

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

BOTMAN INTERNATIONAL, B.V. :
 :
 : CIVIL ACTION
 v. :
 :
 : NO. 99-5088
 INTERNATIONAL PRODUCE IMPORTS, :
 INC., ET AL. :

SURRICK, J.

JUNE 29, 2005

MEMORANDUM & ORDER

Presently before the Court is Plaintiff Botman International, B.V.'s Motion For Final Judgment Pursuant To F.R.C.P. 54(b) (Doc. No. 83) and Defendant International Produce Imports, Inc.'s ("IPI") Motion To Compel Plaintiff To Appear For Deposition And To Cooperate In Discovery (Doc. No. 80).¹ For the following reasons, Plaintiff's Motion will be granted and Defendants' Motion will be denied.

I. FACTUAL BACKGROUND

Plaintiff is a corporation engaged in the business of supplying perishable agricultural commodities. Its principal place of business is in the Netherlands. Plaintiff sold and shipped over 460 individual shipments of produce to Defendant IPI over the course of nearly two years. In a Memorandum and Order dated July 27, 2004, we granted summary judgment in favor of

¹Plaintiff has also filed a Declaration of Adri Botman In Opposition To Motion To Compel Deposition Of Leonardus Petrus Maria Bol ("L. Bol") (Doc. No. 81) and the Declaration Of Paul T. Gentile In Opposition To Defendants' Motion To Compel Deposition Of Leonardus Petrus Maria Bol And Stay Of Execution Of Judgment (Doc. No. 82). Defendant has filed the Declaration Of Mark C. H. Mandell In Reply To Opposition To Motion To Compel Attendance Of Party At Deposition And For Stay Of Entry Of Judgment (Doc. No. 84).

Plaintiff and against IPI on Count I (Breach of Contract), Count II (Failure To Maintain Trust Under PACA²), and Count IV (Breach of Fiduciary Duty). We granted summary judgment in favor of Plaintiff and against Defendant Dirk J. Keijer (“Keijer”) on Count IX (Breach of Fiduciary Duty - Constructive Trust) and Count XI (Breach of Fiduciary Duty). We also granted summary judgment in favor of Plaintiff and against Defendants on all of the Defendants’ Counterclaims. Summary judgment was denied on the Dissipation of Trust Assets claims in Counts III and X against IPI and Dirk J. Keijer respectively.

In our Memorandum and Order, we concluded that IPI had breached its contract with Plaintiff by failing to pay Plaintiff for the various shipments of produce that IPI had ordered and had received from Plaintiff. The total contract price for the produce that was delivered to Defendant was \$1,454,233.75. (Doc. No. 75 at 18.) We also found that a statutory trust arose in favor of Plaintiff upon IPI’s receipt of the perishable agricultural commodities purchased from Plaintiff and that IPI had failed to maintain that trust in violation of PACA, 7 U.S.C. §§ 499a-499s, and its regulations. (*Id.* at 19.) The statutory PACA trust consisted of all inventories of food or other products derived from the commodities and the proceeds from the sale of the commodities. The proceeds from the sale of the commodities amounted to \$433,079.54. (*Id.*) We concluded that IPI breached its fiduciary duty to Plaintiff when it failed to hold the perishable agricultural commodities and the proceeds therefrom in trust for the benefit of Plaintiff. (*Id.* at 19-23.) However, we denied summary judgment on the dissipation of trust assets claims because evidence existed that accounts receivable had been preserved for the benefit of Plaintiff, and Plaintiff did not show that those accounts were fictitious or otherwise uncollectible. (*Id.* at 22.)

²The Perishable Agricultural Commodities Act.

Although it was not clear whether the trust assets were dissipated, it was certainly clear that IPI had breached a duty owed to Plaintiff with respect to the manner in which it kept the PACA trust. (*Id.* at 23.) Because a material issue of fact existed as to whether the trust assets were dissipated, we denied summary judgment on the issue of whether Defendant Keijer, IPI's sole shareholder, had dissipated trust assets (Count X). However, because Keijer was responsible for all of IPI's activities at all relevant times, we concluded that he was secondarily liable for the breach of trust. (*Id.* at 26.) Accordingly, we granted summary judgment against Keijer with respect to Count IX, Breach of Fiduciary Duty - Constructive Trust and Count XI, Breach of Fiduciary Duty - PACA.

Plaintiff files the instant Motion requesting that we enter final judgment in accordance with our Memorandum and Order of July 27, 2004. (Doc. No. 83 at 1.) Plaintiff submits that there should be no further delay in entering final judgment. (*Id.*) Defendants respond that the Court should stay further proceedings and compel Plaintiff to participate in further discovery. (Doc. No. 84 at 1.) Defendants assert that Plaintiff Adrianus Botman ("Adri Botman"), who has represented himself throughout these proceedings as the President of Botman International B.V., is not the President and not the "real party in interest." (*Id.* at 3.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) provides in relevant part that:

the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b). The Third Circuit only has jurisdiction when an appeal is taken from a

final order (28 U.S.C. § 1291) or from an appealable interlocutory order (28 U.S.C. § 1292). The

Third Circuit has stated:

The District Court *cannot*, in the exercise of its discretion, treat as “final” that which is not “final” within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claim actions

Rule 54(b) . . . scrupulously recognizes the statutory requirement of a “final decision” under § 1291 as a basic requirement for an appeal to the Court of Appeals. . . .

Allis-Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 362 (3d Cir. 1975) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956)).³ The Third Circuit has stated, “[a] proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of ‘no just reason for delay.’ The court should clearly articulate the reasons and factors underlying its decision to grant 54(b) certification.” *Allis-Chalmers Corp.*, 521 F.2d at 364.

³ In *Sears, Roebuck & Co.*, the Supreme Court explained the rationale for the adoption of Rule 54(b):

With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims.

351 U.S. at 432.

III. DISCUSSION

Plaintiff asserts that there is no just reason for delay in entering final judgment on our Order of July 27, 2004. (Doc. No. 83 at 1.) Defendants assert that we should not enter final judgment and should instead compel further discovery to determine Adri Botman's exact role at Botman International, B.V. (Doc. No. 84 at 1-2.)

The Third Circuit suggests that we examine the following factors in reviewing 54(b) certifications:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous considerations such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Depending on the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

Allis-Chalmers Corp., 521 F.2d at 364. In examining the relationship between the adjudicated and unadjudicated claims, a number of Counts in Plaintiffs Amended Complaint remain to be adjudicated.⁴ However, it is significant that other than Count XXI (Interest and Attorneys Fees),

⁴Count V - Action on Account Stated, Count VI - Unjust Enrichment, Count VII - Fraudulent Misrepresentation, Count VIII - Constructive Trust, Count XII - Dissipation of Trust Assets - PACA, Count XIII - Piercing Corporate Veil, Count XIV - Fraudulent Conveyance Against Individual Defendant D. Keijer, Count XV - Breach of Fiduciary Duty / Conversion - Constructive Trust Against Individual Defendant C. Keijer, Count XVI - Dissipation of Trust Assets - Constructive Trust Against Individual Defendant C. Keijer, Count XVII - Breach of Fiduciary Duty/Conversion - PACA Against Individual Defendant C. Keijer, Count XVIII - Dissipation of Trust Assets - PACA Against the Individual Defendant C. Keijer, Count XIX - Piercing Corporate Veil Against The Individual Defendant C. Keijer, Count XX - Fraudulent Conveyance Against the Individual Defendant C. Keijer, Count XXI - Interest and Attorneys Fees.

the remaining counts essentially seek damages for the same economic harm that is awarded in our Memorandum and Order of July 27, 2004. Accordingly, it is unlikely that the need for review might be mooted by future developments in the district court or that the reviewing court might be obliged to consider the same issue a second time. Moreover, it seems apparent that if the July 27, 2004, decision of this Court is affirmed, any trial of remaining claims will be significantly simplified and may even be entirely unnecessary.

The presence of a counterclaim that could result in a set-off against the judgment sought to be made final is also not an issue in this case. Although “the possibility of a set-off if defendant recovers on a counterclaim may indicate that an immediate appeal should not be allowed presumably because of the undesirability of awarding an amount that may be reduced by a subsequent judgment on a defendant’s counterclaim . . . ,” *id.* at 366 (citation omitted), no counterclaims remain pending here. Our Order of July 27, 2004, granted summary judgment in favor of Plaintiff on all of the counterclaims filed by Defendants. Accordingly, this factor weighs in favor of entering final judgment.

The miscellaneous considerations such as economic and solvency considerations and expense also weigh in favor of entering final judgment. In addition, Plaintiff filed this lawsuit in 1999, almost six years ago, seeking to be compensated on claims which cannot reasonably be disputed. We are satisfied that it is not in the interests of justice to require Plaintiff to endure further delay.⁵ Accordingly, we will grant Plaintiff’s Motion under Rule 54(b).

⁵We are unpersuaded by Defendants’ argument that Adri Botman incorrectly represented himself as President of Botman International, B.V. (Doc. No. 84.) Adri Botman stated in his declaration that he served as Managing Director at all times relevant to the claims in this case. (Doc. No. 81 ¶ 1.) Paul T. Gentile, Plaintiff’s counsel, also submitted a declaration stating that:

An appropriate Order follows.

the Plaintiff has become an inactive company over the course of the five (5) year litigation, Mr. Botman remains the owner of the claim against the Defendants and is obligated to collect the debt. In fact, Mr. Botman is responsible for the costs of the litigation and by agreement must remit to the purchaser of his shares, Fresh United, the sum of money received from the Defendants in excess of 1.85 million guilders.

(Doc. No. 82 ¶ 4.) Under the circumstances, we will not permit further discovery. The countervailing factors of this Rule 54(b) Motion are significantly more compelling.

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 INC., ET AL. :

ORDER

AND NOW, this 29th day of June, 2005, upon consideration of Plaintiff Botman International, B.V.'s Motion For Final Judgment Pursuant To F.R.C.P. 54(b) (Doc. No. 83, 99-CV-5088) and Defendant International Produce Imports, Inc.'s Motion To Compel Plaintiff To Appear For Deposition And To Cooperate In Discovery (Doc. No. 80, 99-CV-5088), it is ORDERED that Defendants' Motion is DENIED and Plaintiff's Motion is GRANTED as follows:

1. Judgment is entered in favor of Plaintiff Botman International, B.V and against Defendant International Produce Imports, Inc., in the amount of \$1,464,233.75. (Count I of Plaintiff's Amended Complaint.)
2. Judgment is entered in favor of Plaintiff Botman International, B.V. and against Defendant International Produce Imports, Inc., in the amount of \$433,079.54. (Counts II and IV of Plaintiff's Amended Complaint.)
3. Judgment is entered in favor of Plaintiff Botman International, B.V. and against Defendant Dirk J. Keijer in the amount of \$1,464,233,75. (Count IX of Plaintiff's Amended Complaint.)
4. Judgment is entered in favor of Plaintiff Botman International, B.V. and

against Defendant Dirk J. Keijer in the amount of \$433,079.54. (Count XI of Plaintiff's Amended Complaint.)

5. Judgment is entered in favor of Plaintiff Botman International, B.V. and against Defendants on Defendants' First through Sixth Counterclaims.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge