UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN re AAPEX SYSTEMS, INC.,

Debtor.

LUCIEN MORIN, II, Trustee,

Plaintiff, Appellee,

v.

SOUTH WILLIAMSPORT SABRECOM, INC.,

Defendant, Appellant,

LUCIEN MORIN, II, Trustee,

Plaintiff, Appellee

v.

CANTON SABRECOM, INC.,

Defendant, Appellant.

DECISION AND ORDER

00-CV-6137L

#5

On November 21, 2000, this Court issued a Decision and Order affirming the December 30, 1999 Decision and Order issued by Bankruptcy Judge John C. Ninfo, II, which denied appellants' motions for summary judgment. Appellants have now moved for certification pursuant to 28 U.S.C. § 1292(b), to allow them to take an interlocutory appeal to the Court of Appeals for the Second Circuit from my November 21 Decision and Order.

DISCUSSION

Section 1292(b) provides that if a district judge, in making an interlocutory order in a civil case, is "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." If the district court makes such a finding, the court of appeals then has discretion to permit an appeal to be taken from the order. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (interlocutory orders issued by district courts sitting as appellate courts in bankruptcy are appealable under § 1292(b), so long as the party seeking to appeal meets the conditions imposed by that section).

In *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21 (2d Cir. 1990), the Second Circuit, while rejecting what it found to be an "overly restrictive" interpretation of the "controlling question of law" requirement, expressly noted that its decision was not to be taken as implying that § 1292(b) should be liberally construed. *Id.* at 24-25. Indeed, the court stated that "only 'exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Id.* at 25 (quoting *Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 475 (1978)). In subsequent decisions, the court has "urg[ed] the district courts to exercise great care in making a § 1292(b) certification," *Westwood Pharm., Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2d Cir. 1992), and has stated that "use of this certification procedure should be strictly limited ... ." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996).

After considering the factors set forth in the statute, I do not believe that certification is proper here. While reversal of my prior decision might terminate the action, at least as to appellants, the same can be said about any order denying a defendant's motion for summary judgment. That does not mean that the appeal "present[s] 'exceptional circumstances' warranting interlocutory review." *In re Alexander*, 248 B.R. 478, 483 (S.D.N.Y. 2000). To hold otherwise would create an exception that would virtually swallow the rule that certification under § 1292(b) should be "strictly limited."

In addition, I am not persuaded by appellants' contention that "there is substantial ground for difference of opinion" about my November 21 Decision and Order. Although the chief issue here–whether certain transferred funds were imposed with a trust in favor of the United States under 26 U.S.C. § 7501(a)–appears to be an issue of first impression in this circuit, "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. Rather, '[i]t is the duty of the district judge ... to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute.'" *Id.* (quoting *Max Daetwyler Corp. v. Meyer*, 575 F.Supp. 280, 283 (E.D.Pa. 1983) (internal citations omitted)).

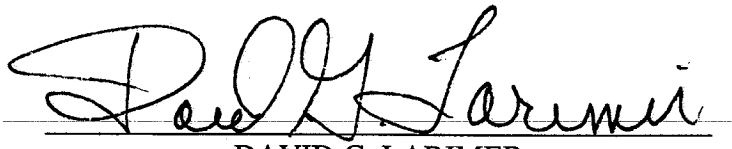
As indicated in my November 21 Decision and Order, I was not persuaded by appellants' arguments that the transferred funds were trust funds, and I do not see any "substantial ground for difference of opinion" as to that issue. It is not enough that appellants disagree with my conclusions in that regard; "[w]hat matters is whether *courts themselves* disagree as to what the law is." *KPMG Peat Marwick v. Estate of Nelco, Ltd.*, 250 B.R. 74, 83 (E.D.Va. 2000) (emphasis added); *see also In re Efficient Solutions, Inc.*, No. Civ.A. 00-2424, 2000 WL 1515174 *1 (E.D.La. Oct. 11, 2000) ("'Difference of opinion' under Section 1292(b) refers to an unsettled state of law or judicial opinion, not mere discontent by the appealing party"). Appellants have not demonstrated any split among the courts regarding this issue, and in fact my decision was consistent with the Ninth Circuit's decision in *Hamilton Taft & Co. v. S & S Credit Co.*, 53 F.3d 285 (9th Cir.), *vacated on other grounds, appeal dismissed*, 68 F.3d 337 (9th Cir. 1995), which was factually quite similar to the case at bar.

In addition, I do not agree with appellants' conclusory assertion that certification would materially advance the ultimate termination of this litigation. The Second Circuit has repeatedly stressed the importance of "the policy against piecemeal appellate review embodied in the final judgment rule ...," *Huminski v. Rutland City Police Dep't*, 221 F.3d 357, 359 (2d Cir. 2000), *accord Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996), and even if reversal of my prior decision did bring an end to the litigation, it does not appear that the litigation will be protracted if certification is denied. The issues here appear to be relatively narrow and discrete, and I do not believe that the interests of judicial economy would be served by allowing an interlocutory appeal to the Second Circuit.

CONCLUSION

Appellant's motion for certification of the Court's November 21, 2000 Decision and Order pursuant to 28 U.S.C. § 1292(b) is hereby denied.

IT IS SO ORDERED.



DAVID G. LARIMER
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: Rochester, New York
December 6, 2000.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Morin

Plaintiff(s)

v. 6:00-cv-06137

South Williamsport

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 12/6/00, of which the within is a copy, and entered 12/7/00 upon the official docket in this case. (Document No. 5 .)

Dated: Rochester, New York
December 7, 2000

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

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Scott Rudin, Esq.