

Veale v. Marlborough CV-92-355-SD 03-22-95  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Scott W. Veale;  
David T. Veale

v.

Civil No. 92-355-SD

Town of Marlborough

O R D E R

Before the court is a notice of the plaintiffs' appeal of this court's February 13, 1995, order to the First Circuit. Because that order is an interlocutory decision, the court treats plaintiffs' notice of appeal as a motion for leave to appeal pursuant to 28 U.S.C. § 1292(b).

Discussion

"As a general rule, "it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance."" Sierra Club v. Marsh, 907 F.2d 210, 212 (1st Cir. 1990) (quoting Director, O.W.C.P. v. Bath Iron Works Corp., 853 F.2d 11, 13 (1st Cir. 1988) (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 123 (1945))). "Thus, an order or judgment is usually

considered 'final' (hence, appealable) only when it 'resolv[es] the contested matter, leaving nothing to be done except execution of the judgment.'" Director, O.W.C.P., supra, 853 F.2d at 13 (quoting United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 14 (1st Cir. 1988)).

This final decision requirement, set forth in 28 U.S.C. § 1291, is "designed to prevent parties from interrupting litigation by pursuing piecemeal appeals." Swint v. Chambers County Comm'n, No. 93-1636, 63 U.S.L.W. 4189, \_\_\_\_\_, 1995 U.S. LEXIS 1805, at \*18 (U.S. March 1, 1995). "The main rule on review of 'final decisions,' 28 U.S.C. § 1291 is [however] followed by prescriptions for appeals from 'interlocutory decisions,' 28 U.S.C. § 1292." Swint, supra, 1995 U.S. LEXIS 1805, at \*18-19. "Section 1292(a) lists three categories of immediately appealable interlocutory decisions," and section 1292(b), which is applicable here, accords "the district courts circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable." Id. at \*19. Section 1292(b) states,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be 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. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

28 U.S.C. § 1292(b) (1993) (emphasis added).

The First Circuit admonishes that

[o]nly rare cases will qualify for the statutory anodyne; indeed, it is apodictic in this circuit that interlocutory certification of this sort "should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority."

In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988) (quoting McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984)).

The February 13 order which plaintiffs seek to appeal dismisses an amended complaint filed by the plaintiffs because of plaintiffs' failure to comply with the limitations imposed by the court in granting leave to amend. The effect of the order was to leave plaintiffs in the same position they were in prior to their unsuccessful attempt to amend their complaint.

The court finds that its February 13 order does not involve a controlling question of law as to which there is substantial ground for difference of opinion. The court further finds that an immediate appeal of the February 13 order will not materially

advance the ultimate termination of this litigation. Plaintiffs' motion for leave to appeal (document 73) is accordingly denied.

SO ORDERED.

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Shane Devine, Senior Judge  
United States District Court

March 22, 1995

cc: Scott W. Veale, pro se  
David T. Veale, pro se  
David P. Slawsky, Esq.