UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO. 97-3924-CIV-LENARD-TURNOFF

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC
SOCIETY, a District of Columbia
corporation, NATIONAL GEOGRAPHIC
ENTERPRISES, INC., a corporation,
and MINDSCAPE, INC., a
California corporation,

Defendants.
_______________________________/

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO MOTION BY DEFENDANTS FOR INTERLOCUTORY APPEAL

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (collectively "Greenberg"), submit this memorandum in opposition to the Motion for Interlocutory Appeal served by Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC. (collectively "the Society").

A. The Requirements for an Interlocutory Appeal

The Society seeks interlocutory appeal, pursuant to 28 U.S.C. § 1292 (b), of an order entered by the Court on January 11, 2002, which granted Greenberg's motion to strike the defendants' answers. That order was amended on February 19, 2002, but only to correct a typographical error. The Society moved for reconsideration, which was denied. Thus the Court

on two occasions has expressed certainty on issues the Society now wants the Court to agree are questionable.

"There is a strong policy against piecemeal interlocutory review of federal court actions, except where an appeal is expressly authorized by statute. Consequently, statutes authorizing interlocutory appeals are to be strictly construed . . . ." 2A Federal Procedure § 3:384. (Footnotes omitted.) The relevant statute "was designed for exceptional cases where a decision on appeal may avoid protracted and expensive litigation and is not intended solely to review the correctness of an interim ruling." Id. The 1292 (b) appeal is to "be used only in the rare case where an immediate appeal would avoid expensive and protracted litigation." Orson, Inc. v. Miramax Film Corp., 867 F.Supp. 319, 321 (E.D.Pa. 1994). As discussed below, an interlocutory appeal would prolong what already is expensive and protracted litigation.

The statute itself recites three requirements: (1) the order from which the appeal is taken must involve a controlling question of law; (2) there must be substantial grounds for a difference of opinion concerning the issue; and (3) an immediate appeal should materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). Unless all of the statutory criteria are satisfied, "a district court may not and should not certify its order . . . for an immediate appeal." Ahrenholz v. Bd. of Trustees of Univ. of Illinois, 218 F.3d 674, 676 (7th Cir. 2000) ("the criteria are conjunctive, not disjunctive"). Those criteria are examined below.

B. The January 11, 2001 Order

The instant motion seeks appellate review of the order entered by this Court on January 11, 2002 (the subsequent order dated February 19, 2002 did not substantively change the preceding order). What the January 11 order said is crucial to the Society's present motion. See

Raven v. Oppenheimer & Co., Inc., 74 F.3d 239, 242 n. 4 (11th Cir. 1996) (district court's order is focus of any interlocutory appeal).

The Court struck the defendants' answers as (a) untimely, (b) filed without leave of Court, and (c) contrary to the Eleventh Circuit mandate. The Court also denied an extension of time within which the defendants might have served answers. It is undisputed that the defendants did not seek leave of the Court before filing and serving their answers. Thus the only two points of law that might be appealed on an interlocutory basis are the untimeliness of the answers and the meaning of the Eleventh Circuit's mandate. Neither is appropriate under the statute.

C. No Controlling Question of Law Exists

As to the appellate mandate, the Society has proposed to this Court on two occasions that its understanding of the mandate is in error. The Court has twice rejected that suggestion, and the current motion is a recital of what has been asserted previously. The language of the Eleventh Circuit's opinion is clear on its face. There is no "controlling question of law" that can affect the mandate.

Moreover, the Society, in Defendants-Appellees Petition for Rehearing and Petition for Rehearing en Banc, filed on April 12, 2001, specifically asked the Eleventh Circuit to "remand the case for the adjudication of any other factual, legal, or equitable defenses to infringement." Petition at 14, n. 3. The Eleventh Circuit did not include such an instruction in its mandate.

As to the timeliness issue for serving answers, the Court construed the rules of procedure and applied them.[1]

The Society, in its motion at page 5, discusses one of the three defenses it claims to be so crucial. Greenberg's motion to strike the defendants' answers asked alternatively that the Court strike the defenses. In his memoranda in support of that motion Greenberg demonstrated that the defenses were legally insufficient. It is a fair assumption that the Court in its deliberations on the motion to strike considered the merits of those defenses.

The Society resurrects a contention, set forth in one of its defenses, that Greenberg somehow granted the Society a license in a letter in 1985 by Greenberg requesting the transfer of copyrights in his photographs to him. Motion at 5. Subsequent to that letter, however, the Society granted not only all copyright interest in the photographs, but went beyond that to convey "all right, title and interest, including copyright." A copy of that document is attached as Exhibit A. The conveyance thus was not limited to copyright and was absolute. Nothing was reserved that could form the basis for any license.

Another defense was whether the Eleventh Circuit improperly ignored the decision in New York Times v. Tasini, ___ U.S. ___, 121 S.Ct. 2381 (June 25, 2001). That matter was analyzed at length by this Court, and rejected, in its January 11 and February 19 orders.

The third defense was an attempt to implicate the 1909 Copyright Act. Greenberg's memoranda in support of his motion to strike the answers show very clearly that that law has no impact on the issues in this case.

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[1] The Society still makes light of the matter, saying that the answers "if late at all, were late by a matter of a few days." Motion at 5.

The Society's motion for an interlocutory appeal cannot be predicated on the defenses themselves, but the Court should weigh the legal weakness of those defenses in determining whether an interlocutory appeal would serve any useful purpose.

D. No Substantial Ground for a Difference of Opinion Exists Regarding the Court's Orders

A failure to point to conflicting legal authority undermines the "substantial ground" requirement. Genentech, Inc. v. Novo Nordisk A/S, 907 F.Supp. 97, 100 (S.D.N.Y. 1995). The Society has cited nothing that conflicts with the Court's orders. See also Oyster v. Johns-Manville Corp., 568 F.Supp 83, app. dismissed, 770 F.2d 1074 (3d Cir.), rev'd. on other grounds, 798 F.2d 93 (3d Cir. 1984). Conversely, if a controlling court of appeals has decided the issue, no substantial ground for a difference of opinion exists. Brown v. Mesirow Stein Real Estate, Inc., 7 F.Supp. 2d 1004, 1008 (N.D.Ill. 1998). The Eleventh Circuit's mandate so qualifies.

The Society's reliance on Florida Evergreen Foliage v. E.I. DuPont De Nemours and Co., 135 F.Supp.2d 1272, 1298 (S.D.Fla. 2001) is quite far off the mark. In that case, the court granted a motion for judgment on the pleadings and agreed that it could be appealed on an interlocutory basis. That motion was filed in only one of 34 consolidated Benlate cases in the court involving fraud, and the court, before proceeding, wanted some clarity on the applicability of the decision to the remaining cases. The circumstances here are strikingly different.

The Society once more attempts to stretch the import of the "corrected" opinion filed by the Eleventh Circuit. The motion asserts that the Society contended, in its petition for rehearing, that the mandate should require the consideration of other defenses. Motion at 6. As noted above, the Eleventh Circuit did not incorporate that assignment in its mandate as the Society had

asked. The only correction to that Court's original opinion was the insertion of the words "if any" with reference to damages and attorney's fees. That insertion can only have relevance to this Court's discretion as to damages and fees that might be awarded. In that sentence, the Eleventh Circuit continued by saying "as well as any injunctive relief that may be appropriate." That language alone reasonably negates any inference that liability issues might still exist. In any event, it is a groaning stretch to suggest that the complete absence of language in the mandate as to liability somehow implies that liability issues should be pursued. The mandate language is not ambiguous, and it does not suggest a "substantial" ground for a difference of opinion as to what the appellate court meant.

E. An Appeal Now Will Not "Materially" Advance the Ultimate Termination of the Litigation

By the Society's logic, any order of the Court that may be ultimately appealable should be subject to interlocutory appeal in the interest of saving time. At the very outset of this case, over four years ago, the Society chose to respond to the Amended Complaint with a summary judgment motion instead of answering. Had they answered, the defendants still could have promptly pursued summary judgment. Had they answered, the defendants would have put their defenses on the table up front. The defendants had a right to postpone their answers. But Greenberg is punished by that strategy in that he is being confronted very, very late in the litigation with new "defenses" that could have been resolved long ago as alternate grounds in the Society's summary judgment motion.

The Society contends that a successful appeal after trial would require additional discovery. Motion at 7. But that simply is not true. All facts required for the "defenses" are in the record, and the issues can be determined as a matter of law.

An interlocutory appeal on the two issues in this Court's orders would materially slow this litigation.

F. Conclusion

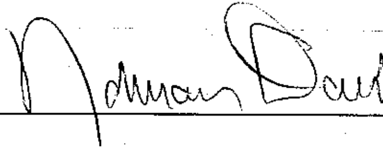
The relevant statute, as noted above, was designed for exceptional cases where a decision on appeal may avoid protracted and expensive litigation and is not intended solely to review the correctness of an interim ruling. This is not one of those rare cases where an immediate appeal would avoid expensive and protracted litigation. The motion should be denied.

STEEL HECTOR & DAVIS LLP
Attorneys for Plaintiffs
200 S. Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398
(305) 577-2988
(305) 577-7001 fax

Norman Davis
Fla. Bar No. 475335

Certificate of Service

I hereby certify that a copy of the foregoing plaintiffs' motion was served by mail on Edward Soto, Weil, Gotshal & Manges, LLP, 701 Brickell Avenue Boulevard, Suite 2100, Miami, Florida 33131; and via Federal Express on Robert G. Sugarman, Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153, this 19th day of March, 2002.



MIA2001/92005-1

National Geographic Society

WASHINGTON, D.C. 20036

SUZANNE DUPRÉ
Corporate Counsel

December 18, 1985

Mr. Jerry Greenberg
SEAHAWK PRESS
6840 SW 92nd Street
Miami, Florida 33156

Dear Mr. Greenberg:

In reply to your letter of November 15th to Mr. Garrett, the National Geographic Society hereby assigns to you all right, title and interest, including copyright, in your photographs appearing in National Geographic Magazine, as follows:

-- January, 1962
Vol. 121, No. 1

Photos on cover and
pages 58 through 89

Registration No. B-960824
Date: March 22, 1962

-- February, 1968
Vol. 133, No. 2

Photos on cover and pages 222-223, 225,
226-227, 238, 240-241 and 251

Registration No. B-402772
Date: January 31, 1968

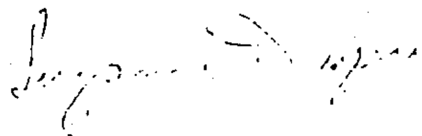
-- May, 1971
Vol. 139, No. 5

Photos on pages 674 through 683

Registration No. B-701984
Date: July 15, 1971

District of Columbia
:ss:
Subscribed and sworn to before
me this 18TH day of
DECEMBER 1985
[signature]
Notary Public
WASHINGTON, D. C.
[illegible] January 3, 1986

Sincerely yours,



cc: W. E. Garrett, Editor

EXHIBIT A