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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 12-00886 VAP (OPx) Date: January 30, 2013

Title: CILLUFFO, et al. *-v-* CENTRAL REFRIGERATED SERVICES, INC., et al.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS: MINUTE ORDER (1) DENYING DEFENDANTS' MOTION TO CERTIFY INTERLOCUTORY APPEAL AND (2) VACATING FEBRUARY 4, 2013 HEARING (IN CHAMBERS)

Before the Court is a Motion to Certify Interlocutory Appeal filed by Defendants Central Refrigerated Services, Inc., Central Leasing, Inc., Jon Isaacson, and Jerry Moyes (collectively, “Defendants”) (Doc. No. 82) (“Motion”). The Court finds the Motion appropriate for resolution without a hearing and accordingly vacates the February 4, 2013 hearing. See Fed. R. Civ. P. 78; Local R. 7-15. After consideration of the papers in support of, and in opposition to, the Motion, the Court DENIES the Motion to Certify Interlocutory Appeal.

I. BACKGROUND

On September 24, 2012, this Court granted Defendants' Motion to Compel Arbitration. (See September 24, 2012 Order (Doc. No. 53) ("Arbitration Order").) The Court found that the Section 1 exemption to the Federal Arbitration Act ("FAA") applied; therefore, the Court refused to compel arbitration under the FAA. (Arbitration Order at 9.) Instead, the Court ordered arbitration under the Utah Uniform Arbitration Act ("UUAA"). (Id. at 14.)

On November 8, 2012, at the request of the parties, the Court issued an order providing clarification of its Arbitration Order. (See November 8, 2012 Order (Doc. No. 61) ("Clarification Order").) In clarifying, the Court stated that (1) Plaintiffs' FLSA claims should be collectively arbitrated while Plaintiffs' forced labor claim should be arbitrated on an individual basis; (2) the statute of limitations is tolled until the stay is lifted; and (3) notices of consent to sue shall be filed with the Court as well as the arbitrator.

On December 13, 2012, the Court issued an order denying Defendants' motion for reconsideration. (See December 13, 2012 Order (Doc. No. 77) ("Reconsideration Order").) Defendants' sought reconsideration of the Court's Clarification Order; specifically, Defendants asked the Court to reconsider that portion of the Clarification Order in which the Court compelled arbitration of the FLSA claims on a collective basis, and the forced labor claim on an individual basis. (See Reconsideration Order at 4.) The Court denied reconsideration. (Id. at 7.)

Defendants bring the instant Motion to certify an interlocutory appeal of the Court's Arbitration Order, Clarification Order, and Reconsideration Order. (See Mot. at 6.) Plaintiffs filed their opposition on January 14, 2013 (Doc. No. 85) ("Opposition").

II. LEGAL STANDARD

A district court may certify an order for interlocutory review when it 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." 28 U.S.C. § 1292(b).

A question of law is "controlling" under § 1292(b) if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court"; however, resolution of the issue need not dispose of the case entirely. In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). Substantial ground for difference of opinion exists when an issue is novel or difficult, one "over which reasonable judges might differ," and over which "uncertainty provides a credible basis for a difference of opinion," Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011) (internal quotation omitted). An immediate appeal from the order may materially advance the ultimate termination of the litigation when resolution of the legal question "may appreciably shorten the time, effort, or expense of conducting a lawsuit." In re Cement Antitrust Litig., 673 F.2d at 1027. The party seeking interlocutory appeal has the burden of ensuring all three requirements are met. See Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010).

III. DISCUSSION

A. Delay

As an initial matter, Plaintiffs argue that Defendants' motion is untimely as it was filed more than three months after the Court's Arbitration Order, and almost two months after the Clarification Order. (Opp. at 5-6.) There is "no specified time limit for seeking certification," (Spears v. Washington Mut. Bank FA, 2010 WL 54755, at *1 (N.D. Cal. Jan. 8, 2010)), though "a district judge should not grant an inexcusably dilatory request." Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc., 202 F.3d 957, 958 (7th Cir. 2000). The Court finds that the delay here is not unreasonable and therefore considers the Motion on its merits.

B. Clarification Order and Reconsideration Order

Defendants seek for the Court to amend the Clarification Order and Reconsideration Order to include a statement indicating that the "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." (Mot. at 6-7.) Specifically, Defendants argue that there is a controlling question of law as to whether the Court properly

interpreted the arbitration clause in the parties' arbitration agreements under federal law and Utah law by ordering collective arbitration of the FLSA claims, and arbitration on an individual basis of the forced labor claim. (See Mot. at 7.)

1. Controlling Question of Law

Defendants argue that the question of whether the Court correctly interpreted the arbitration clause is a controlling question of law, in part, because it is a pure question of law. (Mot. at 11-12.) Defendants further argue that the question concerns the parties' fundamental expectations regarding their arbitration agreements. (Mot. at 17.) Defendants spend the remainder of their argument regarding the status of the controlling nature of the question arguing that the Court's interpretation of the arbitration agreements was incorrect.

Plaintiffs, however, argue that the question here is not controlling because it would not materially affect the litigation. (Opp. at 10.) They point out that reversal of the Court's Clarification and Reconsideration Orders requiring the FLSA claims to be arbitrated collectively will not terminate the action; Plaintiffs would still proceed with arbitration of their FLSA claims on an individual basis. (Id.) Furthermore, Plaintiffs argue that the question here is not a pure question of law; instead, it is a mixed question of law and fact because it involves the interpretation and application of arbitration agreements and the intentions of the parties. (Id. at 10-11.)

The question here, involving the interpretation of arbitration agreements, is not a controlling question of law. "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 litigation rather than advance its resolution.'" Fenters v. Yosemite Chevron, 761 F. Supp. 2d 957, 1005 (E.D. Cal. 2010) (quoting Sfufy Enter. v. Am. Multi Cinema, Inc., 694 F. Supp. 725, 729 (N.D. Cal. 1988). The Court's interpretation of the arbitration agreements dictates the process by which the claims should be arbitrated. Defendants' requested interpretation would still require the claims to be arbitrated; it would only change the process of that arbitration. The two potential interpretations of the arbitration agreements, therefore, ultimately would result in the same general outcome –- arbitration of the claims.

Moreover, the question is not a pure question of law; it is a mixed question of

law and fact. The Ninth Circuit would be required to analyze the arbitration agreements between the parties, and determine the intent of the parties. Defendants admit as much by arguing that "the issue of collective arbitration involves the parties' fundamental expectations." (Mot. at 17.) This, therefore, is not a pure question of law.

Accordingly, Defendants have not demonstrated that the Court's Clarification Order and Reconsideration Order present a controlling question of law.

2. Substantial Ground for Difference of Opinion

Defendants argue that there is a substantial ground for difference of opinion here.

First, Defendants argue that other courts have reached an opposite conclusion when analyzing similar language in arbitration agreements. (Mot. at 17.) To support this argument, Defendants cite Porter v. MC Equities, LLC, 2012 WL 3778973, at *4-5 (N.D. Ohio Aug. 30, 2012). In Porter, plaintiffs brought a collective action for violation of the FLSA. The plaintiffs signed some version of an alternate dispute resolution agreement. Porter, 2012 WL 3778973, at *3. That agreement stated that "any claim or dispute . . . , whether related to the employment relationship or otherwise . . . shall be exclusively resolved" first by mediation, and if mediation fails, then by arbitration. Id. at *3. The agreement was silent on the arbitrability of class, consolidated, or collective actions. The Court in Porter turned to Stolt-Nielsen S.A. v. AnimalFees Int'l, Corp., 130 S. Ct. 1758 (2010), for guidance as to whether the arbitration should proceed on a collective basis. Id. at *5. Although the agreements in Porter "[did] not require plaintiffs to submit to class or collective arbitration, they still require[d] plaintiffs to arbitrate individual claims. Accordingly, pursuant to the FAA," the Porter Court enforced the arbitration agreements and compelled arbitration on an individual basis. Id. at *5.

Porter does not demonstrate a substantial ground for difference of opinion. As a preliminary matter, Porter is a district court case from the Northern District of Ohio, and therefore does not create a fundamental split of authority on the issue. Moreover, Porter is inapplicable here for many of the same reasons that the Court found Stolt to be inapplicable. (See Reconsideration Order at 3-5.) First, the Porter

court compelled arbitration pursuant to the FAA while this Court found that the FAA did not apply. Second, the agreement in Porter was silent on the issue of class, collective, or consolidated arbitrations; here, on the other hand, the arbitration agreements prohibited class and consolidated arbitrations, but said nothing regarding collective arbitrations. Therefore, Porter does not demonstrate that there is a substantial ground for difference of opinion.

Defendants further argue that the Court erred in concluding that, because the arbitration clause prohibits class and consolidated arbitrations, but not collective arbitrations, collective arbitration is permitted. (Mot. at 18.) Defendants cite Reed v. Florida Metropolitan University, Inc., 681 F.3d 630, 642-46 (5th Cir. 2012), in support of their argument. In Reed, a plaintiff brought a putative class action for violation of certain provisions of the Texas Education Code. Reed, 681 F.3d at 632. An arbitration provision in an agreement between the parties stated that the arbitration was to be resolved under the FAA. Id. The district court declined to determine whether the parties' agreement provided for class arbitration, instead leaving the issue for the arbitrator. Id. at 633. The arbitrator determined that the parties implicitly agreed to class arbitration. Id. The district court affirmed the arbitrator's award. Id. On appeal, the Fifth Circuit, relying in part on Stolt, reversed. Id. at 642. The Fifth Circuit found that, in light of concessions made by plaintiff that the parties did not discuss whether class arbitration was authorized and that the arbitration agreement failed to address class arbitration, the arbitration agreement did not compel class arbitration. Id.

Reed fails to demonstrate a substantial ground for difference of opinion, in nearly the same ways as Porter and Stolt. First, the Reed court dealt with arbitration pursuant to the FAA while this Court found that the FAA did not apply here. Second, the plaintiff in Reed conceded that the arbitration agreement did not mention class arbitration; here, on the other hand, the arbitration agreements specifically refer to, and prohibit, class or consolidated arbitrations. Third, plaintiff in Reed was pursuing a class action; here, Plaintiffs are pursuing a collective action under the FLSA. Therefore, Reed does not demonstrate a substantial ground for difference of opinion.

Next, Defendants argue that there is no Utah or federal decision allowing collective arbitration under a contract that prohibits consolidated and class arbitration, nor is there any law supporting a dual-track arbitration process. (Mot. at 17.) "A dearth of cases does not constitute substantial ground for difference of opinion." Couch, 611 F.3d at 634 (quotations omitted). Accordingly, Defendants' argument that there is a lack of authority is not persuasive.

Defendants further argue that Plaintiffs' collective arbitration is equivalent to a consolidated arbitration (Id.) Defendants, however, cite no authority in support of this proposition, nor is the Court aware of any.

Finally, Defendants argue that any distinction between class and collective actions is irrelevant for purposes of enforcing arbitration agreements. (Id. at 18-19.) Defendants rely on Espenscheid v. Direct Sat USA, LLC, 688 F.3d 872 (7th Cir. 2012), a case this Court relied upon for the proposition that collective actions and class actions are different in that a collective action requires individuals to "opt-in" while a class action requires class members to "opt-out." (Mot. at 18; Reconsideration Order at 4.) In Espenscheid, the Seventh Circuit found the distinction between collective actions and class actions irrelevant in resolving a dispute as to whether plaintiffs could appeal a decertification order. Espenscheid, 688 F.3d at 874. Defendants argue that the "same argument could be made with respect to enforcement of arbitration agreements." (Mot. at 19.) Defendants, however, provide no further support for this proposition. There is no authority to indicate that the distinction between collective and class actions would be irrelevant in regards to interpreting arbitration agreements. Defendants' argument is not persuasive.

Accordingly, Defendants have not demonstrated that a substantial ground for difference of opinion exists to warrant certification of an interlocutory appeal of the Clarification and Reconsideration Orders.

3. Materially Advance the Ultimate Termination of the Litigation

Defendants argue that certification of an interlocutory appeal would materially advance the ultimate termination of the litigation because, if collective arbitration of the FLSA claims proceed but are not authorized by the contract, then the arbitration

award will have to be vacated and the claims re-arbitrated on an individual basis, resulting in duplication of the individual arbitration proceedings. (Mot. at 19.) In support of their argument, Defendants rely on DeLock v. Securitas Sec. Services USA, Inc., 2012 WL 3150391 (E.D. Ark. 2012). In DeLock, the court certified an order compelling arbitration for immediate interlocutory appeal because plaintiffs were compelled to arbitrate individually, but the court reasoned that, if the court of appeals were to reverse an arbitration award and order arbitration on a collective basis, then the plaintiffs would have to start over. Id. at *8.

The cause for concern in DeLock is also a concern here. While the facts in DeLock are distinguishable –- the claims were compelled to arbitration on an individual basis, and the court certified an interlocutory appeal to determine whether the claims were to be arbitrated collectively –- the same concerns of inefficiency apply here, especially because a subset (75 people) of those plaintiffs ordered to arbitrate collectively on the FLSA claim (99 people) would arbitrate individually on the forced labor claim. (See Mot. at 20.)

On the other hand, the troublesome outcome proposed by Defendants and signaled in DeLock –- that an eventual arbitration award would be vacated by the court of appeals and the claims would require re-arbitration on an individual basis –- is hypothetical. This outcome would require a number of conditions precedent, none of which are a certainty. The risk of this inefficient outcome does not justify an interlocutory appeal. See Luchini v. Carmax, Inc., 2012 WL 3862150, at *5 (E.D. Cal. Sept. 5, 2012) ("Although the parties may be subjected to the expense of obtaining an arbitration award that ultimately proves to be unenforceable as wrongly ordered, such is not so grim to justify departure from the general rule disfavoring piecemeal appeals"). The general risk of the court of appeals disagreeing with a ruling of this Court may exist throughout the litigation; this does not mean that, at each potentially risky turn, the Court should certify an order for interlocutory appeal on a piecemeal basis.

Moreover, as Plaintiffs point out, were the Court to certify an interlocutory appeal, there would be a delay, likely of more than a year, before appellate resolution. See Luchini v. Carmax, Inc., 2012 WL 3862150, at *5 (E.D. Cal. Sept. 5, 2012). Such a delay would not benefit the parties, either, and the entire arbitration

would be brought to a halt while the parties awaited resolution from the Ninth Circuit. On the other hand, by proceeding with arbitration, the Defendants may, in fact, end up with an arbitration award that they prefer, finding no need then to seek vacation of the award.

Therefore, Defendants fail to demonstrate that certification for interlocutory appeal would materially advance the litigation.

Accordingly, Defendants have not met their burden of demonstrating that the Court should certify an interlocutory appeal of the Clarification Order and Reconsideration Order.

C. Arbitration Order

Defendants seek for the Court to amend its Arbitration Order to include a statement indicating that the "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." (Mot. at 6-7.) Specifically, Defendants argue that there is a controlling question of law as to whether it was proper for the Court, as opposed to the arbitrator, to determine whether the Section 1 exemption to the FAA applies. (Id.)

Defendants argue that this Court should certify the issue for interlocutory appeal because a district court in the District of Arizona has certified the same issue for appeal. (Mot. at 21.) In Van Dusen v. Swift Transp. Co., Inc., ("Swift") the district court ordered arbitration, but declined to rule on the applicability of the Section 1 exemption to the FAA, instead leaving that determination for the arbitrator. 2011 WL 3924831, at *2 (D. Ariz. Sept. 7, 2011). The Swift court certified the interlocutory appeal of that order, based on the Ninth Circuit's opinion in In re Van Dusen, 654 F.3d 838 (9th Cir. 2011).

This Court relied on In re Van Dusen in determining that it, and not the arbitrator, must determine whether the Section 1 exemption applies. This Court, unlike the court in Swift, followed the Ninth Circuit's guidance in In re Van Dusen.

Defendants further argue that the Eighth Circuit has issued a decision finding

that an arbitrator should determine the applicability of the Section 1 exemption, not the district court. See Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 769 (8th Cir. 2011) ("Application of the FAA's transportation worker exemption is a threshold question of arbitrability"). Defendants argue that, in response to the Swift interlocutory appeal, the Ninth Circuit could issue a decision at odds with SuperShuttle, and the split would render the case a likely candidate for review by the Supreme Court. (Mot. at 22.)

Again, Defendants base their argument on a hypothetical. The Court is not persuaded. In In re Van Dusen, the Ninth Circuit clearly stated that the determination of whether the Section 1 exemption applies is not a question of arbitrability; rather, it is an "antecedent determination" that the Court must first consider to determine "whether the agreement at issue is of the kind covered by the FAA." In re Van Dusen, 654 F.3d at 843-44. This Court relied on the Ninth Circuit's guidance, and made the threshold determination that the Section 1 exemption to the FAA applies.

Accordingly, the Court finds that the Arbitration Order does not merit certification for an interlocutory appeal.

IV. CONCLUSION

For the reasons set forth above, the Court DENIES Defendants' Motion to Certify an Interlocutory Appeal.

IT IS SO ORDERED.