VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 100-5-17 Lecv

Sutton et al vs. The Vermont Regional Center et al

ENTRY REGARDING MOTION

Title: Motion for Interlocutory Appeal (Motion: 42)
Filer: Russell D. Barr
Filed Date: July 06, 2022

The motion is DENIED.

The court denied Plaintiffs' Motion to Certify a Class on April 8, 2022. Plaintiffs filed a request for reconsideration of the decision, which the court denied on June 23, 2022. Plaintiffs have now filed a motion seeking permission to file an interlocutory appeal of the court's decision denying class certification. Defendants oppose the motion.

A party's right to seek an interlocutory appeal in civil cases is governed by Vermont Rule of Appellate Procedure 5(b)(1). This rule provides that a trial court must grant any party's motion to file an interlocutory appeal if the court finds the following:

> (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and
>
> (B) an immediate appeal may materially advance the termination of the litigation.

The Supreme Court has ruled that Appellate Rule 5(b)(1) requires the moving party to prove three things: "'(1) the ruling to be appealed must involve a controlling question of law; (2) there must be a substantial ground for difference of opinion on that question of law; and (3) an immediate appeal must materially advance the termination of the litigation.'" *State v. Pelican*, 154 Vt. 496, 501 (1990) (quoting *State v. Wheel*, 148 Vt. 439, 440 (1987)). A party's failure to satisfy any one of these three requirements "precludes certification" by a trial court that the order at issue is appropriate for interlocutory appeal. *In re Pyramid Co. of Burlington*, 141 Vt. 294, 302 (1982). "Interlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments." *Id.* at 300. The trial court exercises its discretion in granting or denying a party's motion seeking interlocutory review. *State v. Haynes*, 2019 VT 44, ¶ 33, 210 Vt. 417.

The first requirement a party must satisfy is that the ruling at issue involve a controlling question of law. For an issue to be "controlling," it need not govern the outcome of the litigation. *In re Pyramid Co.*, 141 Vt. at 302. Instead, reversal of the trial court's decision must

have "'an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants.'" *Id*. at 303 (quoting Note, *Interlocutory Appeals in the Federal Courts Under* 28 U.S.C. § 1292(b), 88 Harv. L. Rev. 607, 618 (1975)).

For an issue to be a question of law for purposes of interlocutory appeals, however, it must be "'capable of accurate resolution by an appellate court without the benefit of a factual record. If factual distinctions could control the legal result, the issue is not an appropriate subject for interlocutory appeal.'" *State v. McCann*, 149 Vt. 147, 151 (1987) (quoting *In re Pyramid Co.*, 141 Vt. at 304); accord *Hubacz v. Village of Waterbury*, 2018 VT 37, ¶ 10 n.3, 207 Vt. 399 ("This Court's consideration of a question certified for interlocutory review addresses only questions of law."). As the *McCann* Court wrote, "'It is necessary . . . that the order [being appealed] involve a clear-cut question of law against a background of determined and *immutable* facts.'" *Id*. at 152 (quoting 9 Moore's Federal Practice ¶ 110.22[2], at 261 (2d ed. 1987) (emphasis added)).

Applying the first part of the three-part test to the issue currently under consideration, the trial court's denial of Plaintiffs' motion for class certification, the court finds that the issue is "controlling" because its reversal would have an immediate effect on the course of the litigation. However, the issue is not a pure question of law because the appellate court would not be able to resolve the issue at hand without the benefit of a factual record. See *McCann*, 149 Vt. at 151; *In re Pyramid Co*., 141 Vt. at 304. Plaintiffs have attached deposition transcripts as exhibits to their motion seeking permission to file an interlocutory appeal and have requested that the court consider the transcripts in ruling on their motion. Wading through deposition transcripts to obtain facts to resolve an interlocutory appeal, however, is exactly the sort of exercise that Appellate Rule 5(b) is aimed at avoiding.

The question of whether the purported class of investors should be certified in this case is a factually intensive inquiry because the investors put money into different projects at different times, they relied on different representations, and they suffered different injuries. The court has not made any findings of fact that the appellate court could rely on in determining whether the trial court erred in denying Plaintiffs' motion for class certification. Indeed, the parties are still actively engaged in discovery and some of the named parties have not even been deposed yet. In asserting that class certification is beneficial for the individual investors, Plaintiffs are rearguing their position that the trial court should have granted their initial motion for class certification. This sort of argument is not appropriate in a motion seeking permission to file an interlocutory appeal.

Plaintiffs do not address the second and third requirements of Appellate Rule 5(b)(1), which are that there "be a substantial ground for difference of opinion on th[e] question of law" and that "an immediate appeal [will] materially advance the termination of the litigation." See V.R.A.P. 5(b)(1); *Pelican*, 154 Vt. at 501. However, in light of the court's determination that Plaintiffs are unable to satisfy the first requirement of the rule--that the issue on which Plaintiffs seek interlocutory appeal is a pure question of law--the court need not address the second and third requirements of Appellate Rule 5(b)(1). See *In re Pyramid Co*., 141 Vt. at 302 ("A failure to satisfy any one of the V.R.A.P. 5(b) criteria . . . precludes certification and appellate decision.").

For the foregoing reasons, Plaintiffs' motion for permission to file an interlocutory appeal is *denied*.

Electronically signed pursuant to V.R.E.F. 9(d) on August 4, 2022 at 11:32 AM.

Mary Miles Teachout
Superior Court Judge