

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JONATHAN P. COLE,

Plaintiff,

v.

JON E. LITSCHER;
MICHAEL CATALANO;
PRISON HEALTH SERVICES, INC.;
PAM BARTELS;
JOHN DOES 1, 34, 35, 36, 37, 39, 82, 84, A, D and E;
and GERALD A. BERGE,

Defendants.

ORDER

04-C-116-C

Plaintiff Jonathan Cole has filed a notice of appeal from this court's order of March 15, 2004, which dismissed one claim as without legal merit and severed the remaining claims of each of the plaintiffs pursuant to Fed. R. Civ. P. 21. In addition, Cole has moved for a stay of the proceedings in this case until the court of appeals rules on the appeal.

Ordinarily, a decision is not appealable unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Coopers & Lybrand v.

Livesay, 473 U.S. 463, 467 (1978). The March 15 decision in this case did not end the litigation on its merits. The order dismissed as without legal merit one of plaintiffs' claims and separated plaintiffs' remaining claims into individual lawsuits that may be litigated to completion. Plaintiff Cole may file a notice of appeal from the March 15 only if I modify the order to include a finding that the order is appealable pursuant to 28 U.S.C. § 1292. For that reason, I construe plaintiff's "notice of appeal" as a motion to modify the March 15, 2004 order to include a finding that the order is appealable immediately under 28 U.S.C. § 1292. The motion to modify will be denied.

28 U.S.C. § 1292 states in relevant part,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling 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, he shall so state in writing in such order.

There is not a substantial ground for a difference of opinion on the question whether it was an abuse of the court's discretion to sever plaintiffs' claims under the circumstances of this case. Moreover, an immediate appeal will not materially advance the ultimate termination of this litigation, whether plaintiff is challenging the decision to sever or the decision to dismiss one of plaintiffs' claims on its merits or both. An appeal at this time will serve only to delay resolution of the action.

Because I am denying plaintiff's motion to modify the March 15 order § 1292 to include a finding that it is appealable under § 1292, plaintiff's motion for a stay of proceedings pending an appeal will be denied as moot.

ORDER

IT IS ORDERED that plaintiff's motion to modify the March 15, 2004 order to include a finding that the order is appealable under 28 U.S.C. § 1292 is DENIED.

Further, IT IS ORDERED that plaintiff's motion for a stay pending appeal is DENIED as moot.

Entered this 30th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge