadline is that initial written discovery requests are due January 9, 2025. ECF No. 42.

As more fully set forth in Defendant Bernstein's Motion to Dismiss and accompanying Memorandum of Law, Plaintiff's Complaint contains case-dispositive, incurable legal defects that warrant its dismissal with prejudice. Unlike the other defendants, who have filed a partial answer, Defendant Bernstein has filed a Motion to Dismiss that is entirely dispositive of the case against her. It is a legal argument that could completely resolve the case against her, resulting in her dismissal from this lawsuit. It is also based purely on legal questions, such as whether Bernstein's speech is protected opinion under the First Amendment and Illinois law. As a dispositive motion based on questions of law, a stay of discovery is appropriate. *Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670, 674 (7th Cir. 1990) (proper to enter order staying discovery pending resolution of qualified immunity claims).

"The filing of a motion to dismiss by itself does not mandate a stay of discovery pending resolution of that motion, nor does the right to discovery continue in light of a pending dispositive motion." *Bianchi v. Tonigan*, 2012 U.S. Dist. LEXIS 167011, \*4 (N.D. Ill. Nov. 26, 2012) (citing *Walsh v. Heilmann*, 472 F.3d 504, 505 (7th Cir. 2006)). "Rather, the determination to stay discovery is based on the individual case and whether ongoing discover[y] is 'unlikely to produce facts necessary to defeat the motion.'" *Id.* (citing *Sprague v. Brook*, 149 F.R.D. 575, 577 (N.D. Ill. 1993)). "Numerous cases in this circuit have even allowed stays in the face of a Rule 12(b)(6) challenge. Stays of discovery are not disfavored and are often appropriate where the motion to dismiss can resolve the case[.]" *Bilal v. Wolf*, No. 06 C 6978, 2007 U.S. Dist. LEXIS 41983, \*4 (N.D. Ill. June 6, 2007).

Here, entry of a stay of discovery until after the Court has ruled on Defendant Bernstein's Motion to Dismiss is warranted. "Courts are more likely to stay discovery pending a motion to dismiss where the motion will resolve an important threshold issue." *Bianchi v. Tonigan*, 2012 U.S. Dist. LEXIS

167011, \*3-4 (N.D. Ill. 2012). As noted above, Bernstein’s Motion to Dismiss is based solely on a legal response to Plaintiff’s own allegations. It relies entirely on threshold legal questions, assuming all factual allegations to be true. It is well-settled that “a party may plead itself out of court by either including factual allegations that establish an impenetrable defense to its claims or by attaching exhibits that establish the same.” *Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 650 (7th Cir. 2006). Defendant Bernstein’s Motion to Dismiss is based on well-settled law which will entirely dispose of Plaintiff’s Complaint. “If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided.” *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997).

A court in this district has entered a stay in a closely comparable case, concerning a Motion to Dismiss brought against a defamation complaint. *Rao v. JPMorgan Chase Bank, N.A.*, 2021 U.S. Dist. LEXIS 205610, \*2 (N.D. Ill 2021) (“As a result, the Court found that Defendants should not be required to incur the costs of discovery, nor the Court the burden of overseeing discovery, before the Court determines whether any of Plaintiff’s claims withstand dismissal.”). In such a circumstance, staying discovery was appropriate, as it would “simplify the issues in the case by waiting to see which issues remain after the motion [to dismiss] is decided.” *Id.* at \*3 (quoting *Harper v. Cent. Wire, Inc.*, No. 19 CV 50287, 2020 U.S. Dist. LEXIS 160211, 2020 WL 5230746, at \*1 (N.D. Ill. Sept. 2, 2020)). As the court in that case explained: “the stay plainly reduces the burden of litigation for the parties (namely Defendants) and the court system alike by waiting to see whether the complaint withstands dismissal to begin discovery.” *Id.* at \*3-4.

No prejudice would result from staying discovery; the plaintiff has the opportunity to conduct discovery of the other parties and there is no discovery needed for the plaintiff to be able to address Bernstein’s Motion to Dismiss. Moreover, in parallel Illinois state proceedings, discovery is automatically stayed pending a decision on a motion to dismiss based on the Illinois Citizen

Participation Act. 735 ILCS 110/20(b). This requirement is illustrative of the reasons to delay discovery in lawsuits brought against the exercise of speech rights and the burdens those lawsuits impose.

Even responding to written discovery requests can impose a significant burden on Defendant Bernstein. Beginning discovery at this time, before the Court has resolved Bernstein's Motion to Dismiss, would require extensive time and resources and pose unnecessary costs on Bernstein and all other parties, and impositions on the court system that can be avoided by staying discovery until after the Court's resolution. Defendant Bernstein now resides in Florida. All other parties are believed to reside in Illinois. Accordingly, discovery in this case as to Plaintiff's claims against Bernstein, including depositions, could require either Defendant Bernstein or all other parties and counsel in this case significant time and expense for travel – all of which may be entirely unnecessary should this Court grant Defendant Bernstein's Motion to Dismiss.

For the reasons stated above, Defendant Bernstein respectfully requests this Court to grant Defendant Bernstein's Motion to Stay Discovery pending a ruling on her Motion to Dismiss Plaintiff's Complaint.

Dated: December 30, 2024

Respectfully submitted,

CHARLES E. HERVAS,

[REDACTED]  
HERVAS, CONDON & BERSANI, P.C.

[REDACTED]

**THE AMERICAN CENTER FOR  
LAW AND JUSTICE**

By: /s/ Nathan J. Moelker  
NATHAN J. MOELKER\*\*

[REDACTED]

GEOFFREY R. SURTEES\*

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

*Counsel for Defendant Michelle Bernstein*

\* Admitted in this Court's General Bar.  
\*\* Admitted Pro Hac Vice

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on December 30, 2024, he caused a copy of the foregoing Defendant's Motion to Stay to be e-filed using the CM/ECF e-filing system which will serve all parties of record.

*/s/ Nathan J. Moelker* \_\_\_\_\_