UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAND-WHITNEY CONTAINERBOARD LIMITED PARTNERSHIP, PLAINTIFF	:	
V.	:	CIV. NO. 3:96CV413 (HBF)
TOWN OF MONTVILLE and TOWN OF MONTVILLE WATER POLLUTION CONTROL AUTHORITY DEFENDANTS	:	

RULING ON DEFENDANTS' MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

I. INTRODUCTION

This action concerns a dispute over agreements entered into by the plaintiff, Rand-Whitney Containerboard, and the defendants, the Town of Montville and the Town of Montville Water Pollution Control Authority, to operate a manufacturing plant in the Town of Montville. Under the agreements at issue, defendants agreed to supply the plant with water of a certain quality necessary for the plant's operation, and to treat effluent coming from the plant in its municipal waste treatment system. Defendants were unable to supply water of the specified quality because of an unacceptably high level of Total Dissolved Solids (TDS) in the municipal water.

The case was tried to a jury from July 15, 2002 to August 9, 2002. At trial, defendants claimed they were fraudulently

induced to enter into the agreements by plaintiff's misrepresentation about the quality of the plant's effluent. On August 9, 2002, the jury found for the defendants on their fraud counterclaim and affirmative defense, finding that defendants: (1) relied on a representation from plaintiff regarding water quality; (2) that they were induced to enter into the Supply Agreement by that representation; (3) plaintiff made that representation with intent to deceive and regarding a belief that it did not in good faith entertain; and (4) the representation proved untrue. [Jury Interrogatories (doc. # 248) ## 1-4.] The jury also found that plaintiff breached the covenant of good faith and fair dealing in the Supply and Treatment Agreements. [Doc. # 248.][1]

On September 27, 2002, plaintiff moved for judgment as a matter of law, or, in the alternative, for a new trial pursuant to Federal Rules of Civil Procedure 50 and 59. [Docs. ## 299-1, 299-2.] The court granted the motion in favor of plaintiff on defendants' fraud defense and counterclaim, and found that the case must be retried to a jury on the issue of

[1] With respect to the covenant of good faith and fair dealing, the jury found that defendants proved that a covenant of good faith and fair dealing applied at the time of, and with respect to, the negotiations leading to the June 29, 1993 Supply and Treatment Agreements, that plaintiff breached that covenant, and that defendants had suffered at least some damages. [Doc # 248, ## 21-23.]

plaintiff's damages and defendants' defenses to damages. [Doc. # 316 at 43.]

In its ruling, the court overturned the jury's verdict because it found no evidence to support the jury's findings that the Town relied on representations made by plaintiff. Critical to the issue of establishing the Town's reliance was the testimony of Tom Bowen. In overturning the jury's verdict, the court found that:

> there was no evidence produced at trial that defendants relied on any Rand-Whitney representation regarding the characteristics of the new mill's effluent. Although Tom Bowen was the only person in a position to rely (in making his recommendation to town decision-makers), there is no evidence that he considered, let alone believed, any Rand-Whitney statement about TDS in the new mill effluent or that he depended on the truth of any such statement in recommending that the town enter the Supply Agreement. On [the] contrary there is direct evidence, Bowen's testimony, that he did <u>not</u> rely [doc. # 348 at 25-26].

Defendants now move for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), seeking review of the court's ruling on the fraud issue.

II. <u>STANDARD OF LAW</u>

Certification for interlocutory appeal is warranted when

the case, "(1)involves a controlling question of law (2) as to which there are substantial grounds for difference of opinion and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." Minnesota Mutual Life Insurance v. Ricciardello, No. 3:96cv2387, 1998 WL 241216, at *1 (D. Conn. May 4, 1998)(internal quotations omitted)(citing 28 U.S.C. § 1292(b)). The Second Circuit has urged that district courts take great care in making a 1292(b) certification. Id. Each prong must be satisfied before a case can be certified. Id.

A court should certify an issue for interlocutory appeal where it presents a "pure question of law", not merely a disputed issue of fact. Ahrenholz v. Bd. of Trustees, 219 F.3d 674, 677 (7th Cir. 2000), accord Locurto v. Safir, 264 F.3d 154, 170 (2d Cir. 2001). An assertion that the district court erred in its determination of evidence sufficiency is not a controlling question of law that gives rise to an interlocutory appeal. Poe v. Leonard, 282 F.3d 123,132 (2d Cir. 2002); Locurto, 264 F.3d at 170. Interlocutory appeals are intended to resolve questions of law in cases where it is "something the court of appeals could decide quickly and cleanly without having to study the record...." Ahrenholz, 219 F.3d at 677. Secondly, an interlocutory appeal is appropriate

when question of law is unsettled within the controlling jurisdiction. See Howard v. Parisian Inc., 807 F.2d 1560, 1567 (7th Cir. 1987); Kliban v. US, 65 F.R.D. 6, 10 (D. Conn. 1974).

III. DISCUSSION

Defendants argue that the court erred in relying on Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108-110 (2d Cir. 1997) to overturn the jury's verdict based on the principle, expressed in Goldhirsh, that "disbelief of a witness' testimony is insufficient to support a verdict in the absence of other affirmative evidence." [Doc. # 306 at 22.] Defendants argue that the Goldhirsh line of cases is untested in this circuit[2], and that, under Connecticut law, there are cases that would permit a jury to find fraud by circumstantial evidence without direct testimony of reliance. See e.g. Miller v. Appleby, 183 Conn. 51, 57 (1981), Duksa v. Middletown, 173 Conn. 124, 128 (1977). Thus, the controlling question of law that defendants contend is unsettled within this circuit is, "what quantum of proof is required to satisfy

[2]Defendants originally claimed that Goldhirsh was of "questionable validity in the circuit", but conceded at oral argument that there exists no caselaw questioning or overruling Goldhirsh.

the reliance element of fraud where that fraud is based in part on material nondisclosure?" [Defs.' Reply Mem. (doc. # 324) at 3.] Defendants also argue that an interlocutory appeal would ultimately further the ultimate termination of litigation by offering direction for a new trial, and will not delay the case because discovery on the remaining issues on plaintiff's damages can proceed simultaneously.

Plaintiff, on the other hand, argues that the issue presented by the defendant is a question of evidence sufficiency, not a controlling question of law. Plaintiff asserts that defendants have offered no basis for doubting the validity of Goldhirsh. Plaintiff's position is that an interlocutory appeal would hinder rather than materially advance the ultimate resolution of the litigation.

The defendants' motion for certification is denied because they have failed to raise an issue satisfying each prong of 28 U.S.C. § 1292(b). Defendants first argue that Bowen's testimony can be construed as providing proof that he did rely on affirmative representations that were made by plaintiff. [Defs. Mem. (doc # 320) at 5.] Defendants assert that there are permissible inferences that can be drawn from direct evidence, as well as circumstantial evidence, that would establish proof of reliance. [Id.] Whether the court

correctly interpreted Bowen's testimony, and whether it correctly evaluated the evidence in determining that there was no reliance is clearly a question of evidence sufficiency, and therefore not appropriate for interlocutory review.

Defendants unsuccessfully attempt to transform this question of fact into a question of law by asserting that there is "substantial grounds for difference of opinion about the quantum of evidence necessary to prove fraud, including proof of reliance, in a case in which the essence of the fraud is the *nondisclosure* of material facts." [Doc. # 320 at 7 (emphasis added).] However, the court has ruled on several occasions that the defendant has a valid claim for fraud only to the extent that it involves an *intentional misrepresentation*. [Ruling (doc. # 135) n. 2 at 5)(emphasis added)]; [Ruling (doc. # 106) pp. 20-22]("As this court has previously ruled, the only valid claim or defense based on an alleged misrepresentation as to the quality of plaintiff's discharge is one which asserts that the misrepresentation was intentionally made.") Accordingly, the cases addressing fraudulent non-disclosure cited by defendants are inapposite.[3]

[3]Defendants argue that the distinction between an affirmative misrepresentation and an omission in this case is a "distinction without a difference." Defendants arrive at this conclusion by asserting that it can be inferred that if

Secondly, defendants have proffered no evidence that there is "substantial grounds for difference of opinion" about the meaning of Goldhirsh within the Second Circuit, nor any basis to question the applicability of Goldhirsh to the facts of this case.

Finally, even if the first two elements were satisfied, the court disagrees with defendants that an interlocutory appeal on this issue is likely to advance the ultimate resolution of this case.

Defendants raise several additional arguments in support of interlocutory appeal that are also unpersuasive. Defendants argue that the Second Circuit should offer the trial court direction for proceeding with the second phase of the trial, and should determine what effect the jury's finding that plaintiff acted in bad faith may have on the reliance issue. Both questions are clearly outside the scope of a permissible interlocutory appeal.

In a supplemental brief filed after oral argument on this issue, and without the court's permission, defendants raised

---

the Town had known about effect of TDS solids that they would not have entered into the agreement. The court disagrees. This argument overlooks the court's finding that there was affirmative evidence, direct testimony from Bowen, that he *did not rely* on statements made about the effluent. As stated above, whether the court was correct in its evaluation of Bowen's testimony is a question of evidence sufficiency.

an additional jurisdictional issue that they assert is also appropriate for interlocutory review. Defendants claim that the plaintiff's motion is either: 1) a proper Rule 50(b) motion but is untimely because it was filed more than ten days after entry of judgment, or 2) that it was filed prematurely, and outside the provisions of Rule 50(b) because it was filed before judgment had entered at the close of all the evidence.[4]

