OVERRIDDEN BY
YANG Bi Kei, CV NO. 91-0025
ORDER OF 31 MAR 92

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

WILAIPORN SRISUWAN et al, Plaintiffs, v. ONWEL MANUFACTURING (SAIPAN) LTD., Defendants.	Civil No. 91-0014 DECISION AND ORDER DISMISSING PENDENT CLAIMS

THIS MATTER came before the Court for hearing on July 19, 1991 of defendant's motions to dismiss or stay the entire action and to dismiss or strike reference to the class action. This case involves claims for declaratory judgment and relief under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 216(b) (1988), as well as pendent jurisdiction claims under the laws of the Commonwealth of the Northern Mariana Islands (CNMI). Plaintiffs were represented by Lecia Eason of Wiseman and Eason. Defendant was represented by Robert O'Connor. Plaintiffs conceded that this case could not be certified as a class action in the absence of additional plaintiffs, and that this case would proceed solely on the claims of the three (now four) named plaintiffs.

A parallel administrative proceeding, also brought by plaintiffs, was previously instituted before the Department of

Commerce and Labor of the CNMI. The "primary jurisdiction doctrine" does not require or permit this court to refrain from exercising jurisdiction over concurrent federal claims simultaneously with a local administrative agency exercising jurisdiction over local claims, even though the claims arise out of the same facts and have similar remedies. Abstention from the independent federal FLSA claims is not appropriate, notwithstanding the inefficiency and possible waste of judicial resources caused by duplicative litigation. Therefore, the motions to dismiss or stay the entire action are DENIED. However, because the pendent claims are not yet ripe due to plaintiffs' failure to exhaust administrative remedies, those claims are, without prejudice, DISMISSED.

DEFENDANT'S REPLY MEMORANDUM

As a threshold question, plaintiffs objected that defendant's reply memorandum improperly raised for the first time the issue of pendent jurisdiction, or lack thereof, over the CNMI claims. The defendant's original memorandum of points and authorities focused on the doctrine of primary jurisdiction as a basis for dismissing or staying the proceedings. However, a review of that memorandum discloses that staying the pendent claims is argued for on page 2, lines 21-23 (last clause), page 4, lines 18-24 (final ¶), and page 5, lines 1-7, albeit without citation to case or statutory authority, or explicit mention of abstention or exhaustion of remedies.

In its reply memorandum, defendant argues that this court may not exercise pendent jurisdiction over the CNMI claims until the Department of Commerce and Labor has acted. Reply Memorandum at 4-8. While never using the term "exhaustion of remedies," that is the legal basis for defendant's assertion of lack of jurisdiction over the pendent claims. This is so notwithstanding the fact that defendant stresses that the doctrines of primary jurisdiction and exhaustion of remedies are often confused, and points out the difference between the two. Memorandum at 3. Here, the situation is complicated by the presence of very similar federal and local claims.

In its reply memorandum, defendant for the first time cites 3 Commonwealth Code (CMC) §4434(f), which requires exhaustion of administrative remedies before bringing suit in the CNMI Superior Court for Minimum Wage and Hour Act (4 CMC §9211 et seq.) or Non-resident Workers Act (3 CMC §4411 et seq.) violations. The pendent local claims are such violations. At oral argument, defendant also used the word "abstention" for the first time, invoking the Colorado River doctrine. See Colorado River Water Conservation District v. U.S., 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d. 483 (1976).

The failure of the defendant to raise jurisdictional objections does not grant this court jurisdiction where none exists. Subject matter jurisdictional objections are never waived and may be raised at any time. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1194 n.2 (9th Cir. 1988); C. Wright &

A. Miller, Federal Practice and Procedure §1350 nn.11 & 15 (2d ed. 1990). This court may raise defects in jurisdiction sua sponte. Id. In the interests of due process, plaintiffs were granted leave to file a supplemental opposition concerning the propriety of the pendent claims, and a status conference was held a week later on July 26, 1991. Thus, the court will consider all arguments on their merits.

PRIMARY JURISDICTION DOCTRINE

Under the doctrine of primary jurisdiction, "[w]hen there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Translantic, 400 U.S. 62, 68, 91 S.Ct. 203, 208, 27 L.Ed.2d. 203, 208-209 (1970). A district court does not have any element of discretion in applying the primary jurisdiction doctrine. "[A]n issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination. Failure to defer when the doctrine so mandates is reversible error [citation], as is deferral in inappropriate situations [citation]." U.S. v. General Dynamics Corp., 828 F.2d 1356, 1364 n.15 (9th Cir. 1987). Four factors are required to invoke the doctrine: (1) the need to resolve an

issue that (2) has been placed by Congress within the jurisdiction of an administrative agency having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. General Dynamics, 828 F.2d at 1362.

If the doctrine applies, the judicial process is suspended and the issues are referred to the appropriate administrative body for its views. U.S. v. Western Pacific Railroad, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d, 126, 132 (1956), quoted in U.S. v. Yellow Freight System, 762 F.2d 737, 739 (9th Cir. 1985) and Farley Transportation Co., Inc. v. Santa Fe Trail Transportation Co., 778 F.2d 1365, 1370 (9th Cir. 1985). Thus, if the defendant's theory is correct, this court would have to wait for up to two years in every FLSA case while awaiting CNMI Department of Commerce and Labor action.

Defendant is correct that the doctrine has been applied by federal courts in favor of state administrative agencies. Palmer v. Massachusetts, 308 U.S. 79, 60 S.Ct. 34, 84 L.Ed. 93 (1939) (passenger line abandonment in railroad bankruptcy). However, Congress never granted enforcement of the FLSA to the states. 29 U.S.C. § 216(b) does allow employers to bring suit in either state or federal court,[1] at least prior to the filing of a complaint by the U.S. Secretary of Labor, but it sets forth

[1]The relationship between the U.S. and CNMI courts is the same as that of U.S. and state courts. 48 U.S.C. § 1694c(a).

or implies no role for any state agency or the CNMI Department of Commerce and Labor. Therefore, the doctrine of primary jurisdiction is not applicable to this case.

PENDENT JURISDICTION

This court undoubtedly has the power to hear the CNMI claims under the concept of pendent jurisdiction. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d. 218 (1966); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3567.1 (2d ed. 1984 & Supp. 1991) (hereafter Wright, Federal Practice). However, the exercise of the power to hear pendent claims is discretionary. Id. Defendant urges the court to apply that discretion to decline to hear the CNMI claims.

Yet where, as here, the claims "derive from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding," Id., judicial economy strongly counsels against declining to exercise pendent jurisdiction. Therefore, this court will not stay or dismiss the pendent claims on the basis of its discretionary authority to do so.

ABSTENTION

The administrative action before the CNMI Department of Commerce and Labor was filed four days prior to this case. Defendant urged at oral argument that this case be stayed or

dismissed to avoid duplicative litigation, relying on Colorado River Water Conservation District v. U.S., 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d. 483 (1976). The Colorado River factors counseling abstention were supplemented in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d. 765 (1983). Thus, in seeking "exceptional circumstances" justifying abstention, the factors to be considered are: jurisdiction over any res or property, convenience of the forum, avoidance of piecemeal litigation, chronological priority of jurisdiction, presence of federal law issues, and the inadequacy of local remedies. Id.; see generally Wright, Federal Practice §4247 (2d ed. 1988 & Supp. 1991).

Here, there is no property involved, and both CNMI and federal courts are equally convenient geographically. However, counsel have noted that resolution of the issues before the CNMI Department of Labor and Commerce will likely take up to two years. It is true that the FLSA claims are within the concurrent jurisdiction of the federal and CNMI courts, and piecemeal litigation could be avoided by dismissing or staying the entire case. However, prompt resolution of all possible issues by this court and the principle of res judicata would also serve judicial economy and avoid piecemeal litigation. The four day priority of the CNMI Department of Labor and Commerce is not dispositive; the administrative proceeding is a long way from ever getting to the CNMI Superior Court. The FLSA is, of

course, a federal law. Because Congress has granted state courts concurrent jurisdiction over the FLSA, CNMI courts can provide perfectly adequate remedies. Indeed, plaintiffs argue that the Department of Commerce and Labor can provide additional remedies through its control of immigration work permits and ongoing administrative supervision and monitoring.

On balance, the "exceptional circumstances" required to cause this court to surrender its jurisdiction are not present. Nor is forum shopping, alone, grounds for Colorado River abstention. Federal Deposit Ins. Corp. v. Nichols, 885 F.2d 633, 637-38 (9th Cir. 1989). Since Colorado River abstention does not apply under the procedural facts of this case, which could be similar to all claims of FLSA and local labor violations, it is unnecessary to consider if such abstention is ever warranted in favor of an administrative agency, as opposed to a court. This court will not abstain from the case under the Colorado River doctrine.

EXHAUSTION OF REMEDIES

3 CMC §4434(f) expressly requires exhaustion of administrative remedies before bringing suit in the CNMI Superior Court for violations of the CNMI Minimum Wage and Hour Act (4 CMC §9211 et seq.) or CNMI Non-resident Workers Act (3 CMC §4411 et seq.), such as the pendent claims in this case. 3 CMC §4434(f) provides:

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> Notwithstanding 1 CMC §9112, no civil action may be brought by a non-resident worker after the effective date of this Act against an employer for violation of the Minimum Wage and Hour Act (4 CMC §9211 et seq.) and/or the Non-resident Workers Act (3 CMC §4411 et seq.) unless the non-resident worker has first filed a written complaint concerning those violations with the Chief of Labor no later than 30 days after the violation is alleged to have occurred. Said civil action, if any, shall be commenced in any court only after the Director or his designee, after a hearing, has issued a decision on the complaint favorable to the non-resident worker and the employer fails or refuses to pay any assessment made by the Director within ten days after receiving notification of the Director's decision, the entire sum of money that the decision says is owed by the employer to the employee. Such payment shall be made through the Director.

Therefore, the local claims are not ripe before the CNMI Superior Court because of failure to exhaust administrative remedies. Likewise, this court may not entertain pendent statutory claims until the terms of the relevant statute are complied with. Indeed, Article III of the U.S. Constitution requires the existence of a "case or controversy" for adjudication before federal courts. If the Director finds in the employees' favor, the defendant employer could well pay the amount due and no lawsuit would be possible or necessary.

The relevant CNMI statutes provide only one avenue of relief, via the Department of Commerce and Labor. This is not a situation in which a statute grants alternative forums, and the election of the administrative route forecloses premature judicial relief even in the absence of a statutory exhaustion of remedies provision. Rivera v. U.S. Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987); but see Stevens v. Department of the

Treasury, ___ U.S. ___, 111 S.Ct. 1562, 114 L.Ed.2d. 1 (April 24, 1991) (unresolved split among circuits).

Thus, this court must dismiss the unripe claims. Although the existence of duplicate administrative and judicial proceedings going forward simultaneously in federal and local forums could lead to a waste of resources, it is probable that discovery in one forum will be identical to that in the other, minimizing the need for additional work. The outcome of the first proceeding to conclude will likely be res judicata as to the latter. Regardless, this court has no power to consider unripe claims.

It should be noted that such dismissal will not harm the plaintiffs' claims insofar as the statute of limitations is concerned. By filing with the CNMI Department of Commerce and Labor, the plaintiffs have tolled the statute for filing in the CNMI Superior Court. Because plaintiffs may also wish to bring the pendent claims back before this court, assuming they ever ripen and are not disposed of by the outcome of the FLSA claims, the dismissal of the pendent claims is without prejudice.

CONCLUSION

This court may not dismiss the entire case or any part of it on the grounds of the primary jurisdiction doctrine or Colorado River abstention. Discretionary dismissal of the pendent claims is not called for because of the policy favoring resolution of all claims in a single forum if at all possible,

thus promoting judicial economy. However, this court may not consider cases which are not ripe because of failure to exhaust administrative remedies.

Accordingly, the motions of defendant to dismiss or stay the entire action are DENIED. As stipulated at oral argument, this case will not be certified as a class action. Because the pendent claims are not yet ripe due to plaintiffs' failure to exhaust CNMI administrative remedies, those claims are, without prejudice, DISMISSED.

IT IS SO ORDERED.

DATED this 30th day of July, 1991.

ALEX R. MUNSON
Judge

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