

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

King Lincoln Bronzeville :
Neighborhood Association, :
et al., :
Plaintiffs, :
v. : Case No. 2:06-cv-745
: JUDGE MARBLEY
J. Kenneth Blackwell, et al., : MAGISTRATE JUDGE KEMP
Defendants. :

OPINION AND ORDER

I. Introduction

This case was filed on August 31, 2006 by a number of organizations and individuals who alleged an ongoing conspiracy by J. Kenneth Blackwell, then the Ohio Secretary of State, and others "to deprive and continue to deprive Ohioans of their right to vote" through the selective and discriminatory allocation of voting machines, the misuse of provisional ballots, the improper purging of voter registration lists, and by relinquishing control of ballots to one of the competing political parties. Complaint, ¶2. In an amended complaint, more specific allegations of vote dilution, vote suppression, and vote inflation or miscounting are made. Most of the specific allegations in the complaint relate to the 2004 general election.

On February 5, 2007, the parties jointly moved to stay the case, and it was stayed initially until April 9, 2007, and, by further requests of the parties, until August 31, 2007. Doc. #34. On that date, plaintiffs then asked for a continuance of the stay until the Court held a status conference. Doc. #35. No party has since requested a status conference and none has been held.

Nothing further occurred in the case until July 7, 2008,

when a motion to intervene was filed. Ten days later, plaintiffs moved for relief from the stay, a motion which the new Secretary of State, Jennifer Brunner, opposed. While that motion was pending, the parties presented the Court with an agreed order lifting the stay "for the sole purpose of permitting the plaintiffs to take the deposition of Michael Connell and any other witnesses whose testimony, in the judgment of these parties, may be warranted based upon the deposition of Michael Connell." Doc. #65. Mr. Connell moved to quash the subpoena issued for his deposition but the subpoena was reissued from the United States District Court for the Northern District of Ohio, and a motion to quash filed in that Court was denied, so the deposition went forward. See Doc. #75. Other than dealing with some motions to intervene, nothing else of significance happened in the case until November 1, 2010.

On November 1, 2010, certain non-parties (the Ohio Chamber of Commerce, Ohio Chamber of Commerce Educational Foundation, Partnership for Ohio's Future, Andrew Doehrel, and Linda Woggon) filed a motion to quash a subpoena which had been issued in this case and signed by one of plaintiffs' attorneys, Clifford O. Arnebeck, Jr. that same day. The subpoena commanded the movants to produce "[a] complete list of contributors, including the date and amount of their contributions, to either your fund for expenditures to influence candidate elections in 2010 or your fund for making contributions to another entity that is making expenditures to influence candidate elections in 2010." Motion to Quash, Doc. #92, Exhibit 3. The compliance date was also November 1, 2010, the day prior to the 2010 general election.

On November 2, 2010, the Court conferred with counsel by telephone to determine if any issues raised by the subpoena and the motion to quash could be resolved expeditiously. At that conference, counsel for the movants agreed to produce, on a

purely voluntary basis, a list of persons or organizations who had contributed to Partnership for Ohio's Future in 2010. The production occurred later that day. The remaining documents at issue are documents showing not just the identities of these contributors, but also the amounts they contributed, the dates of their contributions, and any disbursements made by the Partnership to other organizations (as opposed to disbursements made directly for political expenditures). The Court declined to order the production of these documents on November 2, 2010 (although that is what plaintiffs wanted), but it gave all interested parties the opportunity to file additional written briefs on the issue of whether this discovery should be allowed.

Plaintiffs had filed a combined motion to compel compliance with the subpoena and response to the motion to quash shortly before the November 2, 2010 conference. After the conference, Defendant Brunner filed a document entitled "Defendants' Response to the Plaintiffs' Attempt to Subpoena Karl Rove" (the relationship of the proposed deposition of Karl Rove to the issue raised by the November 1, 2010 subpoena will be explained below), and both plaintiffs and the movants filed supplemental memoranda. The issues raised by the competing motions to quash and to compel are now ripe for decision.

II. The Karl Rove Connection

At first blush, the documents subpoenaed on November 1, 2010, would not appear related in any way to Karl Rove (the Court assumes the reader's familiarity with Mr. Rove). However, as it turns out, because one of plaintiffs' arguments in support of their motion to compel attempts to tie these documents to an upcoming deposition of Mr. Rove, it is necessary to explain some of the events surrounding plaintiffs' current effort to take his deposition.

Although this Court's docket does not reflect any actions

taken by plaintiffs' relating to a deposition of Karl Rove, plaintiffs did serve him with a deposition subpoena (bearing the caption of this case, but issued out of the United States District Court for the District of Columbia, as permitted by Fed.R.Civ.P. 45(a)(2)(B)) for a deposition to take place on November 29, 2010. It is not certain that the deposition will go forward; Mr. Rove filed a motion to quash the subpoena in the District of Columbia District Court, and that case (Case No. 1:10-mc-00711) is still pending. In fact, on November 18, 2010, the Magistrate Judge assigned to the case issued an order directing plaintiffs' counsel to show cause why that court should not stay action on the motion to quash "pending clarification from the United States District Court for the Southern District of Ohio" (Doc. #3, at 3). The order also suggested that it might be more appropriate for Mr. Rove to bring his motion in this Court. Id. at 2.

None of this addresses the question of how Mr. Rove's deposition relates to the documents subpoenaed from the movants on November 1, 2010. It does appear from the parties' filings in this case that at least one of the reasons Mr. Arnebeck wanted the documents was to publish information gleaned from these documents in advance of the November 2, 2010 election. He sought the same documents through a proceeding begun before the Ohio Elections Commission, arguing before that body that he needed the documents in order to show that the Partnership for Ohio's Future had outspent the candidates themselves in two Ohio Supreme Court races and to demonstrate that the activities of that organization violated campaign laws and perhaps other criminal laws. See Doc. 96, Exhibit 2. The subpoena issued in this case seeks the same documents. However, plaintiffs claim here that the documents are needed in order to allow them to prepare for the deposition of Mr. Rove, apparently on the theory that his fund-raising efforts

and expenditures relating to the 2010 general election are tied in some way to the activities of one or more of the movants and that these documents may help to prove that theory. Although this still begs the question of how either Mr. Rove's proposed deposition or these documents has anything whatever to do with this case, plaintiffs attempt to tie these loose ends together through the deposition of Michael Connell and the fact that the Court's stay order was lifted in order to allow not only that deposition to take place, but other depositions that are a logical follow-up to his deposition. In order to understand this argument, it is necessary to relate some of the details of who Michael Connell was (he is now deceased) and why plaintiffs think the need to take Mr. Rove's deposition flows logically from Mr. Connell's testimony.

III. Michael Connell

The information about Michael Connell (the Court hesitates to call this information "facts" because much of it appears to be speculation on plaintiffs' part) is drawn largely from plaintiffs' filings in this Court. It can be summarized as follows.

Mr. Connell was the owner of one or more computer-related businesses, some of which held contracts with the federal government. He was also involved with a number of Republican campaigns, including President George W. Bush's election and re-election efforts. At the same time, plaintiffs claim, he was hired by then Secretary of State Blackwell to assist in setting up a website for the Ohio Secretary of State and had some responsibility for setting up or operating the computer system which tabulated electronic ballots cast in Ohio in both the 2004 and 2006 elections. Plaintiffs appear to believe that Mr. Connell may have been able to manipulate the electronic voting results, which passed through one of his company's computer

servers as part of the tabulation process, in a way that could have affected the outcome of the 2004 presidential election in Ohio.

As noted above, plaintiffs deposed Mr. Connell in this case in 2008. Prior to the deposition, Mr. Arnebeck claims to have received information that Mr. Connell was being threatened by, among others, Mr. Rove. Nonetheless, Mr. Connell proceeded with the deposition. Less than two months later, he died when his small private plane, which he was piloting, crashed on its approach to the Akron-Canton airport. Plaintiffs appear to believe that some combination of government and private actors were involved both in causing the crash and covering up the cause of the crash after it occurred. They also appear to believe (or at least Mr. Arnebeck appears to believe) that at some point, Mr. Connell would have provided information to link Mr. Rove to a conspiracy to corrupt American elections, primarily through the use of money donated by industries such as the tobacco industry, in order to create a more "business-friendly" government, which conspiracy began as long as ten years ago and which is continuing to the present day.

IV. The Issues in this Court

It is important to identify the issue or issues presented for decision by the pending motions to quash and to compel. No one has asked this Court to prohibit plaintiffs from deposing Karl Rove. The movants, of course, would have no standing to do so. Secretary Brunner, in her memorandum, does not appear to be convinced that there is any relationship between any of the matters at issue in this case and the Rove deposition, but at the same time she has chosen not to object to the deposition. Thus, the Court is not being called upon to rule directly whether the Rove deposition is, or is not, within the scope of allowable discovery in this case. However, because the movants have

asserted that the current stay of all discovery other than discovery which has been prompted by Mr. Connell's deposition prevents the Court from enforcing the subpoena issued to them, and because plaintiffs claim that the subpoenaed documents relate to the Rove deposition which, in turn, is related to the Connell deposition, the Court will have to grapple with the relationship between the proposed Rove deposition and the Connell deposition as part of its decision-making process. Nonetheless it need do so (and may properly do so) only to the extent needed to resolve the motions pending here. As will be seen, the scope of the Court's decision does not and need not extend to every aspect of the plaintiffs' attempt to depose Mr. Rove, but only to those aspects that bear some relationship to the documents subpoenaed from the Partnership for Ohio's Future and the other movants.

Thus refined, the issues before the Court appear to be two in number, and they can be stated in this fashion:

1. Does the order granting a limited exception to the stay of all proceedings in this case extend to the discovery sought from the movants?

2. Are there other reasons to deny plaintiffs their requested discovery?

These questions are not mutually exclusive, and to some extent the Court will discuss them together.

V. Discussion

A word about the stay may be in order. From the procedural history recited above, one might question how this case came to be stayed for as long as it has been. The initial motion for a stay (Doc. #26) was premised on the parties' ongoing efforts to settle the case. The second motion for a stay (Doc. #29) recited the same basis, as did the third. (Doc. #32). The order granting that motion (Doc. #34) extended the stay, as requested by the parties, only until August 31, 2007. It does not appear

that the next motion for a stay (Doc. #35) was ever ruled on, but it indicated a desire (at least on plaintiffs' part) that the case be further stayed indefinitely until the Court conducted a status conference. The Court has not held such a conference. Therefore, as a practical matter, all parties and the Court have been treating the case as if it were stayed indefinitely. That is best illustrated by the plaintiffs' July 17, 2008 motion for relief from the stay, which clearly assumed that the case was still stayed based on what plaintiffs described as a "standstill agreement" they had reached with the new Secretary of State and the new Attorney General of Ohio following the 2006 election. The Court did not grant that motion for relief from the stay, which Secretary Brunner opposed, and the only further order regarding the stay is the parties' agreed order concerning the Connell deposition and any related follow-up discovery, which implicitly denies the motion for relief from the stay in all other respects. Thus, a fair reading of the case's procedural history is that the case is still stayed and that any discovery, including the subpoena issued to the movants, must either have been authorized by the Court in advance (which it was not) or fall within the scope of the agreed relief-from-stay order signed on September 19, 2008.

That order, which was drafted by counsel, does appear to give the parties a substantial amount of control over what activities are permitted to go forward despite the stay. By its language, it permits depositions of Mr. Connell and "any other witnesses" as long as the testimony of those other witnesses "in the judgment of these parties, may be warranted based on the deposition of Michael Connell." The only parties whose counsel signed the agreed order were plaintiffs and Secretary Brunner. The movants have raised a technical point about whether former Secretary of State Blackwell, who was sued in both his official

and individual capacities, has ever assented to the taking of Karl Rove's deposition, but he does not appear to be represented in this case in his individual capacity by anyone, unless it is by the Ohio Attorney General's office, and in any event he is not identified as one of the parties who agreed to the order granting partial relief from the stay. Therefore, his assent or lack of assent to the Rove deposition would not appear to be material.

There is a threshold question as to whether the express condition set forth in the relief-from-stay order has been met. Certainly, it is fair to infer that in plaintiffs' judgment, Mr. Rove's deposition (and by necessary implication, any non-party discovery needed to prepare for that deposition) is "warranted based on the deposition of Michael Connell." The only fair reading of Secretary Brunner's memorandum, however, is that she is not of the same mind. Her memorandum points out (and plaintiff has not refuted this point) that Mr. Connell's "deposition focused on work that Mr. Connell did for the Secretary of State's office as an outside vendor working on the Secretary's computer system and website." (Doc. #94, at 2). She goes on to argue, just before conceding that she will not actively object to the Rove deposition, that nothing in the Connell deposition related in any way to campaign finance issues, and, in fact, that this case itself does not raise any campaign finance issues. Id. at 3. Thus, it would be a stretch to characterize her "non-objection" as reflective of a judgment that the Rove deposition is "warranted based on the deposition of Michael Connell."

