

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK D. JONES and
THERESA A. JONES,

Plaintiffs,

v.

TRACY FINCH and
RON WILHELM, in their
individual capacities,¹

Defendants.

ORDER

03-C-0025-C

Defendants Tracy Finch and Ron Wilhelm have moved for a stay of the trial in this case to enable them to appeal the denial of their motion for summary judgment with respect to defendant Wilhelm's claim of qualified immunity for his actions in entering plaintiffs' apartment. The motion will be denied.

¹ Plaintiffs included in the caption of their complaint "other unidentified officers involved in the wrongful execution of the warrant on MARK JONES' apartment," but have never amended the complaint to name these unidentified officers. I conclude from their failure to do so that they have abandoned any claims against these persons.

In denying defendant Wilhelm's motion for qualified immunity, I held that the matter of his immunity rested on a disputed issue of fact: the time that he and his team waited between knocking on plaintiffs' door and kicking it in. Whether officers waited a reasonable period of time depends on the "particular factual situation." United States v. Espinoza, 256 F.3d 718, 722 (7th Cir. 2001) (quoting United States v. Anthony Jones, 208 F.3d 603, 609 (7th Cir. 2000)). If the time was only five seconds, as officer Bybee testified at his deposition, it would be unreasonable unless defendant could point to exigent circumstances suggesting the need for a delay so brief that plaintiff Mark Jones was unable to reach his front door from his living room couch. United States v. Banks, 124 S. Ct. 521, 526 (2003) (fifteen to twenty-second wait reasonable when officers suspected that cocaine would be disposed of if they waited any longer); United States v. Markling, 7 F.3d 1309, 1318-19 (7th Cir. 1993) (seven-second wait reasonable when officers were knocking on door to motel room and had specific tip that suspect was likely to dispose of drugs). Defendants did not cite any evidence in support of their motion for summary judgment that would show that they had reason to believe that they needed to enter the apartment without waiting longer than they did. In fact, they did not even argue this aspect of the case, which makes it exceedingly odd that they would think they are entitled to an immediate appeal on the issue.

Johnson v. Jones, 515 U.S. 304, 307 (1995), holds that courts of appeals lack jurisdiction to consider an appeal from a denial of a defense of qualified immunity when the appeal rests upon a fact-related dispute about the record. Saucier v. Katz, 533 U.S. 194 (2001), did not overrule Johnson. Anderson v. Cornejo, Nos. 02-2234 & 02-2248, 2004 WL 94073, *1 (7th Cir. Jan. 21, 2004). Taking the evidence and reasonable inferences in plaintiffs' favor, as courts must do when deciding a defendant's motion for summary judgment, there remains a disputed issue of fact that is central to a determination of defendant Wilhelm's entitlement to the defense of qualified immunity. Therefore, it would be a waste of judicial resources to stay the trial of this case and permit an interlocutory appeal.

ORDER

IT IS ORDERED that defendants Tracy Finch and Ron Wilhelm's motion for stay pending appeal of this court's denial of their motion for summary judgment as to defendant Wilhelm's entitlement to qualified immunity is DENIED. (Apparently believing that this motion would be granted, the parties stipulated to immediate entry of judgment on dismissed claims to allow them to be appealed together with the qualified immunity claim.

(That stipulation is now moot.)

Entered this 2nd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge