TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED SEP 12 2014

LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SMSC INDIAN RESERVATION STATE OF MINNESOTA

Adam Dedeker,

Plaintiff,

v. Court File No. 785-14

Lori Stovern,

Defendant.

Order Denying Certification of Interlocutory Appeal

On August 15, 2014, the Court entered partial summary judgment in favor of plaintiff Adam Dedeker, ruling that he was entitled to summary judgment on his breach-of-contract claim against Stovern. The Court found that (1) Dedeker and Stovern had entered into a contract under which Stovern agreed to pay Dedeker $750,000 to repay him for amounts she expended (and could not account for) while serving as conservator of his estate, and (2) Stovern breached the contract by paying only $258,000.

Stovern filed two counterclaims, one contending that she didn't owe Dedeker the amount sought because the contract was procured through fraud and while she

was under duress, and the second seeking reimbursement of costs she incurred when she served as conservator to his estate between 2000 and 2004. The first counterclaim was necessarily denied when the Court granted Dedeker's summary-judgment motion and found that Stovern had breached the contract. But Dedeker's summary-judgment motion did not address—and therefore the Court did rule on—the second counterclaim.

Stovern has moved this Court to certify an interlocutory order from the partial summary-judgment ruling under SMSC R. Civ. P. 31, which permits appeals in the same circumstances under which appeals are permitted from federal district court orders. Federal law permits interlocutory appeals from decisions on preliminary injunctions[1] and from orders that "involve[] a controlling question of law as to which there is substantial ground for difference of opinion"[2] if "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[3] Stovern contends that the summary-judgment ruling constitutes such an order because "there is substantial ground for difference of opinion as to whether the matter is appropriate for partial summary judgment."[4]

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[1] 28 U.S.C. § 1292(a).
[2] 28 U.S.C. § 1292(b).
[3] *Id.*
[4] Motion for Permission to Appeal Partial Summary Judgment at 2.

Appeal under 28 U.S.C. § 1292(b)

The basic purpose of Rule 31 and § 1292 "is to allow an interlocutory appeal in exceptional cases in order to avoid protracted and expensive litigation."[5] To be appealable under this rule, "the case must present a question of law, which is controlling, to which there is a substantial difference of opinion, the resolution of which would materially advance the termination of the litigation."[6] Stovern has not identified an controlling issue of law about which there is a substantial difference of opinion in this case. The only issue she identified was whether partial summary judgment should have been granted. That is not a "controlling question of law" appropriate for interlocutory appeal. "Instead, what the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'"[7] Where, as here, the court "merely interpreted the contract[] between the parties, and applied the facts of the case to established contractual principles," there is no controlling question of law presented.[8]

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[5] *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 12, 12 (Mar. 18, 2010).
[6] *Id.* at 13.
[7] *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004) (internal citation omitted).
[8] *Glover v. Udren*, No. 08-990, 2013 WL 3072377, *2 (W.D. Penn. Jun. 18, 2013) (denying 1292(b) certification).

Because Stovern failed to identify a particular question of controlling law that she wants reviewed, she didn't and couldn't identify differences of opinion about such a question. Generally, a difference of opinion would be demonstrated by citing to cases or other authorities expressing opposing views. Mere reference to the *parties'* difference of opinion is insufficient. "The fact that the parties themselves disagree on an issue does not constitute a 'difference of opinion' sufficient to warrant certification of an interlocutory order for immediate appeal."[9] Thus, Stovern did not meet the second criterion for certifying an interlocutory appeal.

Without a controlling question of law over which there is a substantial difference of opinion, Stovern also failed to show that resolving the issue would materially advance the litigation. The Court therefore cannot certify its August 15, 2014 Order for interlocutory appeal under the standards of 28 U.S.C. § 1292(b).

Federal Rule 54(b)

In response to Stovern's motion, Dedeker contended that the partial-summary-judgment ruling constitutes a final order appealable under Fed. R. Civ. P. 54(b), which is incorporated into this Court's Rule 28. Dedeker does not object to the interlocutory appeal being taken under Rule 54(b).[10]

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[9] *Id.* at 13 (citing *Williston v. Eggleston*, 410 F. Supp. 274, 277 (S.D.N.Y. 2006)).
[10] *See* August 25, 2014 letter from L. Rasmussen to the Court.

Rule 54(b) provides:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only *if the court expressly determines that there is no just reason for delay.* Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(Emphasis added). Setting aside other potential problems for the moment, one obvious problem here is that the Court has not directed entry of judgment or expressly determined that there is no just reason for delay.[11] So the Court's order is not, as it stands, appealable under Rule 54(b).

Parties can, however, ask a court to certify a partial judgment as final under Rule 54(b) so that it will be immediately appealable.[12] Even if the Court treats Stovern's motion or Dedeker's response as a request to enter judgment and expressly determine that there is no just reason for delay, however, the Order is not one appropriate for immediate appeal.

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[11] *See generally* August 15, 2004 Memorandum Opinion and Order.

[12]

Rule 54(b) is appropriate when a case involves multiple claims or multiple parties and a court has resolved "at least one but fewer than all the claims or all the rights and liabilities of at least one party with finality and made direction for the entry of judgment."[13] Although the Court has not directed entry of judgment in this case, it did finally resolve the breach-of-contract claim (and Stovern's counterclaim that the contract was invalid). But not every order finally resolving a claim should be certified for immediate appeal under Rule 54(b).

The trial court is to serve as a "dispatcher," to "determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal."[14] The federal appellate courts will generally

> not assume jurisdiction over a case certified to [them] under Rule 54(b) as a routine matter or as an accommodation to counsel and will not [assume jurisdiction] *unless there is some danger of hardship or injustice which an immediate appeal would alleviate*. . . . [T]he possibility that an early intervention might be helpful does not amount to the kind of justification for exercise jurisdiction that our relevant cases require."[15]

And while this Court is not bound by federal precedent, the federal caselaw seems to strike an appropriate balance between permitting immediate appellate review in

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[13] 10 Federal Practice & Procedure § 2659 (3d ed).
[14] *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980) (overturning decision to certify appeal under 4ule 54(b)).
[15] *Taco John's of Huron, Inc. v. Bix Produce Co., LLC*, 569 F.3d 401, 402 (8th Cir. 2009) (emphasis added) (internal citations omitted).

necessary cases while preserving the judicial economy inherent in allowing one appeal at the end of a case.

In *Curtiss-Wright Corp.*, the United States Supreme Court found review appropriate (as had the district court) where the plaintiffs had obtained a substantial money judgment on some of the claims, the statutory interest rate was far lower than market rates, and the remainder of the claims were not likely to be resolved for "many months, if not years."[16] No such circumstances are present here.

In this case, neither party has identified any hardship or injustice that is not present in virtually any case. The only hardship Stovern suggested is the possibility that there will eventually be two trials (one now on the remaining counterclaim and one later if partial summary judgment is reversed). But if that were all that were required, interlocutory appeals would be the rule and the not the exception.[17] This is simply not an appropriate case for Rule 54(b) certification or an interlocutory appeal.

Order

1. Stovern's Motion for Permission to Appeal Partial Summary judgment is DENIED.

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[16] 446 U.S. at 11.

[17] It also may not come to pass since Dedeker has indicated he will soon be moving for summary judgment on Stovern's remaining counterclaim.

2. The parties shall consult with one another and contact the Clerk of Court within 10 days of this order to set a scheduling conference to proceed on the remaining claim.

BY THE COURT:

Dated: September 12, 2014

Vanya Hogen Moline

Judge Vanya Hogen Moline