

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
:  
IN RE SEPTEMBER 11 LITIGATION :  
:  
-----X

**MEMORANDUM AND ORDER**  
**DENYING CERTIFICATION FOR**  
**INTERLOCUTORY APPEAL**

21 MC 97 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

In an Opinion and Order dated September 9, 2003, I denied the motions of three sets of defendants to dismiss the complaints against them, consolidated in In re September 11 Litigation, 21 MC 97 (AKH). I held that defendants had failed to show why they should be dismissed from the cases against them, even before they filed Answers in the individual cases, or they or the plaintiffs presented proofs with respect to the defendants' negligence and related acts of fault, and with respect to the proximate causes of the deaths, personal injuries and property damage that plaintiffs suffered.

Defendants now move for certification under 28 U.S.C. § 1292(b), seeking leave to appeal to the United States Court of Appeals for the Second Circuit even though there has not been a final judgment in the case (or even an order not subject to later consideration after discovery has been taken and the parties have developed a record). I deny defendants' motions as premature. Defendants will have ample opportunity, after discovery, to renew their motions upon a record that can adequately present the full factual context relevant to the issues of duty, the reasonable expectations of the parties in relation to the relevant facts, and the myriad public policies that must be considered to fix the points where duty begins and ends.

One other group of defendants, the airport security companies (Globe Airport Services, Inc., Globe Aviation Services Corporation, Huntleigh USA Corp., and Argenbright Security, Inc.), who were part of the Aviation Defendants' motion, move separately, asking to be

separated from the group of Aviation Defendants of which they were part in order to renew their motion after discovery, by a motion for summary judgment. I grant that motion and, as is clear from what I say, that right is available to all defendants.

### Discussion

Federal practice is strongly biased against interlocutory appeals. Appeals from interlocutory orders prolong judicial proceedings, add delay and expense to litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions. See Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996). In federal courts, the district judge may re-visit earlier decisions and reconsider their wisdom in light of factual and procedural developments in pre-trial and trial proceedings. DiLaura v. Power Authority of State of N.Y., 982 F.2d 73, 76 (2d Cir. 1992) (doctrine of law of the case does not limit court's power to reconsider its own decisions prior to final judgment, particularly in light of the availability of new evidence). Such flexibility, and the sound jurisprudence that it promotes, is compromised by undue liberality in allowing interlocutory appeals. See In re Doe, 546 F.2d 498, 502 (2d Cir. 1976) (refusing to review the denial of a motion to enjoin a grand jury investigation where, in the district judge's discretion, a colorable basis existed and alternative remedies may be available later in the case).

28 U.S.C. § 1292(b) thus provides for limited interlocutory appeals. A district judge may certify an order for interlocutory appeal if the “order involves a controlling question of law, as to which there is substantial ground for difference of opinion,” and where an immediate appeal may “materially advance the ultimate termination of the litigation,” 28 U.S.C.

§ 1292(b). Interlocutory appeal “is a rare exception” where, in the discretion of the district judge, it “may avoid protracted litigation.” Koehler v. Bank of Bermuda Limited, 101 F.3d 863, 865-66 (2d Cir. 1996). The assessment must be “carefully” made, to avoid too many appeals by too many disappointed litigants who could argue that a different ruling by the district judge would end a litigation and save much expense. See SEC v. Credit Bancorp, Ltd., 103 F. Supp. 2d 223, 226 (S.D.N.Y. 2000). The wisdom of federal practice, unlike the practice in many states, is that cases are more swiftly processed and more economically run, and appellate decisions are more wisely made, if appeals await a final judgment in the district court. Thus, the district judge has “unfettered discretion to deny certification of an order for interlocutory appeal even when a party has demonstrated that the criteria of 28 U.S.C. § 1292(b) are met,” Gulino v. Board of Education, 234 F. Supp. 2d 324, 325 (S.D.N.Y. 2002) (quoting Nat’l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 162 (E.D.N.Y. 1999)).

