UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PHILIP SULLIVAN, CHARLOTTE SULLIVAN,	:	
Plaintiffs,	:	
v.	:	Civil No. 3:03cv1203 (MRK)
JEFFREY STEIN, et al,	:	
Defendants.	:	

RULING AND ORDER

Pending before the Court is Plaintiffs' Motion for an Order of Certification of Immediate Appeal & Motion for Stay Pending a Determination by the 2nd Circuit [doc. #221]. Having considered the parties submissions,[1] the Court DENIES Plaintiffs' motion.

I.

Plaintiffs seek to appeal from two non-final orders of this Court and seek certification of appealability by this Court.[2] *See* Mem. of Decision [doc. #141]; Ruling and Order [doc. #212]. Neither order was "final" because each "adjudicate[d] fewer than all of the claims remaining in the action" and "adjudicate[d] the rights and liabilities of fewer than all of the remaining parties."

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[1] The Court considered the following pleadings submitted by the parties: Plaintiffs' Motion for an Order of Certification for Immediate Appeal & Motion for a Stay Pending Determination in the 2nd Circuit [doc. #221] ("Pls.' Mot. for Cert. of Appeal"); Defendant Lee Johnson's Objection to Plaintiffs' Motion for An Order of Certification for Immediate Appeal & Motion for a Stay Pending Determination by the 2nd Circuit [doc. #226] ("Defs.' Objection"); and Plaintiffs' Reply to Defendant Johnson's Objection to Plaintiffs' Motion for an Order of Certification and Plaintiffs' Second Controlling Question of Law for Certification [doc. #233] ("Pls.' Reply").

Citizens Accord, Inc. v. Town of Rochester, 235 F.3d 126, 128 (2d Cir. 2000). Plaintiffs' request is governed by 28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> 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.

Thus, in order to grant Plaintiffs' request, the Court must be satisfied that: (1) Plaintiffs' appeal identifies a controlling question of law, (2) as to which there is a substantial ground for difference of opinion and that (3) immediate appeal from the order will materially advance the ultimate termination of the litigation.

The Second Circuit has understandably urged "district courts to exercise great care in making a § 1292(b) certification." *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992). As a consequence, this Court's power to grant an interlocutory appeal is not to be liberally construed and "must be strictly limited to the precise conditions stated in the law." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990). "Indeed, even where the . . . criteria of section 1292(b) appear to be met, district courts have 'unfettered discretion to deny certification' if other factors counsel against it." *Transp. Workers Union of Am. v. New York City Transit Auth.,* No. 02 Civ. 7659 (SAS), --- F. Supp. 2d ---, (S.D.N.Y. Feb. 25, 2005) (citations omitted).

Because the Court concludes that Plaintiffs have not sustained their burden on the second and third prongs of the § 1292(b) inquiry, the Court denies their request for immediate certification of their appeal.

A. Controlling Questions of Law

Plaintiffs identify two questions of law that they assert are controlling. First is the question of whether an allegation of class-based animus is required to state a claim under clause two of 42 U.S.C. § 1985(2). *See* Pl.'s Reply at 2. The second question is whether Plaintiffs have sufficiently alleged class based animus for actions under Clause Two of 42 U.S.C. § 1985(2) and 42 U.S.C. § 1985(3) by stating that they belong to a so-called "tenant class." *See* Pl.'s Mot. for Cert. of Appeal at 2. Even assuming that these questions are "controlling," the Court declines to certify Plaintiffs' appeal because Plaintiffs have not shown that substantial grounds for difference of opinion exist with respect to either question, or that an immediate appeal will materially advance the termination of litigation in this case.

B. Substantial Grounds for Difference of Opinion

Plaintiffs have failed to demonstrate that there are substantial grounds for difference of opinion on either of the "controlling" questions of law that they have identified. The Court addresses each question in turn.

Preliminarily, the Court notes that there is an unresolved question in the Second Circuit whether race-based animus is required to state a claim under § 1985(2) and § 1985(3) or whether allegations of "other" class-based animus suffice, as the Court discussed at length in its prior ruling. *See* Mem. of Decision [doc. #141] at 5-7. Clearly, if racial animus were required Plaintiffs' § 1985 claims fail as there has never been any suggestion of racial bias in this case. However, this unresolved question has little bearing, if any, to Plaintiffs proposed appeal, because in evaluating Plaintiffs' § 1985 claims, the Court assumed that allegations of class-based animus other than racial animus could suffice to state a claim under § 1985(2) or § 1985(3) .

Racial animus aside, it is without question that in order to state a claim under of § 1985(2) in the Second Circuit, a plaintiff must at a minimum, allege the existence of *some* class-based animus. *See* Ruling and Order [doc. #212] at 4 (collecting cases). The courts of many other jurisdictions have reached the same conclusion. *See, e.g.*, *Chavis v. Clayton County Sch. Dis't*, 300 F.3d 1288, 1292 (11th Cir. 2002) ("The 'equal protection' language included in the second clause of section 1985(2), requires an allegation of class-based animus for the statement of a claim."); *Davis v. Township of Hillside*, 190 F.3d 167, 171 (3d Cir. 1999) ("Because plaintiff does not allege that the officers colluded with the requisite racial, or . . . otherwise class-based, invidiously discriminatory animus the district court correctly dismissed this claim.") (internal citations and quotation marks omitted). Therefore, the Court is not persuaded that there are "substantial grounds for difference of opinion" on this subject.

The Court is equally unpersuaded that there are substantial grounds for difference of opinion on whether Plaintiffs have sufficiently pleaded "class based animus" for purposes of their § 1985(2) and § 1985(3) conspiracy claims. The Second Circuit has held, quoting language from *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that a § 1985 conspiracy must "be motivated by 'some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (quoting *Griffin*, 403 U.S. at 102). The only class that Plaintiffs allege they are a part of is a so-called "tenant class." Pls.' Mot. for Cert. of Appeal [doc. #221] at 7. Although neither the Supreme Court nor the Second Circuit have provided an exhaustive list of what "other" types of classes are protected under § 1985(2) and § 1985(3), the Court is firmly convinced that Plaintiffs' allegations do not suffice. *See* Mem. of Decision [doc. #141] at 2-4; *see also Carchman v. Korman Corp.*, 594

F.2d 354, 356 (3d Cir. 1979) (holding that "tenant organizers do not constitute one of the classes protected by 42 U.S.C. § 1985(3) against class-based animus"); *Chow v. Coghlan*, No. CV-88-1563 (ADS), 1990 WL 92702, at *5 (E.D.N.Y. Jun. 28, 1990) (tenant organizers were not a protected class under § 1985(2) because the classification was primarily economic). Plaintiffs have not brought any case law to the Court's attention that would require a different conclusion.

Thus, Plaintiffs have failed to identify any controlling question of law about which there are substantial grounds for difference of opinion. The Court also notes that many of the defendants against whom Plaintiffs seek to assert § 1985 claims, are immune from suit pursuant to the doctrines of judicial, prosecutorial, and sovereign immunity. *See* Mem. of Decision [doc. #141] at 10-18. Therefore, regardless of how Plaintiffs' proposed appeal were resolved, there would be independent grounds for dismissing Plaintiffs' claims against these defendants.

C. Materially Advance Termination of Litigation

In the Court's view, the third prong of § 1292(b) weighs most heavily against certification of Plaintiffs' interlocutory appeal. *See, e.g.*, *Nesbiet v. Gen. Elec. Co.*, No. 04 Civ.9321(SAS), 2005 WL 729670, at *3 (S.D.N.Y. Mar. 31, 2005) (third factor of 1292(b) is the most important). "An immediate appeal is considered to advance the ultimate termination of the litigation if that appeal promises to advance the time for trial or to shorten the time required for trial." *Id*. (citing 16 Charles A. Wright & Arthur Miller, *Federal Practice and Procedure* § 3930 at 432 (2d ed. 1996)). An immediate appeal in this case will not serve either of these functions.

First, an appeal at this stage will likely slow down the termination of this case rather than advance it. While the Court recognizes that Plaintiffs are *pro se* litigants, it is nonetheless significant that Plaintiffs have already slowed the pace of litigation to a near stand-still by

waiting nearly seven months to amend their complaint. The Court initially ruled on their complaint in May of 2004 yet Plaintiffs did not file a motion to amend until the following December. *See* Pls.' Mot. to Amend Compl. [doc. #175]. Furthermore, along with their motion to certify an immediate appeal, Plaintiffs have also requested a stay of the remainder of this case pending appellate review. *See* Pls. Mot. to Certify Appeal at 1. Such a stay, if granted, would be the second stay in this case, which is already nearly two years old and has only recently reached the dispositive motion stage. *See* Mot. to Stay [doc. #10] (granted by endorsement).

Second, regardless of how the Second Circuit rules on the "controlling" questions Plaintiffs have identified, there will nonetheless remain a number of additional claims against a number of parties that need to be adjudicated. And as the Court has already noted, many of the defendants against whom Plaintiffs' seek to assert §1985 claims are immune from suit in any event. Therefore, an immediate appeal in this case would not substantially reduce the time required for final disposition of this case. Rather than allowing Plaintiffs to pursue piecemeal appeals, the Court feels that it would be far more expeditious to move this case forward to conclusion on the remaining claims. At the end of the case, Plaintiffs can then pursue one appeal on all their claims with the benefit of a fully developed record. *See In re Buspirone Patent Litig.*, 210 F.R.D. 43, 51 (S.D.N.Y. 2002) (declining to certify an interlocutory appeal because "[t]he Court of Appeals should have the benefit of . . . the full record.").

The Court also notes, regrettably, that based on its experience thus far, rather than materially advance termination of litigation, a ruling adverse to Plaintiffs' interests on appeal is likely to spawn countless additional motions for reconsideration. Indeed, this Court has already considered and rejected Plaintiffs' position on the "controlling" questions referred to in this ruling

many times. *See* Mem. of Decision [doc. #141] at 5-9; Ruling and Order [doc. #167] at 1-2; Ruling and Order [doc. #212] at 3-6.

II.

In conclusion, the Court finds that Plaintiffs have failed to satisfy the requirements for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Accordingly, Plaintiffs' Motion for an Order of Certification for Immediate Appeal & Motion for a Stay Pending Determination by the Second Circuit [**doc. #221**] is DENIED. As a result of this ruling, Plaintiffs' request for a stay pending a ruling on their appeal [**doc. #221**] is DENIED AS MOOT. The Court will set a case management schedule for the remaining claims and defendants in this lawsuit by separate order.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut on April 19, 2005.