IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED
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JEANNE A. KRIEGER
CLERK OF COURT

IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

David Gregory Crooks

Plaintiff,

v.

The Shakopee Mdewakanton Dakota (Sioux) Community; the Shakopee Mdewakanton Dakota (Sioux) Community Business Council; the Shakopee Mdewakanton Dakota (Sioux) Community Enrollment Committee; Certain Unknown Members of the SMS(D)C Business Council and Enrollment Committee,

Defendants.

Case No. 468-00

MEMORANDUM OPINION AND ORDER

The Defendants in this case have requested that the Court reconsider its earlier order denying the certification of an interlocutory appeal under Rule 31 of the SMS(D)C Rules of Civil Procedure. See LSI Board of Directors v. L.B. Smith, et al., No. 010-97 (SMS(D)C Ct. App. May 28, 1998) (Rule 31 incorporates substantive, but not procedural requirements of 28 U.S.C. § 1292). The order Defendants had attempted to appeal was a denial of Defendants' motion to dismiss. The order was dated October 31, 2000. Specifically, Defendants argue that since its original motion was one for dismissal, rather than summary judgment, the Court's August 20, 2001 order denying the interlocutory appeal was in error. In addition, Defendants argue that since other parties in other cases

have attempted to rely on the Court's order denying the motion to dismiss as precedent, the Court should reconsider the significance of its earlier order and allow an appeal.

The Court is unpersuaded by Defendants' arguments. As the October 31, 2000 order denying the motion to dismiss makes clear, the Court concluded that dismissal was not appropriate because Defendants had failed to show that there was no set of facts under which Plaintiff could support his complaint. The Court simply permitted Plaintiff an opportunity to prove up his claims.

Denying an interlocutory appeal in order to allow the development of a factual record is appropriate in this case, even if the original order was premised on a motion to dismiss. Federal courts routinely deny certification of interlocutory appeals, even if the appeal is from a denial of a motion to dismiss, where the remaining questions are factual rather than legal. See, e.g., Arnett v. Gerber, 575 F.Supp. 770, 772 (S.D.N.Y. 1983) (refusing to certify a denial of a motion to dismiss, the court states "This complex case, involving interrelated claims under the antitrust laws, federal securities laws, and Delaware corporate law, is in its early stages. Numerous factual issues bearing directly on the selection of the appropriate remedy, if any, remain undeveloped or disputed. In the absence of a more fully developed factual record, certification under § 1292(b) is inappropriate. . ."); Pettit v. Amer. Stock Exchange, 217 F.Supp. 21, 32 (S.D.N.Y. 1963) ("Appellate review cannot be meaningful in this context. Defendants would be seeking the final resolution of difficult substantive questions in a complex factual setting with no more than the bare allegations of the complaint to define the controversy. It is likely that important facts will be developed beyond the present confines of the pleadings, that might have a vital impact on the court's assessment of the issues."); see also Paschall v. Kansas City Star Co., 605 F.2d 403 (8th Cir. 1979).

This case is no different. Any reference in the Court's August 20, 2001 order to Defendant's earlier motion as one for summary judgement does not change this analysis. Plaintiffs have simply failed to meet the heavy burden required to certify a non-final interlocutory order for appeal.[1]

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[1] The Eighth Circuit has recently noted that this burden is significant. In discussing 28 U.S.C. § 1292, upon which SMS(D)C Rule 31 is based, the Eighth Circuit has noted:

In addition, the fact that other parties in other cases have relied on the October 31, 2000 order is not significant. Parties routinely use other opinions as precedent, and this by itself is not sufficient to justify an interlocutory appeal under Rule 31. In any event, the threat of conflicting opinions that the Defendants believe the October 31, 2000 order will create has apparently not materialized in the other case where that order was cited. See Blue v. SMS(D)C, No. 467-00 (Tr. Ct. Nov. 11, 2001) at n. 2 (harmonizing October 31, 2000 order in this case with arguments in that case).

ORDER

For the foregoing reasons, Defendant's Motion for Reconsideration is DENIED and this Court's August 20, 2001 Order denying the certification of an appeal stands.

Dated: December 27, 2001

Henry M. Buffalo, Jr.
Judge

. . . § 1292(b) "should and will be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." S. Rep. No. 2434, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 5255, 5260; accord In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1010 n.1 (1st Cir. 1988); Ashmore v. Northeast Petroleum Div. of Cargill, 855 F. Supp. 438, 440 n.2 (D. Me. 1994); FDIC v. First Nat'l Bank of Waukesha, Wis., 604 F. Supp. 616, 619-20 (E.D. Wis. 1985); Biggers, 171 F. Supp. at 95-96; Charles Alan Wright et al., Federal Practice and Procedure § 3929 (1982 & Supp. 1994) ("Opinions given to general pronouncements about the proper method of applying § 1292(b) frequently announce that it is to be used sparingly, in exceptional cases."). A motion for certification must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted. Bank of New York v. Hoyt, 108 F.R.D. 184, 189 (D.R.I. 1985).

White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994).