IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

INTERWAVE TECHNOLOGY, INC. & JONATHAN KALL, Plaintiffs	:	CIVIL ACTION
v.	:	
ROCKWELL AUTOMATION, INC. & RICHARD RYAN, Defendants	:	NO. 05-0398

MEMORANDUM AND ORDER

Gene E.K. Pratter, J. February 16, 2006

Rockwell Automation, Inc. and Richard Ryan move for reconsideration and, in the alternative, certification for interlocutory appeal of the Court's Memorandum and Order of December 30, 2005. Defendants contend that the Court erred in holding that Plaintiffs may move forward with their fraudulent inducement claim against Mr. Ryan. The Motion will be denied because Defendants have not met the standards applicable to motions for reconsideration but continue to base their argument on their frustration with what they expect the more fully developed factual record to present in the future instead of what the Plaintiffs' current complaint alleges. Inasmuch as Defendants' motion is based on a factual issue that must be resolved in favor of the Plaintiffs at this stage of the litigation, no interlocutory appeal is appropriate.

DISCUSSION[1]

I. Defendants' Motion to Reconsider

A. Standard of Review

[1] Because the facts of the case were set forth in detail in the Court's Memorandum and Order of December 30, 2005, and because this Memorandum is written for the benefit of the parties, there is no need to re-recite the facts here.

The purpose of a motion for reconsideration is to urge the court to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). A court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." Drake v. Steamfitters Local Union No. 420, No. 97-585, 1998 WL 564486, at *3 (E.D. Pa. Sept. 3, 1998) (citing Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)). "Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Industries, Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

Rockwell and Mr. Ryan apparently seek reconsideration based on their contention that the Court has committed an error of law by allowing Plaintiffs' claim against Mr. Ryan, in his individual capacity, for fraudulent inducement to go forward.

B. Allegation That Mr. Ryan Acted Individually

Defendants' representation of factual issues in their Motion is inconsistent with how Plaintiffs' allegations must be considered for the purposes of deciding a motion to dismiss. The crux of the issue is that Plaintiffs have alleged that Mr. Ryan acted to their detriment either in his individual capacity or within the scope of his employment with Rockwell, but Defendants in their motion to dismiss and now in their motion for reconsideration focus only on the possibility of Mr. Ryan's latter capacity while ignoring the possibility of the former by calling it a "trick" pleading.[2] Defs.' Reply at 3. Thus, until Defendants can successfully contain Mr. Ryan's

[2] The very caption of Defendants' primary argument reveals their fundamental error. The caption states: "There Is No Legal Basis To Permit A Fraudulent Inducement Claim To Proceed

potential role in this case exclusively to his role as Rockwell's employee - - such as may well be possible after engaging in discovery on the relevant issue and then presenting a motion for summary judgment or, more efficiently, by persuading Plaintiffs to voluntarily withdraw their claim against Mr. Ryan in an individual capacity - - Defendants cannot properly rely so finally upon the argument they are now prematurely presenting. Because Defendants apparently have not fully appreciated the Court's previous analysis of the issue in the December 30 filings, a more fulsome discussion of the matter is presented here.

Rockwell was the party to the Asset Purchase Agreement ("APA"), not Mr. Ryan in his individual capacity. Am. Comp. at ¶¶ 1, 82. "Whenever a corporation makes a contract, it is the contract of the legal entity -- of the artificial being created by the charter -- and not the contract of the individual members." Walsh v. Alarm Sec. Group, Inc., 95 Fed. Appx. 399, 402 (3d Cir. Mar. 24, 2004) (citing Bala Corp. v. McGlinn et al., 144 A. 823, 824 (Pa. 1929)), see also Bel-Ray Co. v. Chemrite Ltd., 181 F.3d 435, 445 (3d Cir. 1999) ("Generally, of course, an agent of a disclosed principal, even one who negotiates and signs a contract for her principal, does not become a party to the contract.") (citing Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir. 1994); Restatement (Second) of Agency § 320 (1958))). Further, "[a] corporate officer or agent may act either for the corporation or in an individual capacity in matters in which the corporation may be deemed to have an interest. Whether that officer is acting in the one capacity or the other is often difficult to determine . . . ." 2 Fletcher Cyclopedia of the Law of

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Against Rockwell's Employees *Acting In The Scope of Their Employment* When The Plaintiffs Cannot Maintain Such A Claim Directly Against Rockwell Pursuant To the APA's Integration Clause." Mot. to Reconsider at 3 (emphasis added). Plaintiffs correctly respond that the "flaw in defendants' argument, however, is that the Ryan actions were not unquestionably within the scope of his employment." Pls.' Resp. at 6, 7.

Private Corporations § 279 (rev. ed. 1998).

The Amended Complaint that is the determinative document at this point in the litigation states: "At all times relevant to Plaintiffs' Complaint, Defendant Ryan acted *individually, or in his capacity as the agent*, representative and employee of Defendant Rockwell within the course and scope of such agency, representation and employment." Am. Compl. ¶ 15 (emphasis added). Thus, while the integration clause in the APA can be reasonably interpreted to cover the statements made by Mr. Ryan as an officer of Rockwell (while acting for the corporation), the integration clause cannot be interpreted reasonably to cover statements made by him if he was acting individually on his own account for some reason yet to be developed or disclosed. Therefore, if Mr. Ryan acted individually, as opposed to acting on behalf of Rockwell, then the integration clause would not apply to the alleged fraudulent actions of Mr. Ryan and would not foreclose the proposed claim against him.

Defendants contend that the admission in their answer[3] to Plaintiffs' Amended Complaint

[3] Plaintiffs filed their Amended Complaint on June 24, 2005, and Defendants filed their Motion to Dismiss on July 25, 2005, labelling it quite understandably as a "Motion to Dismiss" under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants filed their Answer to the Amended Complaint on January 9, 2006, the same day they filed their Motion to Reconsider. Thus, it was curious, if not entirely inappropriate, for the Defendants to file an answer in the course of asking the Court to reconsider its ruling on the Motion to Dismiss, or, perhaps, vice versa. The filing of the answer, and even worse, asking the Court to consider the content of the answer in deciding a motion to reconsider a ruling on a motion to dismiss disregards the well-beaten path of basic pre-trial litigation practice, not to mention the Federal Rules of Civil Procedure. The odd posture of Defendants' pleadings would permit denial of the reconsideration motion, but the Court will indulge the presumably inadvertent interchanging of the procedural requirements and standards.

Even if the Court were to consider the content of Defendants' answer, thus morphing the motion to reconsider into a motion for judgment on the pleadings, the result would not differ from the Court's determination in this ruling. As with a motion to dismiss, "in ruling on a motion for judgment on the pleadings, the well pleaded facts of the complaint will be taken as true." Churchill v. Star Enters., 3 F. Supp. 2d 625, 626-627 (E.D. Pa. 1998) (When the defendants filed their answer one month prior to their motion to dismiss the court stated: "any

that Mr. Ryan acted within his scope of authority during negotiations negates any allegation that he acted individually. The Court finds no merit in this contention. Defendants look to their own answer to the Amended Complaint to demonstrate that they admit to their preferred alternative allegation that Mr. Ryan was acting within the scope of his employment with Rockwell and ignored the substance of the less convenient alternative by dismissing it as a "trick" pleading. Defs.' Reply at 3. The Court will not make the same error.

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), this Court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Furthermore:

> [i]n determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record. Moreover, a case should not be dismissed for failure to state a claim unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations.

Id. (citations omitted).

The Amended Complaint alleges Mr. Ryan acted individually. The claim must be permitted to go forward to give Plaintiffs the opportunity to develop facts to support that allegation and Defendants the opportunity to marshall facts to foreclose it. Mr. Ryan will have

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motion under Rule 12(b) must be brought prior to the filing of a responsive pleading. . . . For this reason, we will treat the motion as one requesting judgment on the pleadings under Rule 12(c).") See also ATD Corp. v. DaimlerChrysler Corp., 261 F. Supp. 2d 887, 893 (E.D. Mich. 2003) (The court stated that in deciding a motion for judgment on the pleadings under Rule 12(c) "all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, while all contravening assertions in the movants' pleadings are taken as false.")

the opportunity after discovery is complete to prove what he can only allege at this stage --- namely, that "[t]he issue of whether Ryan acted individually or as an agent of Rockwell does not create a factual dispute." Defs.' Reply at 3. Inasmuch as the Court must at this time consider the Plaintiffs' allegations with all reasonable inferences taken in Plaintiffs' favor, it is irrelevant at this stage of the litigation that the prospects for Plaintiffs' success in proving that Mr. Ryan acted in his individual capacity may indeed be as bleak as Defendants implicitly suggest.

Paragraph 15 of the Amended Complaint, quoted in part above, amounts to a permissible alternative pleading under Rule 8(e)(2) of the Federal Rules of Civil Procedure, and therefore, the movant cannot refute Plaintiffs' allegations at this juncture by ruling out the possibility that Mr. Ryan may have acted individually, rather than as an agent for Rockwell "[a]t times relevant to Plaintiffs' Complaint." Am. Compl. ¶ 15.

C. Freedom Medical v. Royal Bank of Canada

Both parties offer cognizable, but competing interpretations of Freedom Medical, Inc. v. Royal Bank of Canada, 2005 WL 3597709 (E.D. Pa. December 30, 2005), a well-reasoned opinion issued by one of the Court's colleagues on the same day as the Memorandum and Order issued by this Court. The court in Freedom Medical dismissed a fraud claim against an individually named defendant in a breach of contract and fraud case that also named as a defendant a corporate affiliate of the individual defendant's employer. The plaintiff in Freedom Medical claimed that the individual was a "principal representative" of his corporate employer and further alleged that his "advocacy skills were significant factors" in the plaintiff's decision to enter into an agreement to retain the individual's employer's corporate affiliate as the plaintiff's financial advisor. Id. at *1. There was also an integration clause in the agreement

between the plaintiff and the corporate defendant similar to the one in the APA here. Id. at *1, 5. Rockwell and Ryan call attention to the portion of the Freedom Medical opinion which states:

> Thus, because Pennsylvania's parol evidence rule bars claims for fraudulent inducement where the contract contains a valid integration clause, we conclude that the Plaintiff's claim cannot stand and will grant Defendants' Motion to dismiss this aspect [fraudulent inducement] of Count III.

Id. at *5.

While in Freedom Medical there were multiple defendants and two separately filed motions to dismiss based on similar arguments, id. at *10, the fact that the Court did not specify which of the several moving defendants were being referred to in the above-quoted statement, suggests that the fraud claim against the individual defendant was dismissed based on the integration clause. Therefore, Defendants here argue that because Mr. Ryan, similar to the individual defendant's role in Freedom Medical, was undisputably one of Rockwell's principal negotiators dealing with the Plaintiffs here, he should also be protected from claims of fraudulent inducement by the APA's integration clause.

In contrast to Rockwell and Ryan's view of Freedom Medical, Interwave and Kall argue that the tort claims against the individual defendant in Freedom Medical were dismissed based on the "gist of the action" doctrine. Interwave and Kall focus on the portion of that opinion that simply dismissed the tort claims as to the individual defendant, and then referenced "note 7" as the basis for the dismissal. Id. at *10. The Freedom Medical footnote 7 then explains that while the plaintiff in that case argued that contract theories cannot bar fraud claims against an individual defendant who was not a signatory to the contract in question, the gist of the action doctrine barred the tort claims against him because the claims were based on the breach of duties created by the contract. Id. at *7 (citation omitted). Therefore, Plaintiffs here distinguish

Freedom Medical from their claims by arguing that in Freedom Medical the gist of the action doctrine was the basis for dismissal of the fraud claim against the individual defendant. Neither party, however, has referred the Court to lynchpin of the Freedom Medical opinion in which the court explained that the fraud count was dismissed because "Pennsylvania's parol evidence rule bars claims for fraudulent inducement where the contract contains a valid integration clause and because Pennsylvania's "gist of the action doctrine" bars the fraud in the performance claim . . ." Id. at *7 (emphasis added).

Of perhaps greater significance for the present purposes, however, only Interwave and Kall identified the key distinction between this case and Freedom Medical, namely the lack of any reference to an alternative pleading in Freedom Medical that would be equivalent to the alternative pleading that is contained in Paragraph 15 of Interwave and Kall's Amended Complaint here. The Freedom Medical opinion makes no mention of any alternative pleading that the individual defendant in that case acted in his individual capacity. This determinative distinction between the Court's Memorandum and Opinion of December 30, 2005 and Freedom Medical dooms Defendants' Motion.

Freedom Medical is a persuasive explanation of the dismissal of claims of fraudulent inducement against an individually named defendant who allegedly made pre-contractual statements in his capacity as an agent of a corporate defendant which was party to a contract, when an integration clause prohibited consideration of pre-contractual statements by the parties to the contract. However, when the individual defendant is alleged to have acted in his individual capacity (and necessarily outside the scope of the agency relationship) an integration clause does

not function to exclude such statements.[4]

II. Defendants' Motion to Certify for Interlocutory Appeal

A district court has discretion under 28 U.S.C. § 1292(b) to decide whether or not to certify a case for immediate appeal. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir.1974). In order to certify an issue for appeal, the district court must find that: (1) there is a controlling question of law; (2) there are substantial grounds for disagreement on the question; and (3) immediate appeal would materially advance the ultimate termination of the litigation. Id.; 28 U.S.C. § 1292(b). However, the strong federal policy against piecemeal appeals serves as a stern gatekeeper for such certifications. See Zygmuntowicz v. Hospitality Invs., Inc., 828 F. Supp. 346, 353 (E.D. Pa. 1993) (citing Freeman v. Kohl & Vick Mach. Works, Inc., 673 F.2d 196, 201 (7th Cir.1982)). Certification should only be granted in the rare case where an immediate appeal would avoid expensive and protracted litigation "and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.

[4] Defendants have taken issue with the Court's use of Sunquest Info. Sys. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644 (W.D. Pa. 1999), in rendering the December 30, 2005 ruling. The case before us does indeed involve facts distinguishable from Sunquest. Defendants correctly point out that Sunquest involved a third party corporation which was an agent to the corporate party to the contract at issue, as opposed to the facts in this case which involve someone who is also an officer of the corporate party to contract. Id. at 648, 656. This distinction, however, does not change the fact that Sunquest stands for the proposition that an integration clause "does not, however, bar those claims against [a defendant] which was not a party to the [contract]." Id. at 656. Furthermore, as both parties and the Court in the December 30, 2005 Memorandum and Order have referenced, the court in Sunquest also relied on the fact that the integration clause in that case (like the one in the APA) did not specifically refer to the representations of agents. Id. at 656 n.7. Therefore, if Mr. Ryan was acting individually as alleged, rather than as a representative of Rockwell, then he was not a "party" to the APA and not subject to the effects of the integration clause in the APA. As Plaintiffs have correctly argued, the corporeal distinction between a non-party individual and a non-party corporation does not change the fact that an integration clause does not apply to a non-party to the contract acting in an individual capacity.

Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958). Additionally, a "motion for certification should not be granted merely because a party disagrees with the ruling of the district judge." Max Daetwyler Corp. v. R. Meyer, 575 F. Supp. 280, 282 (E.D. Pa. 1983). Also, "because interlocutory appeals are not favored, the presence of uniqueness, exceptionality, or extraordinary importance of the question of law involved, and the magnitude of [the] case itself, are factors which should be taken into consideration in every case in determining whether 1292(b) certification is appropriate." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., MDL No. 189, 1979 WL 1689, at *4 (E.D. Pa. Aug. 21, 1979). The moving party bears the burden of demonstrating that "exceptional circumstances justify a departure from the basic policy against piecemeal litigation and of postponing appellate review until after the entry of a final judgment." Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1112 (E.D. Pa. 1992).

Regardless of the level of Defendants' pique attributable to the Court's ruling, that ruling and this case do not meet the standards for certification. Even if one were to accept the presence of a controlling issue of law in determining whether there is substantial ground for disagreement as to such an issue, for the reasons outlined above, the legal issues presented in Freedom Medical do not conflict with the Court's December 30, 2005 Memorandum and Opinion. Indeed, there is no conflict between Defendants' statement of controlling legal issues as to Mr. Ryan's potential liability and the Court's December 30, 2005 Memorandum and Opinion. There is no dispute over the proposition that when interpreting a fully integrated contract under Pennsylvania law, the parol evidence rule excludes the consideration of pre-contractual statements by agents of a party to the contract acting in the scope of their authority. When there is no substantial ground for a difference of opinion, certification for appeal can be denied on this ground alone. See Yeager's Fuel, Inc. v. Penn Power & Light Co., 162 F.R.D. 482, 489 (E.D. Pa. 1995).

Defendants offer West v. Henderson, 227 Cal. App. 3d 1578 (Cal. Ct. App. 1991), as the only additional case for the Court's consideration. While this case applies an integration clause to exclude the statements of an agent of a party to the contract, there is no discussion or even inference that the status of the agent was ever challenged. Defendants offer this California case to prove the proposition that "[o]ther jurisdictions agree that Ryan cannot be sued in his individual capacity for negotiations made in the course of his employment." Mot. to Reconsider at 6. As already discussed, there is no dispute over this legal point, and the Court agrees with those "other jurisdictions" that "Ryan cannot be sued in his individual capacity for negotiations made in the course of his employment." Once again, Defendants ignore Plaintiffs alternative pleading that Mr. Ryan acted individually. Additionally, as the Plaintiffs point out, the case offered by Defendants interprets California law and thus is of little use for the purposes of determining whether there is a substantial difference of opinion when applying Pennsylvania law to the disputes similar to the one before the Court.

Finally, it is not at all clear that allowing immediate appeal would materially advance the ultimate termination of this litigation. Factors to be considered in determining whether an immediate appeal would materially advance the termination of litigation include whether an immediate appeal could: (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify trial, or (3) eliminate issues to make discovery easier and less costly. See e.g., Orson, Inc. v. Mirimax Film Corp., 867 F. Supp. 319, 322 (E.D. Pa. 1994) (citations omitted). Consideration of these factors weigh heavily against granting an interlocutory appeal. Regardless of the outcome of the fraud claim against Mr. Ryan on appeal, this dispute will continue toward trial on the breach of contract issues. Additionally, this Court's Order has already served to streamline the issues for discovery. The Court is loathe to comment upon counsel's strategic

decision-making, but it is not too difficult to see that discovery concentrated upon the issue under discussion is much more likely to produce prompt results than appellate activities in the case in its present posture. Indeed, any additional discovery that could be possibly or theoretically avoided by certifying the interlocutory appeal must be weighed against the possibility that the court of appeals would affirm the Court's ruling, meaning that the case would have been unnecessarily delayed pending the outcome of the interlocutory appeal. Titelman v. Rite Aid Corp., 2002 WL 32351182, at *3 (E.D. Pa. Feb. 2, 2002). Because certifying an appeal at this stage of the proceedings would only amount to asking the appellate court to make the same factual determination that this Court has declined to make, Defendants have failed to demonstrate that certification would materially advance ultimate termination of the litigation.

Rather than presenting exceptional circumstances that would justify appellate review prior to the entry of a final judgment, this dispute presents the unremarkable factual issue of simply whether Mr. Ryan was acting individually or as a representative of Rockwell. While resolution of this issue may ultimately result in the dismissal of the fraud claim against Mr. Ryan, it would be inappropriate to make such a determination at this stage in the litigation.

CONCLUSION

For the forgoing reasons the Defendants Motion for Reconsideration, and in the alternative, Certification for Interlocutory Appeal is denied. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

Gene E.K. Pratter, J. February 16, 2006

AND NOW, this day the 16th of February, 2006, upon consideration of Defendants' Motion for Reconsideration, and in the alternative, Certification for Interlocutory Appeal (Docket No. 36), and the Replies and Responses thereto, it is ORDERED that Defendants' Motion is denied.

BY THE COURT:

S/Gene E.K. Pratter

GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE