

1997 WL 33559329

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United States District Court,
E.D. Michigan.

Linda NUNN, et al., Plaintiffs,
v.

Kenneth MCGINNIS, et al., Defendants.

No. 96-CV-71416. | Oct. 7, 1997.

Attorneys and Law Firms

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Defendants.

Opinion

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

OMEARA, J.

*1 Before the court is Defendants' October 2, 1997 motion for reconsideration. Defendants request that the court reconsider its September 17, 1997 order denying Defendants' motion for a stay pending appeal. In order to prevail on a motion for reconsideration, "[t]he movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof." LR 7.1(h)(3) (E.D.Mich., March 1997).

Defendants assert that a stay is necessary because they are

appealing this court's decision that Defendants are not entitled to qualified immunity. *See, e.g., English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir.1994) ("While the issue [of qualified immunity] is before the trial court or the case is on appeal, the trial court should stay discovery."). The court finds, however, that Defendants have waived their right to avoid discovery in this case because they did not appeal the qualified immunity issue in a timely manner. *See id.* at 1090. Defendants first raised the issue in their motion to dismiss filed September 17, 1996. The court denied that motion in an opinion and order dated February 4, 1997; Defendants did not appeal. Defendants attempted to raise the issue again in their second motion to dismiss or for summary judgment, which was filed July 7, 1997. The court denied Defendants' motion to dismiss with prejudice because it had already ruled upon the 12(b)(6) issues, including the qualified immunity defense. Insofar as Defendants' motion was brought under Rule 56, the court denied it without prejudice as premature, because discovery is not yet complete.

If Defendants wished to avoid discovery in this case, it was incumbent upon them to appeal this court's February 4, 1997 order, which first addressed the qualified immunity issue. *English*, 23 F.3d at 1089-90; *Kennedy v. City of Cleveland*, 797 F.2d 297, 301 (6th Cir.1986) ("[I]f the order [denying qualified immunity] is appealable at all, it must be appealed within the time set by law, here thirty days, or the right must be considered waived."). Because Defendants are not entitled to an automatic stay based upon their appeal of the qualified immunity issue, the court considered Defendants' request for a stay under Fed. R.App. P. 8(a) and the factors outlined in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir.1991). *See* Opinion and Order Denying Defendants' Motion for Stay Pending Appeal, September 17, 1997.

The court concludes that Defendants have not "demonstrate[d] a palpable defect by which the Court and the parties have been misled" in relation to the court's September 17, 1997 order.

Accordingly, IT IS HEREBY ORDERED that Defendants' October 2, 1997 motion for reconsideration is DENIED.