

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

ASTENJOHNSON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 03-1552
	:	
COLUMBIA CASUALTY CO., et al.,	:	
Defendants	:	

MEMORANDUM¹

Stengel, J.

June 29, 2006

On June 22, 2006, this Court entered an Order granting the Defendants’ Motions to Strike Plaintiff’s Jury Demand. Plaintiff filed an Emergency Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and for a Stay on June 23, 2006. Plaintiff also filed a Petition for a Writ of Mandamus with the Third Circuit on June 27, 2006.

I. Motion to Certify for Appeal Under 28 U.S.C. § 1292(b)²

A district court judge may certify for appeal an order not otherwise appealable under the Federal Rules, where the judge believes “such order involves a controlling

¹ This Memorandum accompanies the Order denying Plaintiffs’ Motion for Certification of Interlocutory Appeal and granting the Motion to Stay, filed by this Court on June 28, 2006, at docket number 258.

² Plaintiff also advances an argument pursuant to Federal Rule of Civil Procedure 54(b). Rule 54(b) is applicable in situations in which “more than one claim for relief is presented in an action,” and allows a district court to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties” in order to allow the parties to file an appeal as to the adjudicated claims. As Plaintiff seeks certification of appeal as to the jury demand, and not as to a substantive claim, Rule 54(b) is inapplicable. I will therefore deny the motion as to the Rule 54(b) Motion.

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). Moreover, section 1292 is to be applied sparingly. “[Section 1292] is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.” *Milbert v. Bison Lab., Inc.*, 260 F.2d 431, 433 (3d Cir. 1958).

I find that the underlying Order is not appropriate for certification of appeal under section 1292(b) because there is not a substantial ground for difference of opinion and because certifying this issue for appeal would not materially advance the outcome of the litigation. I note that denial of a jury demand may amount to a “controlling question of law” under section 1292(b). *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, Nos. 74-2451, 74-3247, 1979 WL 1689 at *2 (E.D. Pa. 1979) (Becker, J.) (“the erroneous granting of a jury trial may thus be reversible error”). However, I find that even if plaintiff has shown this issue to be a controlling question of law, it has failed to meet the other requirements for certification under section 1292(b).

Thus, even if the issue is of a controlling question of law, there is no substantial ground for difference of opinion.³ There is “substantial ground for difference of opinion” where there is a divergence of opinion within a district, or where there is a Circuit split.

³ See the Court’s June 22, 2006 Order Granting Defendants’ Motions to Strike Jury Demand for a full discussion of the law controlling this issue.

See Dorward v. Cons. Rail Corp., 505 F. Supp. 58 (E.D. Pa. 1980); *Mazzella v. Stineman*, 472 F. Supp. 432 (E.D. Pa.1979). Federal law is quite clear that no jury right attaches to a purely equitable claim. *See, e.g., Ross v. Bernhard*, 396 U.S. 531, 532 (1970) (citations omitted); *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185 (3d Cir. 1979). I therefore find no ground for difference of opinion.

Moreover, even if I were to find that there were a difference of opinion, certifying this issue for appeal would not materially advance the outcome of this litigation.

AstenJohnson argues strenuously that it is in the interests of judicial economy to certify this issue for appeal due to the risk of duplicative trials if the appeal is successful.

AstenJohnson relies heavily on Judge Becker's decision to certify for appeal his grant of a jury trial in *Zenith Radio*, Nos. 74-2451, 74-3247, 1979 WL 1689. In that case, however, the parties were facing a year-long trial, and there was ample time prior to trial for an appeal to be decided. *Id.* at *3. Moreover, there was no need for a stay to be entered, so the district court proceedings continued while the appeal was pending with the Third Circuit. *Id.*

Zenith Radio is distinguishable from the instant case. First, the parties are facing a two-week trial, not a year-long trial, as in *Zenith Radio*, so the interest of judicial economy are not as high. Second, the parties are facing imminent trial, and a stay would have to be entered while the appeal is considered, prolonging this already three-year-old

litigation.⁴ As a result, I find that certifying this issue for appeal would not advance the outcome of this litigation. I will therefore deny the Motion to Certify.

II. Stay Pending Outcome of Petition for Writ of Mandamus

Plaintiff filed a Petition for a Writ of Mandamus with the Third Circuit on June 27, 2006. I will stay proceedings for a short period of time, pending the outcome of that Petition.

BY THE COURT:

/s/ Judge Paul S. Diamond for
LAWRENCE F. STENGEL, J.

⁴ I note that Plaintiffs argue that the late date is due to Defendants' dilatoriness in filing the Motion to Strike. I find this argument unpersuasive. The issue of proceeding jury or non-jury was raised during the final pretrial conference held on January 23, 2006, and the Motion to Strike was filed on February 10, 2006. The parties requested oral argument on this and other pre-trial issues, and arguments were held on June 20, 2006.