UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIC E. HOYLE,

Plaintiff,

v.

Civil Action No. 08-CV-347C

FREDERICK DIMOND, ROBERT DIMOND,
and MOST HOLY FAMILY MONASTERY,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF AN ORDER INVOKING RULE 54(b) AND ENTERING FINAL JUDGMENT ON ALL CLAIMS PREVIOUSLY DISMISSED

PRELIMINARY STATEMENT

Defendants, Frederick Dimond, Robert Dimond, and Most Holy Family Monastery ("MHFM"), submit this Memorandum in Support of the Court's Order to Show Cause entered on February 3, 2014. [131][1]. Defendants submitted a motion [125] seeking dismissal of their remaining counterclaims, without prejudice, pursuant to Fed. R. Civ. P. ("Rule") 41(c). "The only claims remaining in this action to be disposed of at trial are Defendants' remaining counterclaims." Ritter Affidavit [125-1], ¶¶10-11. The Court entered the Order To Show Cause [131] to show "why this Court should not invoke Rule 54(b) to enter final judgment as to all claims (both plaintiff's and defendants') which have previously been dismissed. This Memorandum of Law supports an Order invoking Rule 54(b).

[1] Bracketed references are to the CM/ECF docket entries.

SUMMARY OF LAW

An Order invoking Rule 54(b) and entering final judgment as to all claims which have previously been dismissed provides a pragmatic approach, considered essential to "a just, speedy, and inexpensive determination." *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). "Federal Rule of Procedure 54(b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties; to do so, the court must make an express determination that there is no just reason for delay." *Curtiss-Wright Corp. v. General Electric Co.*,446 US 1, 1 (1980); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 452 (1956). A district court may direct entry under Rule 54(b) *sua sponte*. *Lankler Siffert & Wohl, LLP v. Rossi*, No. 08 Civ. 10055 (RWS) 2004 WL 541842 at *3 (S.D.N.Y. 2004), *aff'd*, 125 Fed. Appx. 371 (2005) (Summary Order).

Claims that are separable or extricable from each other are appropriate for Rule 54(b) certification. *Ginett v Computer Task Group, Inc.*, 962 F.2d 1085, 1096 (2d Cir 1992). However, "there is always an underlying interrelatedness of the claims between parties in a multiparty civil action…" *Id.* Once claims are shown to be separable, "the district court should be given substantial deference, for that court is 'the one most likely to be familiar with the case and with any justifiable reasons for delay.' " *Curtiss-Wright Corp. v. General Electric Co.*,446 US at 10; *see Ginett v Computer Task Group, Inc.*, 962 F.2d at 1096.

However, even if a claim is not shown to be separable, the nonexistence of the factor would not "necessarily mean that Rule 54(b) certification would be improper. It would, however, require the district court to find a sufficiently important reason for nonetheless granting certification. For example, if the district court concluded that there was a possibility that an appellate court would have to face the same issues on a subsequent appeal, this might perhaps be

offset by a finding that *an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims.*" *Curtiss-Wright Corp. v. General Electric Co.*,446 US at 8 n. 2 (emphasis added) (citing *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 450 n.5 (1956).

The type of efficient judicial administration "meets the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions, while retaining a right of judicial review over the discretion exercised by the District Court in determining when there is no just reason for delay. This does not impair the statutory concept of finality…." *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. at 453.

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

Plaintiff filed his original Complaint on May 9, 2008, alleging four causes of action: fraud, constructive fraud/negligent misrepresentation, unjust enrichment/constructive trust, and money had and received. [*See* 1]. On March 10, 2009, Plaintiff filed an Amended Complaint adding six additional causes of action: mandatory accounting, violations of the Rackateer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d), deceptive trade practices, false advertising, and vicarious liability of MHFM. [*See* 42]. Defendants filed an Answer to the Amended Complaint on March 20, 2009 and interposed seven counterclaims: defamation/injurious falsehood, violation of the Lanham Act, interference with prospective advantage/tortious interference with contract, conversion, breach of fiduciary duty, misappropriation of trade secrets, and violation of the Electronic Communications Privacy Act ("ECPA"). [*See* 43]. Plaintiff filed his reply to the counterclaims on April 9, 2009. [*See*. 44]. Defendants filed a Motion for Summary Judgment on January 6, 2012. [*See* 89]. The Court

granted Defendants' motion for summary judgment and dismissed Plaintiff's complaint on June 22, 2012, [*See* 106], but held in abeyance that aspect of the Defendant's Motion in which they sought judgment on their counterclaims. [*See* 89]. This Court denied Defendant's motion for summary judgment on their counterclaims and granted summary judgment to Plaintiff, *sua sponte*, dismissing Defendant's counterclaims under the Lanham Act and the ECPA. [*See*. 116].

The only remaining claims in this action are Defendants' counterclaims for defamation/injurious falsehood, interference with prospective advantage/tortious interference with contract, conversion, breach of fiduciary duty, and misappropriation of trade secrets.

B. THE REMAINING COUNTERCLAIMS ARE SEPARABLE.

Each of Defendants remaining counterclaims is separable or extricable from each other. Defendants' counterclaims for (A) defamation and injurious falsehood, (B) interference with prospective advantage/tortious interference with contract, (C) conversion, (D) breach of fiduciary duty, and (E) misappropriation of trade secrets are separable claims for the purposes of Rule 54(b). *See Ginett v Computer Task Group, Inc.*, 962 F2d at 1096-97.

Each of these claims are separable because (1) they are based on factual assertions that occurred entirely after Plaintiff's departure from MHFM and therefore after the factual scenario alleged in Plaintiff's dismissed Complaint, and (2) the counterclaims do not rely on the outcome of any of the Plaintiff's now dismissed claim causes of action. Therefore, the remaining claims have no risk of entanglement with the still-pending counterclaims. *See Ginett v Computer Task Group, Inc.*, 962 F.2d at 1096-97. Because each claim is separable, there is no "just cause for delay." *See generally, Curtiss-Wright Corp. v. General Electric Co.*,446 US 1.

Counterclaim (A) relies on statements made by Plaintiff to several members of the public after Plaintiff left MHFM. The injurious statements Plaintiff made including allegations of

stealing and theft. Answer to Amended Complaint, ¶¶ 179-199 [43]. Each of the allegations relies on facts from an entirely separate period of time when Plaintiff's obvious unhappiness provided motive for a series of tasteless actions taken against Defendants.

Counterclaim (B), interference with prospective advantage/tortious interference with contract, has no basis in Plaintiff's claims. Defendants allege that Plaintiff searched out donors and other individuals whom with the defendant had relationships and/or contracts and directed disparaging statements and other conduct about Defendants to those individuals. *Id.* at ¶¶ 206-214. This conduct occurred later in time from Defendants allegations and relies on different conduct than the Plaintiff alleges in his dismissed claims.

Defendants base counterclaim (C) on the conversion of confidential business records, materials, cash and securities wholly unrelated to any monies alleged taken in Plaintiff's dismissed claims. *Id.* at ¶¶ 215-224. These converted items differ from those items in Plaintiff's complaint and can be decided separate and apart from the dismissed claims.

Defendants base counterclaim (D), breach of fiduciary duty, on Plaintiff's conduct both during his membership and participation in the MHFM community and after. Plaintiff's fiduciary duty is not based on his donation of money or value to MHFM, and Plaintiff's breach of said duty is based on facts occurring after his donations and contributions. *Id.* at ¶¶ 225-231.

Defendants counterclaim (E), misappropriation of trade secrets, alleges that Plaintiff took an information database from MHFM that included MHFM supporters, donors, and customers. *Id.* at ¶¶ 232-241. Plaintiff's theft of the MHFM database neither overlaps Plaintiff's dismissed claims nor relies on their outcome.

C. AN ORDER UNDER RULE 54(b) PROMOTES A JUST, SPEEDY, AND INEXPENSIVE DETERMINATION IN PRAGMATIC FASHION AND FACILITATES A RESOLUTION OF THE ENTIRE ACTION.

The Supreme Court stated that a reason such as facilitating settlement, may, *by itself*, be a sufficiently important reason to grant certification under Rule 54(b), even without a finding that the remaining claims are separable. *Curtiss-Wright Corp. v. General Electric Co.*,446 US at 8 n. 2 (emphasis added) (citing *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 450 n.5 (1956). Because Defendants' voluntary dismissal of its remaining counterclaims upon the event of an unsuccessful appeal would end in the same result – a speedy, inexpensive resolution without the need for an expensive and drawn-out trial, the results and reasoning are the same. This type of pragmatic resolution provides the basis necessary to certify that there is "no just reason for delay." *See generally*, *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445.

Here, an Order entering final judgment as to all claims, both plaintiff's and defendants', will fulfil the purpose of the Federal Rules of Civil Procedure by reducing the amount of litigation, narrowing any outstanding issues, avoiding surprises, promoting justice, *See Dill Mfg. Co. v. Acme Air Appliance Co.* 2 F.R.D. 151, 153 (E.D.N.Y. 1941), and may promote an efficient settlement or voluntary dismissal, *See Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. at 450 n.5. Plaintiff intends to file an appeal of the dismissal of his claims and the denial of his motion to file a Second Amended Complaint. [127]. Defendants are willing to dismiss their remaining counterclaims with prejudice if plaintiff's appeal is unsuccessful. [131]. Therefore, allowing Plaintiff to appeal his claims at this point in procedure, instead of awaiting a final judgment on all counterclaims, would actually speed the final outcome of this action, as neither party would have to wait for the outcome of the remaining counterclaims. Furthermore, in the event said appeal is denied, neither party, nor the Court, will have gone through the

unnecessary expenditure of time, money, and other valuable resources, as the Defendants will simply dismiss their remaining counterclaims.

This logical, pragmatic approach to litigation will provide the desired outcome of a "just, speedy, and inexpensive determination," *Brown Shoe Co. v. United States*, 370 U.S. at 306, which fulfills the scope and purpose of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 1. It allows the Plaintiff to continue his quest to ascertain an alternative outcome for each of their previously dismissed claims, without either party, or the Court, incurring the time and expense of litigating the remaining counterclaims which would voluntarily be dismissed pending one possible outcome - an unsuccessful appeal.

CONCLUSION

In order to promote a just, speedy, inexpensive, and pragmatic proceeding and because there is no just reason for delay, the Court should invoke Rule 54(b) and enter final judgment as to all claims which have previously been dismissed by Judge Curtin.

Dated: February 10, 2014

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