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Docket: 1984CV02597-BLS1

Date: March 2, 2020

Parties: Attorney General v. Facebook, Inc.

Judge: /s/Brian A. Davis Associate Justice of the Superior Court

Decision and Order Regarding Respondent's Motion to Stay Order Regarding Attorney General's Petition to Compel Compliance Pending Appeal (Docket No. 35):

The Massachusetts Attorney General (the "Attorney General") commenced this action in August 2019 by filing with this Court a "Petition to Compel Compliance with Civil Investigative Demand Pursuant to G.L. c. 93A, § 7" (the "Petition"). The stated purpose of the Petition is to compel respondent Facebook, Inc.'s ("Facebook" or the "Company") compliance with the Attorney General's Civil Investigative Demand No. 2018-CPD-67 (the "Third CID").[1] On January 16, 2020, this Court issued a comprehensive Decision and Order (the "January 2020 Order") allowing the Attorney General's Petition in part, and directing Facebook to produce certain sought-after materials to the Attorney General within ninety (90) days of the date of the January 2020 Order. Facebook has since noticed its appeal from the Court's January 2020 Order and now requests a stay of that Order pending appeal pursuant to Mass. R. Civ. P. 62(a). The Attorney General opposes Facebook's request for a stay. Both sides have thoroughly briefed their positions. An expedited decision on the question of a stay also has been requested.

The Court has reviewed and considered the written submissions of the parties concerning Facebook's request for a stay. In consideration of all the circumstances, Facebook's request is DENIED for the reasons summarized briefly below.

First, the Court agrees with the Attorney General that its January 2020 Order is not subject to an automatic stay pursuant to Rule 62(a). The January 2020 Order clearly is not a judgment for money damages, see *Borne v. Haverhill Golf & Country Club, Inc.*, [58 Mass. App. Ct. 306](#), 326 (2003) (under Massachusetts law, "the taking of an appeal stays execution of a judgment for the payment of money"), nor is it a judgment of contempt. Rather, the Court's January 2020 Order is most appropriately viewed as "an interlocutory or final judgment in an action for an injunction," which does not qualify for an automatic stay under Rule 62(a). See *Lydon v. Coulter*, [85 Mass. App. Ct. 914](#), 915 (2014) (rescript) ("Even without the explicit label 'injunction,' an order to undertake or refrain from undertaking a particular action nevertheless may be considered an injunction."). See also *Id.* at 915 n.5 (holding that the "automatic stay [provision of Rule 62(a)] does not apply to injunctions.").

[1] Due to confidentiality concerns, the Court has, by agreement of the parties and in conformance with Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, impounded certain portions of the Petition and accompanying exhibits filed by the Attorney General. Redacted copies of these materials have been made part of the public case record for informational purposes.

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Second, because the Court's January 2020 Order does not qualify for an automatic stay under Rule 62(a), Facebook only can obtain a stay of that Order if it "meet[s] four tests." *C.E. v. J.E.*, [472 Mass. 1016](#), 1017 (2015) (rescript). Specifically, Facebook must show:

- (1) the likelihood of [Facebook's] success on the merits;
- (2) the likelihood of irreparable harm to [Facebook] if the court denies

the stay; (3) the absence of substantial harm to other parties if the stay issues; and (4) the absence of harm to the public interest from granting the stay.

Id.

Facebook, however, cannot satisfy the requirements necessary to qualify for a stay of its January 2020 Order, including, without limitation, demonstrating a likelihood of success on the merits. Recognizing that this Judge represents a difficult audience to convince that the January 2020 Order is erroneous, the Court – viewing the question as objectively as it reasonably can -- sees nothing in Facebook's motion papers which lead it to believe that Facebook's pending appeal is likely to prevail. The arguments that Facebook intends to pursue on appeal all were considered and rejected by this Court in issuing its January 2020 Order. The Appeals Court may see it otherwise, but this Court remains of the humble opinion that the January 2020 Order was correctly decided and is likely to be affirmed -- rather than overturned -- on appeal. For this reason alone, the Court, acting within its discretion, chooses to deny Facebook's request for a stay of the January 2020 Order.[2] See *Spence v. Reeder*, [382 Mass. 398](#), 422 (1981) (issuance of a stay pending appeal is a matter within the discretion of the trial court). See also G.L. c. 231, § 116 ("Upon an appeal from a final judgment, the justice of the court by whom it was made may make such orders staying the enforcement of the judgment in an action for an injunction or appointment of a receiver as are needful for the protection of the rights of the parties, until the appeal shall be heard by the appellate court.") (emphasis added).

/s/Brian A. Davis Associate Justice of the Superior Court

[2] In light of Facebook's failure to demonstrate a likelihood of success on the merits, the Court takes no position with respect to the other "tests" that Facebook also must meet in order to obtain a stay of the January 2020 Order. See *C.E. v. J.E.*, 472 Mass. at 1017.