UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CURTIS JOHNSON, et al.,

Plaintiffs,

v.

SERENITY TRANSPORTATION, INC., et al.,

Defendants.

Case No.15-cv-02004-JSC

ORDER DENYING DEFENDANTS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND TO STAY FURTHER PROCEEDINGS

Re: Dkt. No. 177

Plaintiffs allege they were misclassified by Serenity Transportation, Inc. as independent contractors rather than employees and thus denied the benefits of California and federal wage-and-hour laws. Plaintiffs also sued SCI and the County of Santa Clara under a joint employer theory, arguing the entities are jointly and severally liable for Serenity's wage and hour violations. On April 14, 2017, the Court granted summary judgment to SCI and the County on the joint employer common law claims, and deferred decision as to whether, as a matter of law, SCI is not subject to liability under California Labor Code Section 2810.3. (Dkt. No. 172 at 46:14-27.) The Court requested further briefing regarding the "five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time" exemption under Section 2810.3. (Id.) On May 23, 2017, after reviewing the further briefing, the Court denied SCI's motion for summary judgment of Plaintiff's Section 2810.3 claim. (Dkt. No. 175.)

Now pending before the Court is the motion of SCI and SCI California to certify for interlocutory appeal this Court's May 23, 2017 Order denying Defendants' motion for summary judgment as to Plaintiff's Section 2810.3 claim and to stay further proceedings. After carefully reviewing the parties' briefs, and having had the benefit of oral argument on July 13, 2017, the Court DENIES Defendants' motion.

DISCUSSION

One day after the Court's Order denying Defendants' motion for summary judgment on Plaintiffs' Section 2810.3 claim, Defendants' filed the present motion to certify the Order for interlocutory appeal. Defendants argue that the May 23, 2017 Order meets the three requirements for a 28 U.S.C. § 1292(b) interlocutory appeal: (1) the Order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the litigation. See In Re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981). 28 U.S.C. § 1292(b) is only to be used in "exceptional circumstances" in which allowing an interlocutory appeal would avoid protracted and expensive litigation. Id.; see also James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (a district court should certify an 1292(b) interlocutory appeal "in rare circumstances.") "The decision to certify an order for interlocutory appeal is committed to the sound discretion of the district court." United States v. Tenet Healthcare Corp., 2004 WL 3030121, at *1 (C.D. Cal. Dec. 27, 2004) (citing Swint *v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)).

The first factor—a controlling question of law—is not present. A question of law is controlling if the resolution of the issue on appeal could "materially affect the outcome of litigation" in the district court. In re Cement, 673 F.2d at 1027. A "mixed question of law and fact or the application of law to a particular set of facts" by itself is not appropriate for permissive interlocutory review. Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc., 2010 WL 952273, at *3 (D. Or. March 10, 2010); see also Allen v. Conagra Foods, Inc., 2013 WL 6000456, at *3 (N.D. Cal. Nov. 12, 2013) (denying section 1292(b) certification because proposed appeal involved application of the relevant facts to a regulation); Steering Comm. v. United States, 6 F.3d 572, 575 (9th Cir. 1993) (holding a pure legal question was identifiable and therefore the Ninth Circuit could resolve all the questions material to the order). The questions SCI seeks to have reviewed--whether SCI is exempt from Labor Code Section 2810.3 because it "supplied" five or fewer workers at "any given time" and whether remote removal locations of constitute "worksites"--are mixed questions of law and fact. The review requires not only the statutory analysis regarding the definitions of "supplied" and "any given time," but also an application of

the statute's words to the actual facts. In such circumstances it is preferable to review the question on the basis of established trial facts.

A substantial ground for a difference of opinion has also not been shown. "To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). "Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." Id. (citing 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). "Just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." Id. "[A] party's strong disagreement with the Court's ruling is not sufficient for there to be a substantial ground for difference." Id. It is well settled that "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." Id. at 634 (citing In re Flor, 79 F.3d 281, 284 (2nd Cir. 1996)).

While Defendants argue that the controlling law, Labor Code Section 2810.3, has not been addressed by a California state court (indeed any court), the Ninth Circuit has specifically held that such circumstances do not create a substantial ground for a difference of opinion. Id. at 634. Moreover, similar to Couch, Defendants have not "provided a single case that conflicts" with this Court's construction or application of Section 2810.3. Id. at 633. While Defendants strongly disagree with this Court's interpretation, that disagreement does not warrant interlocutory appeal.

Finally, an appeal will not materially advance this litigation. An appeal may materially advance the ultimate termination of the litigation when resolution of the controlling question of law "may appreciably shorten the time, effort, or expense of conducting a lawsuit." In re Cement, 673 F.2d at 1027. Defendants argue that a review of the Order denying summary judgment of the Section 2810.3 claim would conserve court resources because Defendants would be dismissed from the action and the case would be "streamlined" leaving only Plaintiffs' claims against

Serenity. Under Defendants' reasoning, however, a party should be able to appeal every time summary judgment is denied even though interlocutory appeals can only be heard in exceptional cases. See In re Cement, 673 F.2d at 1026. Defendants must do more than just note that granting summary judgment in their favor would end litigation as to the claims against them as it will do nothing about the claims against Serenity and thus will certainly delay the litigation, especially since Defendants are asking the entire case to be stayed in the interim. Thus, this case does not involve "exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." See In re Cement, 673 F.2d at 1026.

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At oral argument Defendants raised another issue: they claimed that in its Orders regarding Defendants' motion for summary judgment on Labor Code § 2810.3 the Court never addressed their argument that because this provision creates a new liability, the Court must construe it narrowly and in Defendants' favor. Defendants' insistence that the Court did not address the issue is wrong. The Court specifically held that it is required to construe the Labor Code broadly in favor of protecting employees, and that the cases Defendants' cited were unpersuasive as none involved the Labor Code. (Dkt. No. 175 at 2:16-23.)

CONCLUSION

For the reasons stated above, the Court DENIES Defendants' motion for certification and to stay further proceedings. This Order disposes of Docket No. 177.

IT IS SO ORDERED.

Dated: July 26, 2017

JACQUELINE SCOTT CORLEY
United States Magistrate Judge