The relief-from-stay order does not directly address how disagreements between the parties as to whether additional depositions are warranted should be resolved. Certainly, one way to read the order is to do so literally - and, because counsel drafted it, a literal reading may be exactly and only what they

are entitled to. Read strictly, the order does not allow any discovery about which the parties disagree; the phrase "in the judgment of these parties" certainly implies that both of them must reach the same judgment in order for the relief from stay authorized in that particular order to apply. Of course, the Court is the ultimate arbiter of whether any stay of the case should continue either in whole or in part, so either party could have applied for additional relief from the stay if what that party wanted to do fell outside the literal boundaries of the Agreed Order. To be fair to the parties and the movants (and because the arguments in the briefs center around this broader issue), the Court will construe plaintiffs' filings liberally and deem plaintiffs to be arguing that, even if, in Secretary Brunner's judgment, the Rove deposition is not proper follow-on discovery as defined in the Agreed Order, it is, in truth, related to Mr. Connell's deposition and therefore something the Court should allow even if the Court must now broaden the scope of the existing relief-from-stay order so that it encompasses the proposed deposition.

Turning to that question, the proper answer is that "it depends." The Court does not have Mr. Connell's deposition before it. It concludes, however, that two things about that deposition must be true. First, because Secretary Brunner's memorandum states, and plaintiffs have not disputed, that the deposition focused on the computer-related aspects of the 2004 and, perhaps, the 2006 election, the deposition did not delve into other aspects of the alleged manipulation of votes or voters in those two elections, including campaign financing and expenditures. Second, because the deposition was taken in November, 2008, and Mr. Connell died the following month, it is very unlikely that any issues relating to who gave money to the Partnership for Ohio's Future or the other movants in connection

with the 2010 election - and particularly the two Supreme Court contests identified in the proceedings before the Ohio Elections Commission - were discussed with Mr. Connell during his deposition. Again, plaintiffs have not argued to the contrary.

The significance of these two facts is this. Without a complete transcript of the Connell deposition, the Court cannot say absolutely that Mr. Rove's proposed deposition is unrelated to any subject discussed with Mr. Connell. Given the breadth of plaintiff's conspiracy theories, it would not be surprising if plaintiffs intended to question Mr. Rove about his relationship with Mr. Connell, Mr. Connell's computer businesses, the alleged manipulation of vote tallies during the 2004 presidential election, and even the purported threat made by Mr. Rove before Mr. Connell was deposed. All of that questioning may fall within the intended, if not the literal, scope of the Agreed Order, and Secretary Brunner's memorandum does not argue this point. What is abundantly clear, however, is that none of the documents subpoenaed from the movants have any relationship at all with these potential deposition subjects. Thus, while the subpoenaed documents may be helpful to the extent that plaintiffs propose to ask Mr. Rove questions about 2010 campaign finance issues - and he may well know something about those issues - a deposition on that subject is not, in the Court's view, "warranted based on the deposition of Michael Connell." Thus, there is simply no logical relationship between the plaintiffs' desire to take Mr. Rove's deposition on subjects broached at Mr. Connell's deposition and the documents plaintiffs have asked the movants to produce. Therefore, whether the relief-from-stay order is read narrowly or broadly, it does not permit this discovery.

Further, the Court sees no need to expand any relief from the stay to encompass this discovery. The allegations in the complaint and amended complaint may be broad, but they are not so

broad as to encompass discovery of events which are of a different nature (campaign financing and expenditures as opposed to disenfranchisement of minority voters through statutory or administrative means or manipulation of electronically-cast votes) from those alleged in the complaint and amended complaint, and which occurred years after these pleadings were filed. Plaintiffs may wish to litigate such issues, but given the current state of the pleadings, they may not do so in the context of this particular lawsuit.

Even if there were no stay in place, the Court is still required to limit discovery to matters which are "relevant to any party's claim or defense" Fed.R.Civ.P. 26(b)(1). The way in which the 2010 Ohio election may have been influenced by money flowing into campaign ads from anonymous donors is not a "claim or defense" raised in the pleadings. Thus, the Court also concludes that the documents covered by the subpoena fall outside the proper scope of discovery in this case, and that it would not be a sound exercise of the Court's discretion to lift the stay in order to allow that discovery to proceed.

VI. Conclusion and Order

The Court reiterates that there are only two motions addressed in this order, and they raise related questions: should the subpoena served on the movants on November 1, 2010, be quashed, or should it be enforced? For the reasons set forth in this Opinion and Order, the Court concludes that the correct answer is "quashed." Consequently, the motion to quash (#92) is granted, and the motion to compel (#93) is denied.

VII. Procedure for Seeking Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt.

I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge

