

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOSHUA PARNELL,

Plaintiff,

v.

CIVIL ACTION FILE NO.:
4:14-CV-0024-HLM

WESTERN SKY FINANCIAL,
LLC, d/b/a Western Sky Funding,
Western Sky, WesternSky.com,
MARTIN A. ("BUTCH") WEBB, and
CASHCALL, INC.

Defendants.

ORDER

This case is before the Court on the Motion to Stay Pending Appeal ("Motion to Stay") filed by Defendant CashCall, Inc. ("Defendant CashCall") [30], and on Defendant CashCall's Motion for Appeal Under 1292(b) ("Motion for Appeal") [31].

I. Background

The Court incorporates the Background portion of its April 28, 2014, Order into this Order as if set forth fully herein, and adds only those background facts that are relevant to the instant Motion. (Order of Apr. 28, 2014 (Docket Entry No. 25).) On April 28, 2014, the Court entered an Order denying Defendant CashCall's Motion to Compel Arbitration and Motion to Dismiss or Motion to Stay ("Motion to Compel") and denying Defendant CashCall's Motion to Dismiss Based on Forum Non Conveniens ("Motion to Dismiss"). (Id.)

On May 9, 2014, Defendant CashCall filed a Notice of Appeal from the Order on the Motion to Compel. (Docket Entry No. 29.) On that same day, Defendant CashCall filed

its Motion to Stay (Docket Entry No. 30) and its Motion for Appeal (Docket Entry No. 31). The time periods in which Plaintiff could respond to those Motions have expired, and the Clerk's docket indicates that Plaintiff has not filed responses to those Motions. (See generally Docket.) The Court finds that the matters are ripe for resolution.

II. Motion to Stay

Defendant CashCall has moved to stay the proceedings in this case pending the United States Court of Appeals for the Eleventh Circuit's resolution of Defendant CashCall's appeal of the Motion to Compel. (Docket Entry No. 30.) The Eleventh Circuit has observed: "When a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel

arbitration, the district court should stay the litigation so long as the appeal is non-frivolous.” Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1253 (11th Cir. 2004) (per curiam). Although the Court denied the Motion to Compel, the Motion to Compel presented close questions for the Court. Specifically, Defendant CashCall’s arguments in support of that Motion were not frivolous, and its arguments concerning the alleged validity of the arbitration clause are not frivolous. The Court consequently must stay the proceedings in this action pending resolution of Defendant CashCall’s appeal from the Court’s Order denying the Motion to Compel. Id. The Court therefore grants the Motion to Stay.

III. Motion for Appeal

28 U.S.C. § 1292(b) provides:

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, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals thereof shall so order.

28 U.S.C. § 1292(b) (emphasis in original). To obtain an interlocutory appeal under § 1292(b), a litigant must: (1) show that the appeal involves a controlling question of law;

(2) establish that a substantial ground for difference of opinion exists; and (3) demonstrate that an interlocutory appeal will materially advance the ultimate termination of the litigation. McFarlin v. Conseco Servs., Inc., 381 F.3d 1251, 1257 (11th Cir. 2004).

The United States Court of Appeals for the Eleventh Circuit has observed:

The term “question of law” does not mean the application of settled law to fact. It does not mean any question the decision of which requires rooting through the record in search of the facts or of genuine issues of fact. Instead, what the framers of § 1292(b) had in mind might be called one of “pure” law, matters the court of appeals “can decide quickly and cleanly without having to study the record.”

McFarlin, 381 F.3d at 1258 (citations omitted) (quoting Ahrenholz v. Bd. of Trustees of the Univ. of Ill., 219 F.3d

674, 676-77 (7th Cir. 2000)). With respect to the “substantial ground for difference of opinion” requirement, the Eleventh Circuit has noted that “a question of law as to which [the Eleventh Circuit is] in complete and unequivocal agreement with the district court is not a proper one for § 1292(b) review.” Id. (internal quotation marks and citation omitted). Further, the Eleventh Circuit has noted that the “materially advance the ultimate termination of the litigation” requirement “means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation.” Id. at 1259. Finally, the Eleventh Circuit has observed that “§ 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of

law without having to delve beyond the surface of the record in order to determine the facts.” Id.

Certification under § 1292(b) “is wholly discretionary with both the district court and [the Eleventh Circuit].” OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1358 (11th Cir. 2008). The Eleventh Circuit has cautioned that:

§ 1292(b) sets a high threshold for certification to prevent piecemeal appeals. Indeed, to obtain § 1292(b) certification, the litigant must show not only that an immediate appeal will advance the termination of the litigation but also that the appeal involves “a controlling question of law as to which there is a substantial ground for difference of opinion.” 28 U.S.C. § 1292(b). Most interlocutory orders do not meet this test.

Id. at 1359. Further, “[t]he proper division of labor between the district courts and the courts of appeals and the

efficiency of judicial resolution of cases are protected by the final judgment rule, and are threatened by too expansive use of the § 1292(b) exception to it.” McFarlin, 381 F.3d at 1259.

Applying the above standards to this case, the Court finds that it is appropriate to certify its ruling on the Motion to Dismiss for interlocutory appeal. First, the issues involved are purely legal questions--whether the forum selection clause is enforceable and whether the tribal exhaustion doctrine applies. The Court further finds that those questions are controlling questions of law. Second, the Court recognizes that a substantial ground for difference of opinion exists concerning the Court’s resolution of those questions. Third, the Court concludes that an interlocutory

appeal will materially advance the ultimate termination of this litigation. This action is a putative class action, and will require significant discovery and motions concerning class-related issues. Resolving the disputes concerning the enforceability of the forum selection clause and the application of the tribal exhaustion doctrine now will save significant time and effort on the part of both the Parties and the Court. Moreover, Defendant CashCall already is entitled to an interlocutory appeal of the Court's Order denying its Motion to Compel, and allowing the Eleventh Circuit to address the Court's rulings on both the Motion to Dismiss and the Motion to Compel at this time will promote efficiency and avoid piecemeal appeals. Finally, the Court already granted Defendant CashCall's Motion to Stay, and

permitting an interlocutory appeal of the Court's rulings on the Motion to Dismiss will not result in further delay of this action.

For the reasons discussed above, the Court concludes that it is appropriate to certify for interlocutory appeal the portion of the April 28, 2014, Order denying Defendant's Motion to Dismiss. The Court consequently grants Defendant CashCall's Motion for Appeal.

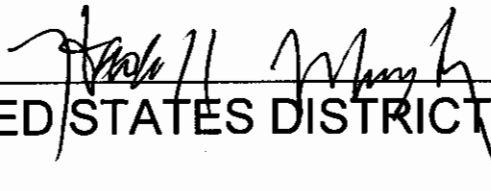
IV. Conclusion

ACCORDINGLY, the Court **GRANTS** Defendant CashCall's Motion to Stay [30], and **STAYS** the proceedings in this case pending the Eleventh Circuit's resolution of Defendant CashCall's appeal of the Court's April 25, 2014, Order denying the Motion to Compel. Further, the Court

GRANTS Defendant CashCall's Motion for Appeal [31], and **CERTIFIES** the portion of the Court's April 28, 2014, Order denying Defendant CashCall's Motion to Dismiss for interlocutory appeal under 28 U.S.C. § 1292(b). Specifically, the Court **CERTIFIES** the following questions to the United States Court of Appeals for the Eleventh Circuit for interlocutory appeal under § 1292(b): (1) whether the tribal exhaustion doctrine requires the Court to dismiss this case pending a determination by the tribal court concerning whether it has jurisdiction; and (2) whether the forum selection clause is invalid or unenforceable based on fraud or overreaching or inconvenience and unfairness of

the chosen forum.

IT IS SO ORDERED, this the 19th day of May, 2014.


UNITED STATES DISTRICT JUDGE