UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

TISSUE TECHNOLOGY LLC, PARTNERS CONCEPTS DEVELOPMENT, INC., OCONTO FALLS TISSUE, INC., and TISSUE PRODUCTS TECHNOLOGY CORP.,

Plaintiffs,

v.

TAK INVESTMENTS, LLC and SHARAD TAK,

Defendants.

Case No. 14-C-1203

TAK INVESTMENTS, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE COURT'S DECISION AND ORDER GRANTING, IN PART, PLAINTIFFS' MOTION FOR LEAVE TO AMEND PLEADINGS

Defendant Tak Investments, LLC ("Tak Investments"), by and through its counsel, Godfrey & Kahn, S.C., submits this memorandum in support of its motion pursuant to 28 U.S.C. § 1292(b) to certify for interlocutory appeal the Court's April 3, 2017 Decision and Order granting, in part, Plaintiffs' Motion for Leave to Amend Pleadings [ECF No. 48].

If the Court's conclusions of law were mistaken, the proceedings – which already have spanned 31 months – would end. If the case continues, without interlocutory review, all of the parties necessarily will expend significant time and resources through discovery and through trial in an unusual set of circumstances, circumstances that include a criminal proceeding involving Plaintiffs' principal. Moreover, the case would proceed to an end that, whatever its nature, would almost surely result in an appeal of right. The Court should grant the motion, and award Tak Investments section 1292(b) certification.

INTRODUCTION

The Court's Decision and Order granted Plaintiffs leave to amend their Complaint to seek to enforce the very promissory notes the Plaintiffs themselves had cancelled, a claim barred by the statute of limitations. The Court reached that conclusion of law without applying the relation back doctrine to the claim Plaintiffs assert in their Amended Complaint against Tak Investments for breach of those four promissory notes. The Court's Decision and Order satisfies the standard for granting interlocutory appeal: (1) it involves a controlling question of law; (2) there is substantial ground for difference of opinion on the question; and (3) an immediate appeal will materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b).

The Court's Decision and Order granted the Plaintiffs leave to amend to add two claims: against Tak Investments for breach of four promissory notes as well as a claim against Sharad Tak for specific performance of the Final Business Terms Agreement. In granting Plaintiffs leave to amend to assert these two inconsistent theories, the Court applied the analysis required by Rule 15(c) and the relation back doctrine to the putative claims against Mr. Tak, but did not do so with respect to the claim against Tak Investments for breach of the four promissory notes. Had it done so, the Court would have found the claim for breach of the promissory notes barred by the statute of limitations because it does not relate back to the filing of the Complaint in this matter.

Tak Investments seeks interlocutory review of the Court's decision. The Plaintiffs should not be able to proceed with the claim for breach of the promissory notes against Tak Investments without the analysis required by Rule 15(c) to determine whether such amendment would relate back to the original Complaint. It does not.

ARGUMENT

I. Standards Applicable to Petition for Interlocutory Review

Section 1292(b) of Title 28 provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order.

28 U.S.C. § 1292(b). These statutory criteria are "not as crystalline as they might be." *Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 676 (7th Cir. 2000). What is clear, however, is that a district court may certify an interlocutory appeal once satisfied that four statutory criteria are met, along with a non-statutory requirement. The statutory criteria are: "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz*, 219 F.3d at 675.

The single non-statutory requirement is that "the petition must be filed in the district court within a *reasonable time* after the order sought to be appealed." *Id*. (citations omitted).

Almost by definition, district court certification under section 1292(b) is unusual. Indeed, it requires the application of judicial discretion twice – first, by the district court and, only then if certification results, by the United States Court of Appeals. While the section is limited to "exceptional cases," *Fed. Deposit Ins. Corp. v. First Nat'l Bank of Waukesha*, 604 F. Supp. 616, 620 (E.D. Wis. 1985), there remains a "duty" to allow an immediate appeal when the well-established standards are met. *See DeKeyser v. Thyssenkrupp Waupaca, Inc.*, No. 08-C-488, 2009 WL 750278, *2 (E.D. Wis. Mar. 20, 2009) (Griesbach, J.)(quoting *Ahrenholz*, 219

F.3d at 677).[1] Contrast this case with, for example, the factors in *DeKeyser* that led this Court to deny a certification request. While there was a question of law involved in *DeKeyser* – whether the Fair Labor Standards Act's "opt-in" procedure precluded state law claims under Rule 23's "opt-out" procedure – the Court found that the remaining three factors were not satisfied. *Id*. Moreover, this Court has noted the importance of a "quick and clean review" of a "discrete legal question" that it found absent little more than a year ago in *United States v. NCR Corp.*, No. 10-C-910, 2016 WL 304805, at *2 (E.D. Wis. Jan. 25, 2016).[2]

There are no questions of fact here (at least at this threshold stage). The questions of law are both significant and "pure." While a motion for reconsideration can accompany a section 1292(b) request, Tak Investments has not done so here because there is no doubt about the Court's familiarity with the case or its appreciation for the novelty and dispositive nature of the issues.

In *Kohler Co. v. United States*, No. 01-C-753, 2003 WL 21693705 (E.D. Wis. June 4, 2003),[3] this Court granted certification because even though it ruled against Kohler on several tax questions, it also found a "substantial ground for difference of opinion" and emphasized the fact that if "Kohler wins on appeal the case will likely be over." *Id*. at *2. Moreover, the appellate court might well "provide guidance…that will impact the trial…eliminating some of the risk of a future appeal…." *Id*. So too, here. If the claim against Tak Investments for breach of the promissory notes does not relate back to the Complaint – and that is Tak Investments' argument – the case against Tak Investments will be over and no appeal will ever be necessary.

[1] A copy of this unreported decision is attached as Exhibit 1.
[2] A copy of this unreported decision is attached as Exhibit 2.
[3] A copy of this unreported decision is attached as Exhibit 3.

This Court cited the Supreme Court's decision in *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 555 (2010), in its Decision and Order, relying on it to apply – against the Plaintiffs – the "mistake" provision of Rule 15(c)(1)(C)(ii). (ECF No. 48 at 5.) Yet the *Krupski* decision has broader ramifications here, including creating the continuing ambiguity that the Seventh Circuit can and should address. "The fallout from [*Krupski*] is that the majority of courts are construing [its] holding narrowly to support their conclusion that lack of knowledge is not a mistake and that defendants may only be substituted rather than added through an amended complaint." Stacy H. Farmer, *The United States Supreme Court in Krupski v. Costa Crociere, S.p.A. Creates Additional Ambiguity in the Relation Back Doctrine*, 35 Am. J. Trial Advoc. 207, 209 (2011). Here, the Plaintiffs – with, so far, the Court's permission – have added (not substituted) Sharad Tak as a specific performance defendant even though the statute of limitations has eliminated any liability on the cancelled notes. Moreover, that party addition depends on the notes being deemed cancelled but, at the same time the Plaintiffs are, only now, alleging that the notes are in breach. This Court noted that the conflicting claims "might *eventually* prove inconsistent." (ECF No. 48 at 8). But this too remains a question of law, and the resulting confusion warrants interlocutory appeal.

II. The Statutory Criteria Are Satisfied

The Court's Decision and Order granting Plaintiffs leave to amend to assert a claim for breach of the four promissory notes satisfies the statutory criteria for interlocutory review.

First, the decision for which Tak Investments seeks review involves a controlling question of law. Whether an amendment relates back to the complaint is governed by Rule 15(c) of the Federal Rules of Civil Procedure, presenting a question of law. *See Robinson v. Clipse*, 602 F.3d 605, 607 (4th Cir. 2010). The Seventh Circuit has emphasized that the question of

whether an amended pleading relates back pursuant to Rule 15(c) is a separate question from whether to grant leave to amend in the first place. *Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011). Here, the Court left this question unanswered as it relates to Tak Investments.

Second, whether the new claim for breach of the notes relates back to the filing of the complaint is "controlling" as its resolution is likely, if not certain, to affect the further course of litigation. *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) ("A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so.") (citing *Johnson v. Burken*, 930 F.2d 1202, 1205-06 (7th Cir. 1991); 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3930, at 159-60 & n. 12 (1977)). A question of law "need not completely dispose of the litigation in order to be 'controlling.'" 19 James Wm. Moore, *Moore's Federal Practice* § 203.31[3] (3d ed. 2017). The district court need determine "only that the appeal present a controlling question of law on an issue whose determination may materially advance the ultimate termination of the case." *Id*.

Here, had the Court not permitted the amendment as it relates to Tak Investments, there would be no claim remaining against Tak Investments, as the Court previously granted summary judgment on Plaintiffs' specific performance claim. Further, the instatement of the claim against Sharad Tak is inextricably bound to the instatement of the corporate note claim. The claims are, indeed, inconsistent: one depends on facial validity and the other on deemed invalidity. Once the United States Court of Appeals accepts a certified interlocutory appeal, it takes the entire case: "the order appealed from as well as any other orders and any other questions, although themselves interlocutory and not otherwise appealable, that underlie and that are inextricably

involved with the order being appealed." *Id*. § 203.32[3][a]; *see also Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981) ("When an order is certified for appeal by a district court and appeal is accepted by a court of appeals all questions material to the order are properly before the court of appeals."). "[I]t is the order that is appealable, and not [just] the controlling question identified by the district court." 19 *Moore's Federal Practice* § 203.32[3][a].

Additionally, the issue for which Tak Investments seeks interlocutory review is contestable. The issue faced by this Court – whether a party can be subject to suit on one set of cancelled contracts after the statute of limitations has run, simply because another claim under a different contract provides no avenue for relief – is novel and contested by the parties. It implicates due process and fundamental fairness: the Plaintiffs made choices that have consequences. The federal rules no doubt are flexible, as the Court noted, but they do impose limits.

Relation back is appropriate only when an amendment merely restates the same factual allegations of the original complaint and claims that those facts support an additional theory of recovery. *See Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001) ("Generally, an amended complaint in which the plaintiff merely adds legal conclusions or changes the theory of recovery will relate back to the filing of the original complaint [but only] if 'the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading.'") (quoting 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1497, at 95 (2d ed. 1990)); *see also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379 (7th Cir. 1996) (relation back permitted "where an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading.").

Tak Investments respectfully maintains that the Court erred in failing to analyze whether the proposed amendment related back to the original Complaint. Tak Investments was without notice of the new claim at the time the original Complaint was filed and prosecuted to conclusion, prosecuted twice to summary judgment. The claim for breach of the four promissory notes is not based on the same facts alleged in the Complaint. To the contrary, the Complaint alleged the notes had been cancelled by Plaintiffs. Without that that indispensable allegation, the request for relief – a transfer of a minority interest – was impossible. Without that notice, moreover, even if leave to amend should be granted, the amendment cannot properly relate back to the filing of the Complaint as Tak Investments was without notice of the claim within the limitations period.

Finally, the resolution of the issue of whether the Plaintiffs' claims against Tak Investments relate back to the filing of the Complaint promises not only to speed up this litigation, but to end it. Were the Court to apply the relation back doctrine mandated by Rule 15(c), on review and reversal, and conclude that Tak Investments never received notice of the claim for enforcement of cancelled promissory notes there would not be any justiciable claim remaining against Tak Investments. With Tak Investments out of the litigation, it is difficult to conceive of how *any* claims could proceed in the parallel tracks given their mutual inconsistency.

How can Mr. Tak be required to specifically perform an obligation triggered by the deemed cancellation of the same four promissory notes and, at the same time, the Plaintiffs claim Tak Investments has breached the notes for which Plaintiffs seek money damages? The plaintiffs cannot have it both ways: a breach of contract claim against a corporate entity if the contracts are valid and a specific performance claim against Sharad Tak personally since the contracts have been cancelled, as the plaintiffs repeatedly say they have been. The resolution of

the question of whether the contract claim against Tak Investments for breach of the promissory notes relates back to the original Complaint will move this litigation to its ultimate resolution.

III. The Motion for Leave to Appeal is Timely

Tak Investments specifically raised the section 1292(b) certification process at the scheduling conference on April 12, 2017. Moreover, there has been virtually no discovery in this matter and no conceivable prejudice to the Plaintiffs. In fact, one of these Plaintiffs, Oconto Falls Tissue, Inc., has yet another action – just served – pending before this Court against a related defendant, ST Paper, LLC, that involves the same set of transactions. *See Oconto Falls Tissue, Inc. v. ST Paper, LLC*, No. 17-C-103 (E.D. Wis. filed Jan. 23, 2017).[4] Looming over both cases, and a similar state court action, remains the status of one of the Plaintiffs' principals, Ronald Van Den Heuvel, with whom the Court is quite familiar. Inevitably, regardless of the outcome of the criminal proceeding, it will affect this litigation. There is time and incentive, in short, for the United States Court of Appeals to resolve a section 1292(b) appeal.

Beyond the statutory criteria identified above, a party seeking interlocutory review of a district court's decision must petition the district for leave to do so within a reasonable amount of time. *Ahrenholz*, 219 F.3d at 675. In *Kohler*, when this Court granted certification, it noted that the certification petition was filed, in the reasonable period required, "more than two months after the order for which certification is sought." 2003 WL 21693705, at *1 n.1. In addition, the Court specifically observed that "at the status conference held shortly after issuance of my decision, Kohler indicated it was considering such a petition…." *Id*. So, too, here – where fewer than 30 days have passed since the order at issue, and nothing else has transpired.

[4] The Plaintiffs in this case and the Plaintiff in case No. 17-C-103, as well as the Plaintiff in a related case pending in the Wisconsin Circuit Court for Oconto County, *Tissue Technology, LLC v. ST Paper, LLC*, No. 2014 CV 156, are all represented by the same counsel. All three cases – including this one – are subject to further motion practice.

Here, Tak Investments is making this request within 30 days of the Court's Decision and Order granting Plaintiffs' motion for leave to amend. This is a reasonable amount of time in which to petition a district court for interlocutory review. Indeed, it is the same time in which a litigant must file a notice of appeal of a final order or judgment. *See* Fed. R. App. P. 4(a), There has been no prejudice to the Plaintiffs. Tak Investments' request is timely, more timely by twice than the petition ratified in *Kohler*.

CONCLUSION

While the Court applied the relation back doctrine with respect to Mr. Tak as a new party, it did not perform this analysis mandated by Rule 15(c)(1)(B) with respect to the new and inconsistent claim sought to be added by Plaintiffs against Tak Investments. Tak Investments submits that this was an error that the Seventh Circuit should have the opportunity to address for the benefit of the parties here and the law generally. Tak Investments never had notice of the claim for breach of the four cancelled notes in the original Complaint. The amendment should not relate back.

There is no common core of operative facts that bind together the claim Plaintiffs originally brought with the claim in the Amended Complaint. The events giving rise to the two claims are different in both time and type. The claim initially asserted by Plaintiffs for specific performance hinged upon the Final Business Terms Agreement and notice being given to Tak Investments that the four promissory notes were cancelled. According to Plaintiffs, this would have required a transfer of an equity interest in Tak Investments to Plaintiffs if proper notice had been given sometime after three years from the date of the Final Business Terms Agreement. In contrast, the new claim Plaintiffs would assert for breach of the promissory notes matured by the date the last payment was due in 2010.

Tak Investments respectfully requests that the Court grant its motion for interlocutory review of the April 3, 2017 Decision and Order granting Plaintiffs' leave to amend their Complaint.

Dated this 3rd day of May, 2017.

s/ Jonathan T. Smies
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EXHIBIT 1

2009 WL 750278
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Ryan DeKEYSER, Thomas Cooper, Harley Granius and Carlo Lantz, on behalf of themselves and others similarly situated, Plaintiffs,
v.
THYSSENKRUPP WAUPACA, INC. d/b/a Waupaca Foundry, Inc., Defendant.

No. 08-C-488.
|
March 20, 2009.

Attorneys and Law Firms

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Joseph Louis Olson, Paul E. Benson, Mitchell W. Quick, Michael Best & Friedrich LLP, Milwaukee, WI, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO CERTIFY AN INTERLOCUTORY APPEAL

WILLIAM C. GRIESBACH, District Judge.

***1** The plaintiffs in this case are proceeding with a collective action pursuant to the Fair Labor Standards Act of 1938 as Amended, 29 U.S.C. § 201, *et seq.* ("FLSA"). Plaintiffs also advance three causes of action based upon Wisconsin law. In ruling on Defendant Thyssenkrupp Waupaca, Inc.'s ("Waupaca") motion to dismiss all but a portion of the FLSA claim, I determined that plaintiffs were not barred from bringing state law claims under Rule 23 of the Federal Rules of Civil Procedure simply because they also were proceeding with a claim under the FLSA's "opt-in" procedure. (Doc. # 82 at 4-10.) Waupaca has moved the Court for certification of an interlocutory appeal on the question under 28 U.S.C. § 1292(b). For the reasons stated below, Waupaca's motion will be denied.

BACKGROUND

The named plaintiffs in this action are current and former nonexempt hourly workers who were or are employed by Waupaca at its foundries in Marinette or Waupaca, Wisconsin. (Compl.¶¶ 1, 8-12.) The complaint contemplates three distinct classes of potential plaintiffs in addition to the named plaintiffs: (1) the "FLSA class," those who were, are or will be employed by Waupaca as a foundry worker at any time within three years[1] prior to the complaint through the date of final disposition of the case; (2) the "Wisconsin class," those who were, are or will be employed by Waupaca as a foundry worker at any time within two years prior to the complaint through the date of final disposition of the case; and (3) other "similarly situated persons currently or formerly employed by Defendant in states other that the State of Wisconsin...." (Compl.¶¶ 2-4.)

The plaintiffs allege that Waupaca, a member of a highly regulated industry, is required to provide proper environmental controls to protect worker safety and provide its workers the means to protect themselves from the dangers inherent in foundry work. (Compl.¶ 22.) The complaint alleges that Waupaca has not fully compensated its employees "donning and doffing gear and equipment, showering, and walking to and from the production floor." (Compl.¶ 1.) The FLSA claim is that Waupaca failed to pay overtime and failed to keep records of hours worked.

As noted above, Waupaca moved for dismissal of all causes of action, with the exception of a portion of the FLSA claim. (Doc. # 21.) In support of the motion, Waupaca argued that plaintiffs could not bring state law claims under the "opt out" procedure of Rule 23, as such claims were barred by the "opt in" collective action procedure of the FLSA. I disagreed and noted that the Seventh Circuit had not squarely addressed the issue. (Doc. # 82 at 8.) Waupaca argues it did not get a "clear answer" from the court in its ruling on the motion to dismiss, and believes the issue is therefore "ripe for review by the Seventh Circuit." (Doc. # 96 at 2.)

The court has granted conditional certification of the FLSA collective action and approved a notice to be sent to all potential plaintiffs. (Doc. # 91.) Over 400 employees of Waupaca have opted into the FLSA action as of plaintiffs' last count. (Doc. # 111 at 2 .)

ANALYSIS

***2** Interlocutory appeals are provided for by 28 U.S.C. § 1292(b).[2] The invocation of § 1292(b) should be limited

to "exceptional cases" in which an appellate decision "may obviate the need for protracted and expensive litigation...." *Fed. Deposit Ins. Corp. v. First Nat. Bank of Waukesha, Wis.,* 604 F.Supp. 616, 620 (E.D.Wis.1985). The Seventh Circuit has had occasion to remind the district courts that § 1292(b) presents four statutory criteria: "there must be a question of *law,* it must be *controlling,* it must be *contestable,* and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trustees of Univ. of Ill.,* 219 F.3d 674, 675 (7th Cir.2000). It also noted one nonstatutory requirement, that the petition "must be filed in the district court within a *reasonable time* after the order sought to be appealed." *Id.* at 675-76 (citing *Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.,* 202 F.3d 957, 958 (7th Cir.2000)). All of these criteria must be satisfied before a district court certifies an order for immediate appellate review. *Id.* at 676. The Seventh Circuit has spoken of the "duty" of the district court to allow an immediate appeal to be taken when all of the criteria are met. *Id.* at 677. Finally, although the district court must certify an issue or issues before an interlocutory appeal may be taken under § 1292(b), "an appeal under § 1292(b) brings up the whole certified order, rather than just the legal issue that led to certification." *United Airlines, Inc. v. Mesa Airlines, Inc.,* 219 F.3d 605, 609 (7th Cir.2000) (internal citation omitted).

Waupaca argues that the question it seeks to have certified for immediate appeal is a controlling issue of law, a "pure" question of law appropriate for resolution by the Seventh Circuit. Section 1292(b)'s "question of law" refers to a "question of the meaning of a statutory or constitutional provision, regulation or common law doctrine...." *Ahrenholtz,* 219 F.3d at 676. Waupaca is right in its contention that it presents a question of law, though whether it is "controlling" requires closer analysis.

In order to be a "controlling" question of law, the resolution of the issue must affect the course of litigation. *United States v. Approximately 81,454 Cans of Baby Formula,* 2008 WL 4058044, *1 (E.D.Wis. Aug.26, 2008) ("A question of law is controlling if its resolution is likely to affect the course of the litigation.") (citing *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.,* 86 F.3d 656, 658 (7th Cir.1996)); *Harrisonville Tel. Co. v. Ill. Commerce Comm'n,* 472 F.Supp.2d 1071, 1080 (S.D.Ill.2006) ("A controlling question of law is a threshold issue that seriously affects the way in which a court conducts a litigation, for example, impacting whether or not the plaintiff has a claim for relief under a particular statute.") A "controlling question" can exist where resolution of the question will resolve the litigation in its entirety, or where it will establish whether a particular claim exists. *E.E.O.C. v. Maggies Paratransit Corp.,* 351 F.Supp.2d 51, 53 (E.D.N.Y.2005). Some courts have gone so far as to say that for an issue to be controlling it is not enough for it to be determinative in the case at hand, but must contribute to the termination at an early stage of other cases. *Fed. Deposit Ins. Corp.,* 604 F.Supp. at 620; *Kohn v. Royall, Koegel & Wells,* 59 F.R.D. 515, 524-25 (S.D.N.Y.1973); *contra Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille,* 921 F.2d 21, 24 (2d Cir.1990) (resolution of question need not have wider precedential value to be "controlling" for purposes of § 1292(b)).

***3** I am unconvinced that the question which Waupaca seeks to have certified is controlling for purposes of § 1292(b). The parties muddy the waters on the issue by arguing about whether a decision not to certify a class under Rule 23 is the sort of decision for which a permissive appeal may be taken under § 1292. Although I have conditionally certified the FLSA class, I have yet to rule on the certification of a class under Rule 23, a decision which either party may appeal under Rule 23(f). In any event, a ruling in favor of Waupaca on appellate review of the question of whether plaintiffs' Rule 23 class action claims are barred by the procedures of the FLSA would certainly not resolve the matter, as the FLSA claim would remain and the court would likely have jurisdiction over the same state law claims brought in a separate Rule 23 action removed under the Class Action Fairness Act, 28 U.S.C. § 1332(d) as Amended ("CAFA"). The court could also exercise supplemental jurisdiction over the state law claims of those who have opted into the FLSA collective action.

I also find that Waupaca has failed to demonstrate that the question it wishes to have the Seventh Circuit review is contestable, as it is not one "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Waupaca's emphasis on the fact that the court noted the question required "careful consideration" in its ruling on the motion to dismiss does not mean that there is a substantial ground for difference of opinion. (Doc. # 82 at 7.) As plaintiffs note, most courts who have addressed the issue have concluded that there is no procedural incompatibility between FLSA and Rule 23 actions. Waupaca's repeated assertion that *King v. Gen. Elec. Co.,* 960 F.2d 617 (7th Cir.1992), teaches that there is such an incompatibility does not demonstrate that the issue is contestable. Further, just because the authorities are not unanimous on a question of law does not mean a court must find that substantial grounds for difference of opinion exist. *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust,* 889 F.Supp. 849, 852 (E.D.N.C.1995) (also noting that "a district court has the discretion to find

a lack of substantial ground for difference of opinion even though the only other reported decision on the issue at hand disagrees with the conclusions of the court.") (citing *Singh v. Daimler-Benz, AG,* 800 F.Supp. 260 (E.D.Pa.1992), *aff'd,* 9 F.3d 303 (3d Cir.1993)). For these reasons, I am not of the opinion that the question which Waupaca moves the Court to certify is contestable.

Waupaca fails to show how a permissive appeal would materially advance the ultimate termination of this lawsuit. Even if the issue were to be considered by the Seventh Circuit, a resolution favorable to Waupaca would not necessarily extinguish any of the plaintiffs' claims. As noted by plaintiffs and above, this is because there are over 400 employees who have opted into the FLSA collective action, and even if the procedures of the FLSA were held to bar a class action under Rule 23, the court could exercise supplemental jurisdiction over any state law claims members of the FLSA might have. (Doc. # 111 at 14.) Plaintiffs also observe that a separate lawsuit could commence and advance the same claims. Waupaca thinks this to be too much hypothesizing and claims the issue of whether the same claims could find their way back into this court through other means, even if the Seventh Circuit were to rule in its favor, is not before the court. But the court cannot proceed with a blind eye to these possibilities in determining whether an interlocutory appeal would materially advance this litigation. Waupaca has failed to provide sufficient justification of how permitting an interlocutory appeal will materially advance this lawsuit.

***4** Having determined that Waupaca's request for an interlocutory appeal fails to meet the statutory criteria of § 1292(b), I need not determine whether it was filed within a reasonable time after the court's order.

CONCLUSION

I conclude that Waupaca has failed to demonstrate that this is an exceptional case in which it may invoke § 1292(b) for an interlocutory appeal. The issue which Waupaca would have the Seventh Circuit review is not dispositive to any of the claims in this lawsuit, as if Waupaca were to receive a favorable ruling in its appeal, the court could exercise supplemental jurisdiction over the claims of the opt-in plaintiffs. Finally, an interlocutory appeal with a ruling in Waupaca's favor would likely have the effect of prompting a separate class action beginning in state court with eventual removal into this court. This would not be in the interest of judicial economy. As I have found that the statutory criteria of § 1292(b) are not met, Waupaca's motion to certify the question of whether the plaintiffs' Rule 23 class action claims are barred by the opt in collective action procedures of the FLSA is **DENIED.**

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 750278

Footnotes

1 The Plaintiffs' contention that the putative FLSA Class would contain workers as far as three, *vice* two, years prior to the filing of the complaint is based upon an allegation of willfulness on the part of Waupaca. (Compl.¶ 43.) The FLSA allows for a class spanning back three years if the alleged violations are willful. 29 U.S.C. § 255(a).

2 Section 1292(b) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

EXHIBIT 2

2016 WL 304805
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

United States of America and The State of Wisconsin, Plaintiffs,
v.
NCR Corporation, et al., Defendants.

Case No. 10–C–910
|
Signed January 25, 2016

Attorneys and Law Firms

Michael J. Nelson, Latham & Watkins, LLP, Chicago, IL, for Defendants.

ORDER

William C. Griesbach, Chief Judge, United States District Court

***1** Before me presently are the Plaintiffs' motion to strike and Defendant NCR's motion to certify the judgment. For the reasons given below, I will deny both motions.

I. Motion to Strike

The government seeks to strike the surrebuttal testimony of Mr. Butler regarding his "28 percent share" opinion, which was based on certain of Dr. Wolfe's estimates Butler obtained during the December 2012 trial. In support of its motion, the government argues that Butler's opinion, based on Wolfe's estimates, should have been disclosed prior to trial. It also argues that the opinion was not proper surrebuttal testimony because it was simply bolstering his prior testimony rather than being responsive to any matters raised during rebuttal testimony. Georgia–Pacific and the government raised these objections at trial, but they were overruled.

NCR raises a number of arguments in opposition to the motion to strike. In short, it defends admission of the testimony at trial, but it also questions whether the government's motion to strike is procedurally appropriate. Finding it dispositive, I address only the latter objection.

At trial, this court overruled the objections to Butler's surrebuttal testimony, concluding both that it was procedurally appropriate and proper surrebuttal. (ECF No. 731, Tr. 2782–84.) Following the trial, the parties filed briefs. NCR's brief cited Butler's testimony about his use of Wolfe's estimates: "Even under Dr. Wolfe's higher estimates, the full contamination scenario would require approximately '40 percent higher dredge volumes than the NCR [alone] dredge volumes.' " (ECF No. 746 at 37.) NCR echoed its reliance on Wolfe in its brief on appeal: "Like the estimates presented by the Simon Team and Connolly, Wolfe's calculations showed that NCR was a minority contributor of PCBs in OU4. (Tr. 2267:23–2268:6.) The District Court rejected Braithwaite's and Jones's work and largely ignored the estimates by Wolfe and Connolly." (ECF No. 1050–1 at 6.) Noting this, the court of appeals remanded for consideration of whether Butler's use of Wolfe's estimates would present a reasonable basis for apportionment. It is true, as the government notes, that NCR did not specifically refer to the "28 percent" estimate Butler attributed to NCR at trial. Even so, both this court and the court of appeals were aware that NCR was attempting to show that the harm was divisible even if NCR relied on Georgia–Pacific's expert for the underlying estimates.

It is unclear whether, as NCR now says, the government should have pressed its objections to the admission of Butler's testimony in its post-trial briefing, its appellate briefs or at oral argument—or all three. But I need not conclude that the argument is waived to conclude that it is not properly before me. Though it is styled as a motion to strike, in essence it is a motion seeking reconsideration of my earlier evidentiary ruling. In support of its motion seeking reconsideration, the government cites a vague principle encouraging district courts to explore alternative bases for their decisions. *Young v. Verizon's Bell Atl. Cash Balance Plan,* 615 F.3d 808, 815 (7th Cir.2010). The government argues that even though it has won the case against NCR on other grounds, a ruling granting the motion to strike (as opposed to finding it moot) would provide a second, independent basis for the court of appeals to uphold the government's victory.

***2** The government's earnest desire to bolster its case on appeal is understandable, but I am not aware of any procedural mechanism, nor any precedent, for entertaining a motion addressing a three-year-old previously-decided issue, particularly when that motion is brought by the party that has already won on another ground. Surely, the desire to have a second ground for that victory cannot be enough to justify reconsideration, or else parties would never cease asking for rulings, and re-dos of rulings, despite having won on other grounds.

The only precedent the government cites is a case in which the Seventh Circuit praised a district court for developing the record fully and exploring alternative bases of decision: in *Young,* the district court, due to uncertainties in ERISA law, had decided to bifurcate a trial, applying different legal standards of review (deferential and *de novo)* to each phase of the trial. *Id.* at 814. In essence, the district court created a record that would allow the court of appeals to reach a complete result under either standard of review.

A general preference for thoroughness, or for exploring alternate bases for a decision, does not warrant revisiting issues decided long ago, however. *Young* involved a district court that created an alternative basis for its decision in the first instance, not on a motion for reconsideration years later. The case is before me presently with directions to consider certain evidence, not to consider whether that evidence should have been allowed in the first place. Whether or not this court's December 2012 evidentiary ruling is outside the scope of the mandate or law of the case, it remains true that the matter is now before me only because of a completely unrelated issue. The remand to consider the matters the Seventh Circuit cited was not an invitation to open the door to revisit other issues. Accordingly, the motion to strike will be denied as moot.[1]

II. Motion to Certify Appeal Under § 1292(b)

NCR has requested certification, for immediate appeal, of this court's October 19, 2015 decision finding that NCR had failed to prove its divisibility defense. To guide the district court, there are four statutory criteria for the grant of a section 1292(b) petition: there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation. *Ahrenholz v. Bd. of Trustees of Univ. of Illinois,* 219 F.3d 674, 675 (7th Cir.2000).

The parties opposed to the certification argue that the question decided in my October 19 order was essentially one of fact, rather than law; after all, the Seventh Circuit had remanded the action to this court so that this court could undertake certain findings of fact pertinent to the divisibility defense. Thus, there is not a question of "law" susceptible to easy resolution by the court of appeals. NCR argues just the opposite, claiming that the divisibility defense is indeed a question of law because it relied on the Seventh Circuit's directives about the proper legal standards for divisibility.

It is true, as NCR says, that there are questions of law "involved" in the proposed appeal, but at their core they are tied up with difficult questions of fact. The Seventh Circuit has explained that the "question of law" clause in section 1292(b) refers to a "pure" question of law, e.g., "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"—the kinds of things a court of appeals could decide "quickly and cleanly without having to study the record." *Id.* at 677. Here, it should go without saying that appellate review would require much more than a "quick and clean" review of a discrete legal question.

Accordingly, the request for § 1292(b) certification is **DENIED.** Having found that judgment should not be entered at this time (under § 1292(b) or otherwise), I will decline to enter the judgment proposed by the government. The motion to strike is **DENIED.** The clerk will set the case on the calendar for a telephonic scheduling conference.

***3 SO ORDERED** this 25th day of January, 2016.

All Citations

Slip Copy, 2016 WL 304805

Footnotes

1 Similarly, this court has not considered the declaration the government wants to strike, either. Accordingly, its motion is moot as to the declaration as well.

EXHIBIT 3

2003 WL 21693705
United States District Court,
E.D. Wisconsin.

KOHLER COMPANY, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.

No. 01–C–753.
|
June 4, 2003.

Attorneys and Law Firms

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ORDER

GRIESBACH, J.

***1** This case is now before me on plaintiff Kohler Company's Petition for Certification of Issue for Interlocutory Appeal pursuant to 28 U .S.C. § 1292(b). Kohler asks that I certify an interlocutory appeal to the Seventh Circuit Court of Appeals from my Decision and Order of February 20, 2003, in which I denied Kohler's motion for summary judgment. For the reasons stated below, I conclude that the petition should be granted.

In this case, Kohler seeks a refund for tax it paid under protest, which was assessed on a transaction it entered into under the Mexican debt equity swap program. Kohler purchased an interest in U.S. dollar denominated debt obligations of the Mexican government from an unrelated seller, a U.S. bank. Kohler then exchanged its interest in the debt obligations for equity in a newly formed Mexican subsidiary, which was funded, upon cancellation of the debt, by a deposit by the Mexican government of Mexican pesos in a restricted account for the benefit of the subsidiary. The dollar value of the pesos deposited in the account (about $19 million) exceeded the dollar amount that Kohler had paid for its interest in the debt obligations (about $11 million). The Internal Revenue Service conducted an audit of the transaction and concluded that Kohler had realized a short-term capital gain of the difference between what Kohler had paid for the Mexican debt obligation and the dollar value of the pesos made available to Kohler's subsidiary. It is the tax assessed on this amount that Kohler seeks to have refunded.

On February 20, 2003, I denied Kohler's motion for summary judgment. It is that decision which Kohler requests I certify for immediate appeal.

As the Seventh Circuit has recently emphasized, there are four statutory criteria for the grant of a § 1292(b) petition: "There must be a question of *law,* it must be *controlling,* it must be *contestable,* and its resolution must promise to *speed up* the litigation."[1] *Ahrenholz v. Bd. of Trs. of Univ. of Ill.,* 219 F.3d 674, 675 (7th Cir.2000).

I conclude that all of the statutory criteria are met in this case. In denying Kohler's motion for summary judgment, I rejected its claim that the presumed equivalence rule of *United States v. Davis,* 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1962), applied. Generally, the *Davis* rule is that when property with readily ascertainable value is exchanged in an arms-length transaction for property without a readily ascertainable value, the value of the latter property is presumed equal to that of the former. 370 U.S. at 68. Kohler argued that under *Davis,* the value of the restricted peso account that was set up for the benefit of its subsidiary was equal to the amount it had paid for the interest in the Mexican debt obligations. Thus, it claimed, it realized no gain as a result of the transaction. I rejected the application of *Davis,* to put it generally, because the value of the pesos account may be readily ascertainable and because what Kohler traded to Mexico (debt payable in Mexican pesos) could be valued higher than what Kohler had purchased (debt payable in U.S. dollars).

***2** Kohler also argued on the basis of the Fifth Circuit's decision in *G.M. Trading Corp. v. Commissioner,* 121 F.3d 977 (5th Cir.1997), that even if the exchanges were not equal, any excess value it received should be deemed a contribution to capitol and therefore non-taxable. Finally, Kohler argued that if gain was realized, it would not be recognized under Treas. Reg. § 1.367(a)–1T(b)(3)(i). In support of this argument Kohler relied on United States Tax Court's decision in *CMI International, Inc., v. Commissioner,* 113 T.C. 1, 1999 WL 492535 (1999). I rejected these arguments as well.

I am satisfied that each of the issues I addressed in the summary judgment decision raises a question of law that would be controlling. Although the United States disputes whether the first issue is one of law, I believe that the applicability of the *Davis* rule to Kohler's debt equity swap is indeed a question of law. And a decision in Kohler's favor on any one of the three issues would have ended the case in Kohler's favor. Moreover, I am satisfied that Kohler's position is a contestable one. The parties' briefs regarding certification themselves show the contestability of the first issue—the parties spend numerous pages rearguing the application of the *Davis* rule. In my February 20 decision I found that the case law proffered by Kohler did not apply as Kohler argued, but the question nevertheless is one on which there is substantial ground for difference of opinion. Finally, resolution of these three questions would speed up the litigation. If Kohler wins on appeal the case will likely be over. If the United States wins on appeal, the Seventh Circuit may provide guidance on matters that will impact the trial in this case, eliminating some of the risk of a future appeal following trial. I therefore conclude that the petition should be granted.

Accordingly, IT IS THEREFORE ORDERED that Kohler's petition for certification of the issues raised in this matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is hereby GRANTED.

IT IS ORDERED that the following issues are certified for appeal:

1. Whether as a matter of law and under the presumption of equal exchanges recognized in *Davis* Kohler realized no gain as a result of its debt equity swap transaction;

2. Whether any excess value received by Kohler constitutes a nontaxable contribution to capital; and

3. Whether Kohler's recognized gain from the transaction is zero under Treas. Reg. § 1.367(a)–1T(b)(3)(i).

IT IS FURTHER ORDERED that all proceedings in the district court shall be stayed pending resolution of such appeal.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21693705, 92 A.F.T.R.2d 2003-5098

Footnotes

1 There is also a requirement that the petition be filed in the district court within a reasonable time after the order sought to be appealed. In this case, the petition was filed on April 25, 2003, more than two months after the order for which certification is sought. While in most cases, this delay may seem unreasonable, I note that at the status conference held shortly after issuance of my decision, Kohler indicated it was considering such a petition and that the petition was ultimately filed within the time allowed by this court. For this reason, and given the complexity of the case, I conclude that the delay was not unreasonable.