3-28-1983

Judge Tenney Opinion re: Consolidation

Lewis M. Steel '63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVAGLIANO, et al.,	:	
Plaintiffs,	:	77 Civ. 5641 (CHT)
-against-	:	
SUMITOMO SHOJI AMERICA, INC.	:	
Defendant.	:	
PALMA INCHERCHERA,	:	
Plaintiff,	:	82 Civ. 4930 (CHT)
-against-	:	
SUMITOMO CORP. OF AMERICA,	:	
Defendant.	:	

OPINION

APPEARANCES

For Plaintiffs Avagliano, et al. and Incherchera:

STEEL & BELLMAN, P.C.
351 Broadway
New York, New York 10013

For Defendant Sumitomo Corp. of America:

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022

TENNEY, J.

Plaintiffs, employees and former employees of defendant Sumitomo Corp. of America ("Sumitomo")[1] move pursuant to Federal Rule of Civil Procedure ("Rule") 42(a) to consolidate, for all purposes, the above-captioned actions. For the reasons discussed below, the cases are ordered consolidated for discovery purposes, without prejudice to the right of either party to move for consolidation for trial after discovery.

Background

Avagliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (CHT), was filed in November 1977. In 1978 Sumitomo filed a motion to dismiss the complaint. The issues raised by that motion were not finally resolved until the Supreme Court rendered a decision upholding this Court's refusal to dismiss plaintiffs' Title VII claims, _____ U.S. _____, 102 S. Ct. 2374 (1982).

During the pendency of the Avagliano appeals, Palma Incherchera filed a charge against Sumitomo with the Equal Employment Opportunity Commission ("EEOC") that contained allegations similar to those of the Avagliano complaint. In June 1982 the EEOC sent Incherchera a "right to sue" letter, which gave her 90 days in which to institute an action. Because Avagliano had not yet been remanded to this Court,

Incherchera could not intervene in that action. Consequently, in July 1982 she instituted a separate action, Incherchera v. Sumitomo Corp. of America, 82 Civ. 4930 (CHT). Incherchera, like Avagliano, was filed as a class action.

Plaintiffs now move to consolidate the two actions. They note that Incherchera is a member of the putative Avagliano class, and that the allegations of the two complaints are essentially the same, except that the Incherchera complaint also includes a claim of race discrimination. Thus, they argue that consolidation is appropriate in light of the common questions of law and fact presented by the two cases, and would be in the interest of judicial economy.

Defendant, on the other hand, argues that the record is not sufficient to determine whether common questions of law or fact warrant consolidation for all purposes. However, defendant does not oppose consolidation for discovery purposes.

Discussion

Rule 42(a) provides:

> Consolidation; Separate Trials
>
> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A motion to consolidate actions is addressed to the discretion of the district court. Tucker v. Arthur Andersen & Co., 73 F.R.D. 316, 317 (S.D.N.Y. 1976); Transeastern Shipping Corp. v. India Supply Mission, 53 F.R.D. 204, 206 (S.D.N.Y. 1971). "[C]onsolidation may be denied where no common question of law or fact is involved, where the rights of the parties would not be adequately protected, . . . or when consolidation would not effect any appreciable saving of time or expense." 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice, ¶ 42.02[3] at 42-22 to -25 (2d ed. 1982) (footnotes omitted). The burden is on the moving party to convince the court that the actions should be consolidated. Transeastern Shipping Corp. v. India Supply Mission, supra, 53 F.R.D. at 206.

In the instant case, Sumitomo opposes consolidation for all purposes at this stage, arguing that the record does not contain sufficient evidence to determine whether consolidation for all purposes is warranted. In support of its argument, Sumitomo notes a number of differences between Incherchera and Avagliano: (1) the two actions relate to different time periods; (2) Incherchera contains a § 1981 claim, while the § 1981 claims asserted by the Avagliano plaintiffs have been dismissed; (3) Incherchera contains a claim of race discrimination, in addition to claims of discrimination on the basis of sex and national origin; and

(4) defendant has asserted counterclaims in Avagliano, but not in Incherchera.

The Court is persuaded that consolidation of the two actions for discovery purposes is in the interests of fairness and judicial economy. However, the Court agrees with the defendant that the appropriateness of consolidation for trial should be considered after discovery. None of the differences between the two cases noted by the defendant necessarily precludes consolidation. It may well be appropriate to consolidate the two actions for trial. Nevertheless, only after discovery reveals the extent to which these actions involve common questions of law and fact can this Court make a meaningful assessment of whether and to what extent these actions should be consolidated for trial.

Accordingly, Avagliano and Incherchera are consolidated for discovery purposes only, without prejudice to the right of either party to move for consolidation for trial after discovery.

So ordered.

Dated: New York, New York
March 28, 1983

CHARLES H. TENNEY
U.S.D.J.

FOOTNOTE

1/ At the time Avagliano was filed, defendant's name was Sumitomo Shoji America, Inc. Its name was subsequently changed to Sumitomo Corp. of America.