Under New York law, the law governing the cases against both the Aviation Defendants and the World Trade Center defendants, the “duty point” is fixed by balancing factors of substantial moment and complexity: “the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 192 (N.Y. 1994). I discussed each of these factors in some detail, but without the benefit of a record. The Aviation Defendants conceded that they had a duty to passengers, and admitted that they had assumed a duty in the past to ground victims, but argued that “a law of extraordinary consequences” could draw a distinction. (Tr. of May 1, 2003, at 8.) The World

Trade Center defendants conceded that they owed a duty reasonably to assure the safety of occupants and business invitees, but argued that their conceded duty should not apply to the consequences of the terrorist-related aircraft crashes.

I held that defendants had not shown a principled basis for the distinctions they sought to draw. Indeed, there is even substantial dispute as to what is the right question to ask. With regard to the Aviation Defendants, why would a duty that extended to ground victims where an airline had operated or maintained a plane negligently, not extend to ground victims who were killed by a hijacked plane also involving negligence of the Aviation Defendants? With regard to the World Trade Center Defendants, why would a duty to safeguard a building's occupants against large-scale fires be suspended if the fires were caused by terrorist hijackings?

And there are many other questions that could affect how duty might be formulated, in what contexts, and to whose benefit. With regard to the Aviation Defendants, was the nature and scope of the screening that took place the same at each of the three airports? What did federal regulations prescribe and in what circumstances? Did screening extend to materials brought aboard airplanes by maintenance people or non-passengers, or left aboard by passengers in previous flights? Could certain materials pass through accepted methods of screening? Were different hijacking scenarios considered, and different dangers evaluated? What dangers were perceived by those establishing the procedures for screening and the coverage of such procedures with regard to all those who had access to, or would come aboard, passenger airplanes?

The same is true with regard to the arguments of the Port Authority. The several complaints that have been filed make extensive claims, with each such claim potentially

affecting the existence, extent, and scope of duty. To what extent, if any, should the original design and construction of the Twin Towers, and the dangers and risks that were then contemplated, be in issue? What were the consequences of changes in insulating materials, in creating and maintaining clear evacuation paths, in the integrity and strength of stairway walls, in internal communications, and the like? How did the owners and managers of the Towers strategize about evacuation and security needs in the aftermath of the 1993 terrorist-caused explosions in the garage beneath the Towers and following other fires and emergencies in the buildings?

Unquestionably, the questions of law to be decided will be better defined, and thus better resolved, by development of the record. The contentions of the parties often change as pre-trial proceedings progress, with some claims being abandoned, others stressed, and some presented only as context and background. Defendants' motions to dismiss, however, asked me to rule on the issue of duty owed to various categories of plaintiffs at a very early stage of the litigation, on the pleadings alone and before any discovery. While the existence of duty is a question of law, the considerations that affect the issue of duty are factually complex, involving extensive inquiries into public policy, the relative expectations of the parties, and material concerns of equity, fairness, and risk allocation. See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001); Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 192 (N.Y. 1994). Clearly, the parties will be aided in briefing by a developed record after discovery, as will any appellate court that reviews my determinations. Indeed, the issue of duty frequently awaits trial and verdict before it is decided. As I observed in my decision, "The defendants may well be able to show at a later state in this litigation that the

conduct of the terrorists ‘so attenuates defendants’ negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendants.’” In re September 11 Litigation, 2003 U.S. Dist. LEXIS 15522 at \*54-55 (quoting Kush v. City of Buffalo, 449 N.E.2d 725, 729 (N.Y. 1983)).

In Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001), the Court of Appeals addressed the issue of duty of gun manufacturers to victims of gun violence following full development of the record, including trial. The court drew on facts developed during the litigation, such as the fact that weapons causing death or injuries to victims pass through numerous links in a distribution chain, from manufacturer, to distributor or wholesaler, to the first retailer, and finally to subsequent legal purchasers or thieves. It concluded that “[g]iving plaintiffs’ evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff [] came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.” Id. at 1062. The court also relied on the failure by plaintiffs to proffer evidence supporting imposition of duty, including: “evidence tending to show to what degree their risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society,” id. at 1062; evidence “showing any statistically significant relationship between particular classes of dealers and crime guns,” id. at 1063; or evidence that a manufacturer knows or has reason to know that certain distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis, see id. at 1064.

Similarly, in Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189 (N.Y. 1994), the New York Court of Appeals drew on the evidence developed in the case to hold that a

maintenance company hired by a hospital owed a duty to a nurse who was hurt when a fan fell from the wall. The court, considering the matter after the return of a jury verdict for the plaintiff, closely examined the record and found that “[u]nder the circumstances and evidence adduced in this case, we conclude that Servicemaster assumed a duty to act.” Id. at 191. The court ruled that duty existed because “plaintiff proved not only that Servicemaster undertook to provide a service to Ellis Hospital and did so negligently, but also that its conduct in undertaking that particular service placed Palka in an unreasonably risky setting greater than that, had Servicemaster never ventured into its hospital servicing role at all.” Id. at 194. The court distinguished Palka from past precedent, declining to find duty by finding that Servicemaster’s agreement was comprehensive and exclusive.

As in Hamilton and Palka, I believe that a factual record will facilitate intelligent review and authoritative determination of the issues of duty raised by these cases. A factual record is even more vital in this litigation because so little is known about many of the causes and consequences of September 11, 2001, and thus the parameters of possible duties owed to the plaintiffs and the chain of events leading to the injuries, deaths, and property damage have not yet been clarified. Without more than the pleadings, a precise formulation of the issues cannot be put forth and tested against the law.

The same considerations obtain with regard to the motion of Boeing. Boeing argues that an interlocutory appeal is necessary to define “the outer limits of product liability law with respect to duty, foreseeability, proximate and superceding cause, as well as the interplay of state law and Federal law under the [Air Transportation and Systems Stabilization] Act.” (Letter from Ropes & Gray of 9/17/03 at 1-2.) Boeing’s statement of purpose itself provides the ground

against interlocutory appeal. Questions of such complexities, gravity and scope require a clear and detailed record of the factual context for necessary and appropriate judicial rulings. What were the standards and purposes for designing cockpit doors? What were the instructions given to pilots in the event of hijackings of airplanes during flight, and what was reasonably expected of pilots, co-pilots and crew? On what factual basis does Boeing argue that the risk of death or serious injury to passengers and ground victims from a hijacking was not reasonably foreseeable? The case on which Boeing relies, Baltimore & Ohio Railroad Co. v. Patterson, 129 S.E.2d 1 (Va. 1963), apart from being distinguishable, as I discussed in my decision, made its rulings based on a full record, after trial.

There is another point to be considered. Second Circuit procedure allows for referral of novel and difficult questions of state law to the highest state court, for decision. See 2d Cir. R. § 0.27. In the case at bar, three highest courts would be involved, the New York Court of Appeals, the Pennsylvania Supreme Court, and the Virginia Supreme Court.<sup>1</sup> It would not be sound jurisprudence to refer the important questions of this case on an uncertain record and a hesitant set of questions to three highest state courts for separate, but related, rulings.

I hold, accordingly, that certifying the September 9, 2003 Opinion and Order for interlocutory appeal is not appropriate at this time. The basic task of the district court is to create a full record to support necessary and appropriate rulings of law. Appellate review will be appropriate after, and not before, such a record is created.

---

<sup>1</sup> Each of these courts would appear to accept certification from the U.S. Court of Appeals for the Second Circuit. See N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17 (2003); Pa. Sup. Ct. Internal Operating Proc. R. 1(b) (2003); Va. Sup. Ct. R. 5:42 (2003).

