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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**DAVIS MORENO CONSTRUCTION,
INC.,**

Plaintiff,

v.

**FRONTIER STEEL BUILDINGS
CORP.,**

Defendant.

1:08-cv-00854-OWW-SMS

MEMORANDUM DECISION AND ORDER
DENYING DEFENDANT'S MOTION FOR
CERTIFICATE OF APPEALABILITY
(Doc. 133)

I. INTRODUCTION.

Plaintiff Davis Moreno Construction, Inc., ("Plaintiff") proceeds with an action for damages against Defendant Frontier Steel Buildings Corp. ("Defendant").

On November 18, 2010, the court entered an order granting Plaintiff's motion for partial summary judgment, holding that Defendant was a "contractor" as defined by California's Contractors' State License Law ("CSLL")¹ for the purposes of the parties' agreement. (Doc. 120).

Defendant filed a Motion for Certificate of Appealability pursuant to 28 U.S.C. § 1292(b) on January 5, 2011. (Doc. 133). Plaintiff filed opposition on January 10, 2011. (Doc. 141).

¹ CAL. BUS. & PROF. CODE § 7000 *et seq.*

1 Defendant filed a reply on January 13, 2011. (Doc. 144).²

2 **II. LEGAL STANDARD.**

3 Federal law authorizes district courts to certify otherwise
4 unappealable orders in certain circumstances. Pursuant to 28
5 U.S.C. § 1292(b):

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

22 28 U.S.C. § 1292(b).

23 The party seeking interlocutory review "has the burden of
24 persuading the court of appeals that exceptional circumstances
25 justify a departure from the basis policy of postponing appellate
26 review until after the entry of a final judgment." *Coopers &*
27 *Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

28 The standard to certify a question of law is high and a
district court generally should not permit such an appeal where "it
would prolong the litigation rather than advance its resolution."

² In the motion for certification, and again in Defendant's reply to Plaintiff's opposition, Defendant's counsel makes the false statement that the court has signaled the "significance" of the issues entailed in this case by publishing its opinions. (Doc. 133 at 2; Doc. 144 at 4). As the court advised counsel in a prior order, "the court played no part in Westlaw's decision to report [previous] Memorandum Decisions." (Doc. 85 at 4 n.2). Counsel's unfounded representations to the contrary violate applicable standards of professional conduct, as well as Federal Rule of Civil Procedure 11.

1 *Syufy Enter. v. Am. Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D.
2 Cal.1988). Section 1292(b) is to be used only in exceptional
3 situations in which allowing an interlocutory appeal would avoid
4 protracted and expensive litigation. *United States Rubber Co. v.*
5 *Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Plaintiff must
6 demonstrate that (1) there is a controlling question of law, (2)
7 that there are substantial grounds for difference of opinion, and
8 (3) that an immediate appeal may materially advance the ultimate
9 termination of the litigation. *In re Cement Antitrust Litigation*,
10 673 F.2d 1020, 1026 (9th Cir. 1982). "'In applying these standards,
11 the court must weigh the asserted need for the proposed
12 interlocutory appeal with the policy in the ordinary case of
13 discouraging piecemeal appeals.'" *Association of Irrigated*
14 *Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1087 (E.D.
15 Cal.2008).

16 **III. DISCUSSION.**

17 Defendant's motion seeks certification of four issues for
18 appeal:

19 (1) Whether the court erred as a matter of law applying
20 the California Contractor's License statute, B&PC 7026,
21 et. seq. to a Colorado Defendant designer and steel
22 supplier which did not engage in erection of the subject
pre-engineered steel building for a California Project;
and

23 (2) Whether the Court erred as a matter of law or abused
24 its discretion in making material findings of fact which
25 are not supported by the record regarding Defendant's
status as a contractor subject to licensure by the State
of California; and

26 (3) Whether the Court abused its discretion or erred as
27 a matter of law in refusing to enforce the parties'
bargained for choice of Colorado law contract provision;
and

28 (4) Whether the Court erred as a matter of law or abused

1 its discretion by failing to apply the appropriate burden
2 of proof required to sustain Plaintiff's Complaint, or to
3 establish that Defendant may be subject to the California
Contractor's License statute, or the Court may refuse to
enforce a bargained for choice of Colorado law.

4 (Doc. 133). With respect to each of these issues, Plaintiff must
5 demonstrate that (1) there is a controlling question of law
6 implicated, (2) that there are substantial grounds for difference
7 of opinion, and (3) that an immediate appeal may materially advance
8 the ultimate termination of the litigation. *In re Cement Antitrust*
9 *Litigation*, 673 F.2d at 1026.

10 **A. Controlling Question of Law**

11 The court's rulings that California law governs the parties'
12 dispute and that Defendant was a contractor within the meaning of
13 California law are rulings on controlling questions of law under
14 the Ninth Circuit's broad standard. *See In re Cement Antitrust*
15 *Litigation*, 673 F.2d at 126 (issue is "controlling" if its
16 resolution could materially affect the outcome of the litigation).
17 Defendant does not limit its interlocutory appeal request to these
18 issues, but also seeks to challenge the burden of proof applied in
19 adjudicating the parties' motions for summary judgment.
20 Defendant's challenge to the burden of proof is devoid of merit, as
21 the quantum of proof required to sustain summary judgment has long
22 been settled. *E.g. Soremekun v. Thrifty Payless, Inc.*, 509 F.3d
23 978, 984 (9th Cir. 2007).

24 In essence, Defendant seeks to challenge every ruling the
25 court has made on a premature appeal to totally avoid a trial.
26 Defendant has not carried its burden with respect to any of its
27 requests.
28

1 **B. Substantial Ground for Difference of Opinion**

2 To determine if a "substantial ground for difference of
3 opinion" exists under 28 U.S.C. § 1292(b), courts must examine the
4 extent to which the controlling law is unclear. *Couch v. Telescope*
5 *Inc.*, 611 F.3d 629, 634 (9th Cir. 2010). While identification of
6 a sufficient number of conflicting and contradictory opinions will
7 provide substantial ground for disagreement, for purposes of 28
8 U.S.C. § 1292(b), a dearth of cases does not constitute substantial
9 ground for difference of opinion. *Id.* The mere presence of a
10 disputed issue that is a question of first impression, standing
11 alone, is insufficient to demonstrate a substantial ground for
12 difference of opinion under 28 U.S.C.S. § 1292(b). *Id.*

13 Defendant does not offer any legal authority or argument
14 sufficient to establish that there is a substantial ground for
15 difference of opinion regarding the court's choice of law analysis
16 or Defendant's status under California law.³ Although there is no
17 definitive pronouncement from the California Supreme Court stating
18 that an entity that prepares shop drawings and fabricates custom
19 materials for erecting a building's structural steel framework is
20 a "contractor" for purposes of the CSLL, existing California
21 authority suggests that such an entity is a contractor. See *WSS*
22 *Industrial Construction, Inc. V. Great Western Contractors, Inc.*,
23 162 Cal. App. 4th 581, 593(2008) ("the public has a right to expect
24 the party designing [shop drawings]...will, at a minimum, have the

25
26 ³ Defendant's four-page motion contains no analysis concerning the choice of law
27 issue. (See Doc. 133). The court denied Defendant's motion for reconsideration
28 of the choice of law issue on November 9, 2009. (Doc. 66). The court has also
already denied Plaintiff's request for certification of the choice of law issue.
(Doc. 85).

1 qualifications required and to possess a valid contractor's
2 license;"); see also *Banis Restaurant Design, Inc. v. Serrano*, 134
3 Cal. App. 4th 1035, 1044 (Cal. Ct. App. 2005) (design services
4 "reflect[] coordination of the architect and engineers" and thus
5 constitute the work of a contractor). Defendant cites no contrary
6 authority and provides no analysis as to why there is a substantial
7 ground for difference of legal opinion on this point.

8 More importantly, Defendant provides no authority or analysis
9 to raise a substantial ground for difference of opinion on the
10 court's construction of the parties' agreement, pursuant to which
11 Defendant retained broad authority to perform repairs to the
12 Project's structure in California and to direct performance of such
13 work by others. (Memorandum Decision, Doc. 118 at 15-17). The
14 Memorandum Decision granting Plaintiff partial summary judgment
15 found:

16 Pursuant to paragraph 13 of the purchase agreement, in
17 the event "any corrections of mis-fabrication" were
18 required, Defendant had the right to "perform the
19 work...itself" or to authorize Plaintiff to perform the
20 work. (Stephen Davis Decl., Ex. E) (emphasis added).
21 Further, the contract required that any corrections of
22 mis-fabrication be approved by Defendant in writing and
23 "performed as directed" by Defendant prior to the work
24 being done. Affording the words of this provision their
25 ordinary meanings, Defendant retained broad authority to
26 perform repairs to the Project's structure and to direct
27 performance of such work by others. See *California State
28 Auto. Asso. Inter-Insurance Bureau v. Warwick*, 17 Cal. 3d
190, 195 (Cal. 1976) ("the word 'any' is broad, general,
and all embracing"). **By retaining broad authority to
perform work or direct the performance of work on the
Project, Defendant undertook by contract to alter,
repair, or improve portions of a building within the
meaning of the CSLL. CAL. BUS. & PROF. CODE § 7026
(2010).**

27 (Id. at 16-17) (emphasis added). Defendant fails to provide any
28 authority or analysis which indicates the existence a substantial

1 ground for difference of opinion regarding the court's
2 interpretation of the parties' agreement and its effect on
3 Defendant's status under the CSLL.

4 **C. Advancement of Ultimate Termination**

5 Defendant's motion does not establish that an immediate appeal
6 may materially advance the ultimate termination of the litigation.
7 To the contrary, trial is still required to adjudicate Plaintiff's
8 breach of contract claims, and Defendant has filed a motion to
9 continue the trial in order to permit Defendant to appeal the
10 court's ruling on the CSLL issue. Moreover, the trial will take
11 three to four days. Defendant's complaints about the "bankrupting
12 character" of California's CSLL and the difficulty Defendant may
13 face in posting a bond on appeal do not bear on the issue of
14 whether an immediate appeal will materially advance the ultimate
15 termination of the parties litigation. Instead, Defendant seeks to
16 avoid the trial, set for February 28, 2011, in this more than two-
17 year old case. Defendant's request for certification is DENIED.

18 IT IS SO ORDERED.

19 **Dated: February 1, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE