

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER, et al.,	:	Case No. 1:10-cv-820
	:	
Plaintiffs,	:	
	:	Chief Judge Susan J. Dlott
vs.	:	
	:	<u>PLAINTIFF HUNTER'S MOTION</u>
HAMILTON COUNTY BOARD OF	:	<u>TO PRESERVE TRIAL DATE OR</u>
ELECTIONS, et al.	:	<u>IN THE ALTERNATIVE CERTIFY</u>
	:	<u>AS FRIVOLOUS DEFENDANT'S</u>
Defendants.	:	<u>ANTICIPATED APPEAL</u>
	:	

Defendant Board of Elections indicated it may appeal this Court's "denial" of Defendant's Motion for Summary Judgment. Plaintiffs move for an order preserving the trial date or in the alternative, certifying the anticipated appeal as frivolous and ask the Court to retain jurisdiction to start the trial on July 18, 2011.

A. The Anticipated Appeal Should be Certified Frivolous Because Defendant's Filing a Motion for Summary Judgment on Sovereign Immunity and Filing a Notice of Appeal a Week Later are Manipulative Actions Done Solely to Delay the Trial.

Should Defendants file a notice of appeal, it will be filed seven months after the case was filed; filed prior to the Plaintiffs having any opportunity to respond to the motion for summary judgment; and filed on the eve of the final pretrial conference. Clearly, any notice of appeal at this juncture is clearly being employed for the sole purpose of delaying trial. When a notice of appeal is used in a manipulative fashion to avoid trial, this Court has the power to retain jurisdiction by declaring the appeal frivolous. *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 734, 740 (N.D. Ohio 2006) *aff'd in part, rev'd in part sub nom. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008) (district court certified the appeal of sovereign immunity frivolous and retained jurisdiction); *Blair v. City of Cleveland*,

148 F.Supp.2d 919, 922 (N.D. Ohio 2000) (when defendants use claims of immunity in a manipulative fashion, the district court may certify that the defendant has surrendered the entitlement to a pretrial appeal and proceed with trial).

Defendant's right to take an interlocutory appeal is subject to waiver for "noncompliance with reasonable temporal limitations placed by the district court upon the filing of motions seeking immunity." *Kennedy v. City of Cleveland*, 797 F.2d 297, 298 (6th Cir. 1986) (qualified immunity motion for summary judgment denied for being filed after the deadline for dispositive motions passed). The court held that a defendant must exercise "a reasonable modicum of diligence in the exercise of that right [to file an interlocutory appeal]." *Kennedy*, 797 F.2d at 301. In *Yates v. City of Cleveland*, 941 F.2d 444, 448 (6th Cir. 1991), the court stated that when a defendant, who was dilatory in raising a qualified immunity after five years of litigation and on the eve of trial, the district court has the discretion to cut off motions for summary judgment. The court did not rule on the defendant's waiver of its right to file an interlocutory appeal in *Yates* because the district court had not made findings on frivolousness or waiver.

Following *Yates*, a number of district courts in this Circuit have declared appeals frivolous and maintained jurisdiction of the trial while the appeal was pending.¹ *See, Rodriguez v. City of Cleveland*, No. 1:08-CV-1892, 2009 WL 1661942, p. *2 (N.D. Ohio 2009) ("A defendant's right to bring such an interlocutory appeal is strictly curtailed by two limitations, however. First, a defendant cannot stop district court proceedings by simply asserting a frivolous interlocutory appeal. If a defendant's challenge to the denial of his qualified immunity defense is

¹ This Court's holding in *Jones v. City of Cincinnati*, No. 1:04-CV-616, 2006 WL 3505866, p. *1 (S.D. Ohio 2006) (Judge Dlott), is not inapposite. In *Jones*, this Court held that the notice of appeal divested this Court of its power to try Plaintiff's claims. *Id.* While this is true generally, it is not true in all circumstances. The district court has the power to regain jurisdiction if the appeal is deemed frivolous. *See, Yates* and its progeny. Moreover, in *Jones* the Court was not asked to rule on whether the appeal was frivolous, instead, the Court *sua sponte* ordered the case stayed pending appeal.

devoid of merit, the district court can declare it as such and move forward with the case.”); *Smith v. County of Lenawee*, No. 09-10648, 2009 WL 3672107, p. *2 (E.D. Mich. 2009) (“[I]f a district court finds the appeal to be frivolous, it retains jurisdiction over the entire matter.”); *Pucci v. 19th Dist. Court*, No. 07-10631, 2009 WL 596196, p. *3 (E.D. Mich. 2009) (“[I]f a district court certifies the appeal as frivolous, it retains jurisdiction.”); *McCormick v. Brzezinski*, No. 08-CV-10075, 2009 WL 3246706, p. *1 (E.D. Mich. 2009) (“Although the court has authority to proceed and ignore the improper notice of appeal, it does not have authority to dismiss any notice of appeal. *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir.1994) (“[T]he decision to dismiss a notice of appeal rests with this court, not the district court.”). Accordingly, the court will proceed with this case, ignoring the notice of appeal, but it cannot dismiss the notice of appeal.”).

In this case, Defendant Board of Elections did not file an Answer to Plaintiff Hunter’s Complaints for over five months (Doc. 56 filed May 3, 2011). In its Answer Defendant does not raise sovereign immunity, nor make any claim that Plaintiff seeks retroactive relief in violation of the Eleventh Amendment.² Defendant did not raise sovereign immunity in the Joint Final Pretrial Order (submitted to chambers June 29, 2011). Defendant waited until the eve of the Final Pretrial Conference to file a Motion for Summary Judgment, 12 days before trial, which is set to begin on July 18, 2011. (Doc. 94)

When this Court declined to rule on the Motion prior to affording the Plaintiff’s the normal time to respond to a motion for summary judgment, Defendants did not alert the Court

² The boiler plate defense in paragraph 7 and repeated in paragraph 8 is vague and only reserves the right to raise a defense that becomes available during discovery: “Defendant Board hereby provides notice that it intends to assert and rely upon all of the affirmative defenses, avoidances, counterclaims, cross-claims, third party claims, immunities, avoidances, and set-offs which may become available or apparent during the course of discovery or trial. Defendant Board reserves the right to amend its answer for the purpose of asserting such defenses.” Doc. 56. Nothing occurred during discovery to alert the Defendant to the fact it could raise a sovereign immunity defense.

that it considered the declination to rule a denial of the motion and planned to file a notice of appeal. Nor could it. There is no precedent in this Circuit for considering a Court's declination to rule on a Motion for Summary Judgment regarding an immunity defense before the motion is ripe for review. *See Everson v. Leis*, 556 F.3d 484 (6th Cir. 2009) (holding that allowing plaintiff time to conduct discovery before responding to a motion for summary judgment on qualified immunity is immediately subject to an interlocutory appeal when the Court does not making a finding that material facts are in dispute before holding the motion in abeyance). Unlike *Everson*, where the motion was pending for ten months before the Court held the motion in abeyance, the motion for summary judgment was pending one day before this Court declined to rule on the motion before the parties had an opportunity to brief the issue.

Since Defendant was dilatory in raising the sovereign immunity defense until the day before the final pretrial conference, and now indicated it may file a notice of appeal only days after filing the motion, any appeal filed should be declared frivolous and this Court should preserve the trial scheduled for July 18, 2011.

B. The Anticipated Appeal Should be Certified Frivolous Because Defendant Waived Its Sovereign Immunity Defense

The Board cannot on the eve of trial attempt to raise immunity where it already voluntarily invoked the jurisdiction of the federal court by defending the case on the merits. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *see also Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003) (state waived the defense of Eleventh Amendment immunity in § 1983 action where the state, instead of asserting Eleventh Amendment immunity, defended the suit on the merits—engaging in substantial discovery and filing a motion for summary judgment); *In re Corporacion de Servicios Medico Hospitalarios de Fajardo*, 123 B.R. 4, 6-7 (Bankr.D.P.R.1991) (defendant waived any Eleventh Amendment

immunity by waiting until the eve of trial to first raise defense, after having participated in extensive pretrial proceedings).

A State may waive Eleventh Amendment sovereign immunity through its own conduct: by legislation, by removing an action to federal court, or by appearing without objection and defending on the merits. *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469 (6th Cir. 2006); *see also Lawson v. Shelby County, TN*, 211 F.3d 331 (6th Cir. 2000) (State may waive protection of Eleventh Amendment by consent in the form of a voluntary appearance and defense on the merits in federal court); *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) (observing that courts have found waiver where the state evidenced an intent to defend the suit against it on the merits).

In determining whether there has been a waiver, courts evaluate the extent to which a state has participated in the lawsuit. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365 (3d Cir. 1997) (collecting cases), *aff'd*, 527 U.S. 666 (1999). They recognize that waiver should be unequivocal but that “[i]t may evidence that waiver ... through action other than an express renunciation.” *Neinast*, 217 F.3d at 279. In *Hill v. Blind Industries and Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), the court, addressing the concept of waiver by participation, explained as follows:

Although the waiver must be unambiguous, we have never held that an express written waiver is invariably required. On the contrary, we have recognized that a state may waive its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.... [A] waiver of Eleventh Amendment immunity has been found when the state's conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity. *See, e.g., Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (defendants' conduct during litigation “indicates consent to this suit and an acceptance of the federal court's jurisdiction”). ...

Hill, 179 F.3d at 759.

The Complaint, filed November 21, 2010, named the Board, Chair and members in their official capacities as defendants. (Doc. 1). Defendants filed an Answer to Plaintiff Hunter's Complaint on May 3, 2011 (Doc. 56). In its Answer Defendant does not raise sovereign immunity, nor make any claim that Plaintiff seeks retroactive relief in violation of the Eleventh Amendment. Nor did Defendant raise sovereign immunity in the Joint Final Pretrial Order. Moreover, the Board has defended both the case on the merits before this Court and in three appeals before the Sixth Circuit Court of Appeals, one of which Defendant Board filed. In none of the appeals did Defendant Board raise sovereign immunity. Furthermore, Defendants have engaged in broad discovery and extensive pretrial proceedings. If permitted to assert this belated defense, the Board will have effectively "proceed[ed] to judgment without facing any real risk of adverse consequences." *Ku*, 322 F.3d at 433 (quoting *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring)). Accordingly, in evaluating the extent to which the Board has participated in the lawsuit to date, it is clear that the Board waived its immunity and cannot now raise such a defense to either the particular due process claim, or the entire case. Therefore, this Court should declare the anticipated appeal frivolous and preserve the trial date.

CONCLUSION

For these reasons, Plaintiff requests this Court certify Defendant's anticipated appeal frivolous and retain jurisdiction to hear this trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

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