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ARNOLD SHARP V. BIG ELK CREEK COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ARNOLD SHARP,
COMPLAINANT

v.

BIG ELK CREEK COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 89-147-D

PIKE CD 89-08

DECISION AND ORDER REINSTATING STAY

Appearances: Arnold Sharp, Bulan, Kentucky, pro se;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs,
Louisville, Kentucky for Respondent.

Before: Judge Melick

This Discrimination Proceeding under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, is before me following interlocutory review by the Commission remanding the case on May 2, 1990, for evidentiary proceedings to determine whether the Respondent's Motion for Stay should be reinstated. The history of these proceedings, as summarized by the Commission, is set forth below:

> The record developed to date indicates that, subsequent to this February 28, 1989, discharge, Sharp appeared and testified before a Commonwealth of Kentucky Department of Employment Services referee in an effort to secure unemployment compensation. Respondent's Administrative Director, Jim Meese, also testified at this hearing. Because Sharp believed Meese's testimony at that hearing to be false, he caused a criminal complaint and arrest warrant to be issued against Meese. Accordingly, on September 13, 1989, Respondent moved for a postponement of the instant action, asserting that Meese, the principal and likely only witness for Respondent in the Mine Act discrimination proceeding pending before the administrative law judge, intended to assert his Fifth Amendment privilege against self-incrimination "prevent[ing] him from testifying further as to the matters surrounding the criminal case and any collateral civil matter." Motion for Postponement at 2.

Sharp filed his opposition to the motion for postponement arguing that the criminal matter has no bearing upon the discrimination matter. Sharp requested that the then scheduled hearing before the administrative law judge go forward.

The respondent filed a reply asserting:

> . . . The subject matter before the unemployment hearing factually mirrors the instant proceeding. Should Mr. Meese testify in the hearing scheduled in this discrimination proceeding before the Federal Mine Safety and Health Review Commission relative to the facts surrounding Complainant's discharge, he would waive his Fifth Amendment privilege against self-incrimination. In Re: Atterbury, 316 F.2d 106, 109 (6th Cir. 1963); Anderson v. Commonwealth, Ky. App., 554 S.W. 2d 882, 884 (1977).

On September 20, 1989, the judge issued an Order of Continuance and Stay Order:

> I find upon consideration of the circumstances that the Motion for Continuance is well-founded and that it would be in the best interests of this litigation to grant a brief continuance and stay in these proceedings pending disposition of the noted criminal proceedings. This is particularly true in this case since the criminal charges involve a claim that a witness apparently essential to this case gave a false statement in a related proceeding and that criminal case is already scheduled for trial in the near future. Order at 3.

Thereafter, on January 5, 1990, the criminal charge against Meese was dismissed. However, on January 22, 1990, the dismissal was appealed and the criminal action remains pending. Noting these occurrences and over the objections of Sharp, the administrative law judge issued a second stay order on February 2, 1990, pending" . . . final disposition of the noted criminal proceedings. . . " Order at 1.

The evidence adduced at subsequent expedited hearings in London, Kentucky confirms the undisputed representations by counsel for Respondent in connection with his motions for continuance. Mr. Sharp in his complaint herein alleges discharge and discrimination in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act) in retaliation for his previously successful Mine Act litigation against the Respondent. Among the acts of alleged unlawful harassment and retaliation and claimed evidence of ill-will toward him are 12 instances of purported false statements by Respondent's administrative director, James Meese. In particular, and of special relevance to this proceeding, Sharp alludes to four allegations of false swearing by Mr. Meese before the Commonwealth of Kentucky Unemployment Insurance Commission with respect to: (1) the filing of a worker's compensation claim, (2) investigation of the accident giving rise to the alleged filing of the worker's compensation claim, (3) the number of days off experienced by Arnold Sharp, and (4) the firing by the company employing the defendant of Ralph Patrick. (See Statement of Appeal, page 6-Respondent's Motion Exhibit No. 1).

The record shows that on August 11, 1989, Arnold Sharp also initiated a criminal complaint in the Kentucky courts against Meese by charging that on June 12, 1989, Meese "unlawfully made a false statement while under oath to the Commonwealth of Kentucky unemployment division". An arrest warrant was thereafter issued to Mr. Meese charging him with the offense of "false swearing" under KRS 523.040.1

These charges were subsequently dismissed at a preliminary hearing before a judge of the Perry County District Court and the Perry County attorney thereafter appealed that dismissal to the Perry County Circuit Court.

While the initial criminal charging documents do not set forth any specific acts of "false swearing", the Commonwealth Attorney in his brief on appeal, specified four acts of "false swearing" which had been identified to him by Mr. Sharp. They were purportedly made at a hearing before the Kentucky Unemployment Insurance Commission as follows: (1) The filing of a worker's compensation claim, (2) investigation of the accident giving rise to the alleged filing of the worker's compensation claim, (3) the number of days off experienced by Arnold Sharp, (4) the firing by the company employing the defendant of Ralph Patrick (Statement of Appeal at page 6 - Respondent's Motion Exhibit No. 1).

These alleged acts of "false swearing" are identical to four of the twelve charges of false testimony alleged by Sharp to be evidence of harassment, ill-will, and discrimination as well as evidence of an unlawful discharge under Section 105(c) of the Mine Act in this case. Such evidence would therefore be relevant and admissible in these proceedings. Mr. Sharp continues to assert that this evidence is essential to his discrimination case herein. At the hearing Sharp stated "all the issues are going to be brung [sic] up in the case because that's what they say they fired me on which he outright lied." (Tr. 32)

At the evidentiary hearing, counsel for Respondent, as he previously stated in connection with his motions for continuance, again stated that James Meese would be an essential witness and probably the only witness, for the defense against Sharp's allegations. On this issue the following colloquy occurred at the hearing:

> The Court: *** What is the essence of your defense?
>
> Mr. Hopson: Are you asking what are the facts that we intend to prove or who we would prove--
>
> The Court: Yes, what are the facts you intend to prove.
>
> Mr. Hopson: We intend to prove that Mr. Sharp under the absentee policy had incurred sufficient discipline, had been put on notice that his job was in jeopardy--
>
> The Court: For what?
>
> Mr. Hopson: For absenteeism. And had gotten to the point where he was on probation for absenteeism when he incurred a very suspicious injury for which

> we sought a medical release in order to obtain medical information. He flat refused to supply that release. We were unable to get further medical information and as a result of that virtual insubordination, as well as his overall poor attendance record, he was terminated. Now, Mr. Meese is the only witness that has knowledge of those facts. He's the only one we have that can testify to those facts.
>
> The Court: Why is that? What is his position? What are his duties and responsibilities in relation to these charges?
>
> Mr. Hopson: He is director of administration for this company which at the time of Mr. Sharp's discharge had only 80 employees. It's not a big company. he had personnel function as well as various other administrative duties.
>
> The Court: And it was his action and his determinations that led to Mr. Sharp's discharge?
>
> Mr. Hopson: That's correct. He tracked the absenteeism. He, in fact, wrote Mr. Sharp the warnings, he wrote Mr. Sharp the discharge letter. (Tr. 14-16)

In addition Mr. Meese testified at the hearing that in his capacity as administrative director of Respondent, Big Elk Creek Coal Company, he oversees the administrative and personnel functions for the company. He testified that he alone was responsible for tracking employee attendance and absenteeism including Mr. Sharp's. He was the only company witness at the cited unemployment proceeding and the only person knowing the "full scope" of the case. In addition Meese was the person who made the final decision to discharge Sharp and purportedly is the only person with firsthand knowledge of all the reasons for Sharp's discharge.

The relationship between the criminal charges against Meese and the testimony needed from Meese in the defense of this case was further explored in the following colloquy:

> [by Mr. Hopson] Mr. Meese, I'd like you to turn now to a document in the Exhibit which is

marked as Respondent's Exhibit 1 to this motion which is a document toward the end of the Exhibit some 10 to 15 pages from the end of the Exhibit called Statement of Appeal and it's tendered by the Perry County Attorney. Do you see that? If you would, turn to page six of that document. In the first document. In the first full paragraph of that document there are four items listed pertaining to the false swearing allegations: (a) the filing of a workers' compensation claim; (b) investigation of the accident giving rise to the alleged filing of the worker's compensation claim; (c) the number of days off experienced by Arnold Sharp; (d) the firing by the company employing the Defendant of Ralph Patrick. My question, Mr. Meese, is did the investigation of the accident giving rise to the alleged filing of the workers' compensation claim involve you? Did you do it?

[Mr. Meese] Yes.

Is that involved in your review of the facts which led to Mr. Sharp's termination?

[Mr. Meese] Yes.

And (c), the number of days off experienced by Arnold Sharp, did the number of days off experienced by Mr. Sharp play any part in the decision to terminate him?

[Mr. Meese] Yes.

And (d) the firing by the company employing Defendant and Ralph Patrick, did the question of whether Mr. Patrick was fired or he quit an issue or is it an issue in the discrimination case which is before the Commission in some way?

I'm not sure--could it be an issue?

Yes.

I'm not sure I follow the question.

Was there any question in the unemployment proceeding raised regarding unfair treatment of Mr. Sharp and whether he was singled out?

I don't recall.

The Court: Was Mr. Patrick, he was apparently fired?

Mr. Hopson: Your Honor, that's an issue in the criminal case. The contention by Mr. Sharp is that he quit. I believe the testimony in the unemployment case was that he was fired and it's related to I believe absenteeism or something. And that is one of the things that Mr. Meese is now charged with in the criminal case.

The Court: Was testifying allegedly falsely in the unemployment compensation proceeding about the basis for Mr. Patrick's separation from the company?

Mr. Hopson: That's correct.

The Court: It is maintained by Mr. Sharp that this case was not the same as his case?

Mr. Hopson: That is my understanding.

The Court: And the company apparently took the position that it was the same?

Mr. Hopson: That's my understanding, Your Honor.

The Court: I see. It would be evidence according to Mr. Sharp that he was treated differently than this other gentleman for similar circumstances?

Mr. Hopson: I believe that's correct.

The Court: All right.

Q33 Mr. Meese, if I ask you questions regarding the basis for Mr. Sharp's termination and the events which led up to that and your investigation of all that in a discrimination proceeding before the Commission before this criminal case is resolved, what would your response be?

A I've been advised by counsel to plead the Fifth Amendment, my Fifth Amendment right, until this criminal matter is cleared up. (Tr. 41-44)

This testimony is not disputed. It is apparent therefore that the factual evidence giving rise to both Sharp's allegations of Section 105(c) violations and the allegations of criminal "false swearing" initiated by Sharp

before the Kentucky Criminal Courts are intertwined and in significant respects, identical. It may also reasonably be inferred from his testimony that Meese would decline in these proceedings to answer any questions relating to the criminal charges now pending before the Kentucky courts and that he would assert his privilege against self incrimination under the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . " U.S. Const. Amend. V. It is well-established that this privilege is applicable to administrative proceedings. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964); Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986) cert. denied 108 S. Ct. 1732 (1988). In order to sustain the privilege the trial judge need only determine that the implications of the question posed or the evidence demanded, considered in the setting in which it arises, might lead to injurious disclosures. Only if the incriminating effects are not evident is it proper to require some explanation from the witness of his fear of incrimination. Hoffman v. U.S., 341 U.S. 479, 486-87 (1950). Obviously it would defeat the purpose of the privilege to require the witness to disclose in explanation of the fear of prosecution the very facts about which he or she is entitled to keep silent, so the scope of the privilege is quite broad. Hoffman, supra at page 488. Specifically, the witness cannot be compelled to produce testimony which could involve the direct disclosure of guilt for past acts. Glickstein v. U.S., 222 U.S. 139 (1911).

The determination of whether the assertion of the Fifth Amendment privilege is proper ordinarily arises during trial and in fact can only, in the final analysis, be determined on a question-by-question basis. Here the issue arises in the context of a request for a stay pending final resolution of criminal charges against a key defense witness for "false swearing". On the basis of the undisputed record herein it is clear that in order to defend itself from the charges of discrimination under Section 105(c) of the Act the Respondent corporation will necessarily have to call James Meese as a witness. Indeed Respondent concedes that without Meese, it likely could not defend itself and would have to sustain a decision by default.

It is also clear from the undisputed record that questions relevant and material to this case would likely be posed to Mr. Meese at any trial on the merits and that the

potentially incriminating effects of such questions would be obvious. Hoffman, supra. It would therefore defeat the purpose of the privilege to require Mr. Meese to make further disclosure in explanation of his fear of prosecution.

In U.S. v. Wilcox, 450 F.2d 1131 (5th Cir., 1971) the Court stated, in an analagous situation, as follows:

> And so when a witness is asked a question that could show that he had already committed a crime i.e., perjury at a prior trial, his refusal to answer is permissible almost by the definition of self-incrimination. He is still criminally accountable for his perjury, but he may not be convicted out of his own mouth over his claim of privilege. Thus the aphorism that one cannot take the Fifth Amendment on the ground that if he testifies he will perjure himself applies only as an excuse for not testifying initially. It does not mean that having once testified, the Fifth Amendment is not available to avoid giving further testimony which might expose the witness to substantial risk of prosecutions growing out of the prior testimony.
>
> See also U.S. v. Prior, 381 F. Supp. 870 (1974).

Thus it is clear that if trial on the merits of this case would proceed now before final disposition of the criminal charges against Mr. Meese, Meese would assert his privilege in response to material questions and the mine operator would be unable to fairly defend itself. There is accordingly a conflict between the interest of the Complainant in a prompt trial of his 105(c) complaint and the corporate mine operator's right to defend itself. Faced with a similar conflict the U.S. Court of Appeals, Federal Circuit in Afro-Lecon, Inc. v. U.S., 820 F.2d 1198 (Fed. Cir. 1987), applied a balancing test for determining whether a stay of the civil proceedings should be granted.2

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In Afro-Lecon, the General Services Administration Board of Contract Appeals had refused the corporation's motion for a stay of the civil appeal and required the corporation to respond to its order to compel discovery from the corporation. The corporation had sought a stay because its key witnesses such as officers, former employees, and consultants were advised by counsel not to participate in responding to the Board's order on the basis of their Fifth Amendment rights against self-incrimination. The Board, in its decision denying stay, had noted that the refusal of crucial witnesses of the corporation to testify made it impossible for the corporation to comply with the Board's previous order.

While noting that the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings, the Court held that the Board should balance the interest of the corporation in a stay against the possible prejudice to the appellee arising from the potential loss of important evidence because of the stay. The Court noted that the corporation's interest in the stay was strong since its officers and employees claimed the Fifth Amendment. The court in Afro-Lecon, remanded to the Board for a determination of whether the corporation's plant manager could properly claim a real and appreciable risk of self-incrimination.

Similarly, the Commission has remanded this proceeding for a determination of the propriety of Meese's Fifth Amendment claim. As I have already found, Meese's risk of self-incrimination in this case is clear as is the likelihood of his assertion of the privilege at any trial on the merits. In applying the Afro-Lecon balancing test to the present case, it is clear that a further stay is warranted. As in Afro-Lecon, the corporation herein has a strong interest in staying this action until Meese's criminal charges are resolved and he is available to testify. Without Meese's testimony, it would be deprived of its right to have a meaningful opportunity to defend itself.

In balancing Sharp's interest in avoiding delay arising from a stay of this action I conclude that the Fifth Amendment privilege and the corporation's right to defend itself should take precedence. See Vardi Trading Co. v. Overseas Diamond Corp., 1987 U.S. Dist. LEXIS 8580, slip op. at 4 (S.D.N.Y. 1987) (Attached hereto as Appendix A). There is not even a suggestion that evidence would be lost as a

result of any delay. Moreover since Sharp and Meese appear to be the only material witnesses in this action, since similar evidence appears to have been preserved in transcripts from other proceedings and in other written records and since the criminal proceeding will likely entail many of the same factual issues, it is unlikely that any evidence would be lost.

In addition, the recrod shows that Sharp has already collected unemployment benefits for at least a portion of the period of lost wages since his discharge and, if successful in this proceeding, would be entitled, with certain exclusions, to backpay with interest. It may also reasonably be inferred that Respondent would in any event appeal any adverse decision thereby delaying any final disposition. It is also significant to note in this case that it is Sharp who has initiated and pursued the criminal action giving rise to the delay herein. It would be particularly inequitable therefore to permit him to now proceed in this action while the operator cannot defend itself.

Accordingly the Stay Order previously issued in this case is hereby reinstated to remain in effect until such time as the criminal charges pending against James Meese (Case No. 90-X-001 in the Perry County Circuit Court Commonwealth of Kentucky) have become final.

There are also other compelling reasons for not immediately proceeding to trial in this case but to await final resolution of the criminal charges. Conviction of the mine operator's key witness for "false swearing" could provide significant evidence demonstrating lack of credibility. Rule 609, Federal Rules of Evidence; 33 Fed. Proc. L. Ed. Witnesses 80:105 - 80:118. Indeed in some jurisdictions conviction of such an offense is so devastating to witness credibility that the witness is completely barred from even giving testimony under oath.

It is my judgment that such evidence is so potentially critical and significant to this case in light of the singular importance of the testimony of Mr. Meese, that trial on the merits of this case should in any event not proceed until final resolution of those criminal charges. As the Commission has often stated, one of the important functions of the administrative law judge is the assessment of witness credibility. See e.g., Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary o.b.o. Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983); Bjes v. Consolidation Coal Co., 6 FMSHRC 1411 (1984). It is therefore important that the trial judge independently exercise that judgment and properly consider that factor in regulating the course of the hearing.

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For this additional and independent reason then, the Stay Order must be reinstated.

Gary Melick
Administrative Law Judge
(703) 756-6261

ÄÄ
FOOTNOTES START HERE

1. KRS (Kentucky Revised Statutes) 523.040 provides as follows:

False Swearing. - (1) A person is guilty of false swearing when he makes a false statement which he does not believe under oath required or authorized by law. (2) false swearing is a class B misdemeanor.

The crime of false swearing under Kentucky law is distinguished from perjury in that the false statement need not be material to prove the offense.See Commonwealth v. Thurman, 691 S.W. 2d 213 (Kentucky, 1985).

2. See also U.S. v. Kordel, 397 U.S. 1 (1970); K.J.F. Fabrics, Inc. v. U.S., 651 F. Supp. 1437 (Ct. Int. Trade 1986); Paul Harrigan and Sons, Inc. v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); and U.S. v. U.S. Currency, 626 F.2d 11 (6th Cir. 1980) in support of the proposition that a stay of a civil action in favor of a related criminal proceeding is appropriate when a corporation's employees are unable to testify in the civil proceeding because they have been charged in a related criminal action.

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APPENDIX A

14TH CASE of Level 1 printed in FULL format.

Vardi Trading Company, Plaintiff, v. Overseas Diamond Corporation and Harold Arviv, individually, Defendants

No. 85 Civ. 2240 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1987 U.S. Dist. LEXIS 8580

September 22, 1987, Decided; September 23, 1987, Filed

OPINIONBY: [*1]

HAIGHT

OPINION:
MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

In this civil action based upon diversity of citizenship n1 defendants moved for an order staying the proceedings until the resolution of criminal charges pending against them in Florida arising out of the same or related commercial transactions. Plaintiff opposed the stay, and subsequently moved for summary judgment pursuant to Rule 56 F.R.Civ.P. Defendants contend that the prayed-for stay should embrace plaintiff's summary judgment motion.

n1. According to the pleadings, plaintiff Vardi Trading Company is a New York parthership maintaining its principal place of business in New York City. Defendant Overseas Diamond Corporation is a foreign corporation, maintaining its principal place of business in Miami, Florida. Defendant Harold Arviv is a citizen and resident of Toronto, Canada.

For the reasons which follow, I grant defendant's motion for a stay of these civil proceedings, and deny plaintiff's motion for summary judgment without prejudice to subseouent renewal.

I.

Plaintiff alleges that at the pertinent times it was engaged in business as an importer and wholesale distributor of precious gems. Complaint, para. [*2] 5. The complaint further alleges that "heretofore and prior to April 12, 1983" plaintiff sold quantities of rubles and sapphires to the corporate defendant, Overseas Diamond Corporation. Id., paras. 7, 8. The individual defendant, Harold Arviv, 15 alleged to be the principal of Overseas, and the guarantor of 90 promissory notes

executed by Overseas in favor of plaintiff to pay for the gems. Id., paras. 7, 12, 21.

Plaintiff's motion for summary judgment, filed and served subsequent to defendant's motion for a stay, proceeds on the theory that plaintiff delivered the contracted-for gems to Overseas and has not been paid for them. Summary judgment is sought against Overseas on the promissory notes, and against Arviv on his guarantees.

This civil action was commenced on March 21, 1985.

On September 21, 1984 the State Attorney for Broward County, Florida filed in the Circuit Court for the Seventeenth Judicial Circuit of Florida a criminal information n2 against a number of entities and individuals. The defendants include Overseas and Arviv. In essence the defendants are charged with participating in a racketeering enterprise and over-arching fraudulent scheme referred to as "The [*3] Gemstone Enterprise." Arviv is charged with incorporating Overseas "for the purpose of supplying inferior grade gemstones" to the victims of a "boiler room" operation. The information alleges that Arviv incorporated Overseas for that illicit purpose on or about September 19, 1980. The information further alleges that "beginning on or about December 1, 1980 and continuing on or about May 31, 1983, HAROLD ARVIV and RICHARD PRICE did supply inferior grade gemstones through OVERSEAS DIAMOND CORP." to victims of the scheme. Information No. 84-10703 CF A at p. 49.

n2. So styled in the copy attached to the motion papers. Defendants call the charging instrument an "indictment."

Defendants contend, and plaintiff does not appear to dispute, that gems sold by plaintiff to overseas constitute a portion of the gems which Overseas and Arviv are accused of utilizing in violation of the Florida criminal statutes.

Arviv has given a deposition in the case at bar. However, when the questioning focused upon the true value of the gems Overseas purchased from plaintiff, Arviv asserted his fifth amendment privilege.

In these circumstances, defendants move for a stay of this litigation pendin reesolution [*4] of the criminal charges in Florida, and plaintff moves for summary judgment on the promissory notes and guarantees given to secure payment for the gems it sold to Overseas.

II.

It is apparent that the true value of the gems sold by plaintiff to defendants is a central issue in both the criminal and civil cases. To convict defendants on the criminal charges, the prosecution must presumably prove that defendants knowingly and willfully sold "inferior grade gemstones" to third parties at prices in excess of their true value. On the other hand, in the civil case defendants would presumably defeat plaintiff's claim for the purchase price in the sale from plaintiff to Overseas if the proof demonstrated that the gems were of a quality inferior to that contemplated by the contract.

In any event, the issue of valuation is sufficiently intertwined among the two cases to entitle defendants to a stay of the civil proceedings. Defendants are simply not in a position

to make factual averments with respect to the gems' value while the criminal charges against them are pending. Arviv' reliance upon the fifth amendment during a deposition taken on October 8, 1985, during the pendency of the criminal [*5] information, was justified. The same principle extends to defendant's resistance to plaintiff's motion for summary judgment. During the pendency of the criminal charges defendants cannot consistent with their constitutional privilege, be required to say anything on the key issue of valuation. The fifth amendment is a privilege of broad application. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects

against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444, 45 (1972) (footnotes omitted).
A stay of these civil proceedings constitutes a necessary and hence appropriate safeguard of defendants' fifth amendment privilege. Defendants cannot, consistent with that privilege, be compelled to choose between waiving at, or suffering the practical equivalent of a judgment by default in the civil case. I appreciate that the stay will result in inconvenience and relay to the plaintiff, but under settled authority the fifth amendment privilege takes precedence. See, [*6] e.g., Diemstag v. Bronsen, 49 F.R.D. 327, 328 (S.D.N.Y. 1970). The cases cited by plaintiff are factually inapposite.

Conclusion

For the foregoing reasons, and in the exercise of my discretion, I grant jefendant's motion for a stay of all proceedings in the case at bar, including further discovery and resolution of plaintiff's motion for summary judgment, pending trial or other disposition of the criminal charges in Florida.

Plaintiff's motion for summary judgment is accordingly denied on the present record, without prejudice to renewal when the basis for the stay no longer exists.

Defendants' counsel are directed to advise the Court and plaintiff's counsel by letter every three months, beginning on November 1, 1987, with respect to the status of the criminal proceedings against defendants in Florida.

In the interim, the Clerk of the Court is directed to place this case upon the Suspense Docket.

It is So Ordered.