Both arguments are without merit. Plaintiff responds, and the court agrees, that defendants erroneously conflate the "jury verdict" with the "judgment". A verdict is "a jury's finding or decision on the factual issues of a case." Black's Law Dictionary 653 (Pocket ed. 1996). A judgment is "a court's final determination of the rights and obligations of the parties in a case." Id. at 345. Federal Rule of Civil Procedure 50(b) unambiguously states that a renewed motion for judgment as a matter of law must be filed "no later than 10 days after entry of *judgment.*" Fed. R. Civ. P. 50(b)(emphasis

[4] Federal Rule of Civil Procedure 50(b) states, "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment, and may alternatively request a new trial or join a motion for a new trial under Rule 59...." Fed. R. Civ. Pro. 50(b).

added). Federal Rule 59(b) states that a motion for a new trial must be made "no later than 10 days after entry of the *judgment.*" Fed. R. Civ. P. 59(b)(emphasis added).

The distinction between the verdict and judgment is clearly expressed in Federal Rule 58(a)(2)(A), which states, "unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when (i) the jury returns a general verdict." Fed. R. Civ. P. 58(a). See also Wirtz v. Hotel, Motel & Club Employees Union, 381 F.2d 500, 508 (2d Cir. 1967)("The Federal Rules of Civil Procedure make a clear distinction between the decision (the Findings of Fact and Conclusions of Law) and the judgment."), rev'd on other grounds, 391 U.S. 492 (1968).

However, immediate entry of judgment after a verdict is not appropriate when some claims have yet to be adjudicated. Federal Rule of Civil Procedure 54(b) states, "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

direction for the entry of judgment." Fed. R. Civ. P. 54(b). In other words, entry of a partial judgment is not permitted, unless there is "no just reason for delay" and by an order of the court. In this case, the court reserved on several claims that have yet to be decided.[5] On July 29, 2002, the court also granted plaintiff's motion to bifurcate the issue of defendant's damages (doc. # 230).[6] The jury returned its

---

[5] Pursuant to the Trial Order, issued on July 15, 2002, the court reserved on the following issues:

1. Plaintiff's claim for a declaratory judgment that Montville breached the Supply Agreement Sec. 8.3(e) by failing to provide Rand-Whitney with notice of the effluent treatment request from Mohegan Sun.

2. Plaintiff's request for relief from the obligation to make future payments under the Order Approving Tentative Settlement, based on the claim that defendants breached the Tentative Settlement by failing to install the heat exchanger pursuant to contract.

3. Plaintiff's claim for a declaratory judgment that defendants breached Sec. 8.1 of the Treatment Agreement by failing to provide Rand-Whitney with required BOD capacity reports.

4. Defendants' claim that the Supply and Treatment Agreements be reformed. [Doc. # 204.]

[6] Defendants did not object to bifurcation. In its ruling, the court noted, "The only concern expressed by defendants is that, given defendants' setoff claims, it would be unfair if plaintiff tried to execute on a judgment before defendants' trial on damages took place. The likelihood of that situation occurring aside, the court will consider any request for relief by defendants if and when those events occur." [Doc. # 230.]

verdict on August 9, 2002, and pursuant to Rule 54(b), no judgment was entered. The parties thereafter agreed on a schedule for submission of post-trial motions, to which the plaintiff adhered. Plaintiff's Rule 50(b) motion is therefore timely.

Defendants also err in asserting that plaintiff's Rule 50 motion was premature. Federal Rule of Civil Procedure 50(a) requires that parties be "fully heard" on an issue before the court considers a motion for judgment as a matter of law.[7] Fed. R. Civ. P. 50(a). Rule 50(a) authorizes the court "to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case." United States ex rel. Maris Equip. Co. v. Morganti, Inc., 163 F. Supp. 2d 174, 180 (E.D.N.Y. 2001)(citing Advisory Committee Note 1991 to Rule 50(a)); Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 286 (2d Cir. 1998)("Under Rule 50(a), a party may move for judgment as a

[7]Rule 50(a) states, "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue againt that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot undet the controlling law be maintained or defeated without a favorable finding on that issue." Fed. R. Civ. P. 50(a).

matter of law ("JMOL") during trial at any time prior to the submission of the case to the jury.”). In this bifurcated case, plaintiff’s renewed motion was made at the appropriate time, after the jury returned its verdict on liability and before the second stage of the trial on damages.

IV. CONCLUSION

For the reasons stated above, defendants’ motion for certification [**doc. # 319**] is **DENIED**.

This is not a recommended ruling. The parties consented to proceed before a United States Magistrate Judge [doc. # 20] on July 30, 1996, with appeal to the Court of Appeals.

SO ORDERED at Bridgeport this 20 day of September 2004.

_____/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE