

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KADIAN NOBLE,

Plaintiff,

v.

HARVEY WEINSTEIN, BOB WEINSTEIN,
THE WEINSTEIN COMPANY LLC, and
WEINSTEIN COMPANY HOLDINGS, LLC,

Defendants.

1:17-cv-09260 (RWS)

DEFENDANT HARVEY WEINSTEIN'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO CERTIFY THE AUGUST 14, 2018 OPINION AND ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B) AND TO STAY PROCEEDINGS PENDING RESOLUTION OF § 1292(B) PROCEEDING

Defendant Harvey Weinstein, by and through his counsel of record, submits the following reply Memorandum of Law in Support of His Motion to Certify the August 14, 2018 Opinion and Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Proceedings Pending Resolution of § 1292(b) Proceeding (Docs. 88-90) and in opposition to Plaintiff's Memorandum of Law In Opposition to Defendant Harvey Weinstein's Motion to Certify the August 14, 2018 Order for Interlocutory Appeal (Doc. 97). For the reasons set forth below and in the moving papers, Defendant Harvey Weinstein's Motion should be granted in its entirety.

Preliminary Statement

Defendant Harvey Weinstein has demonstrated exceptional circumstances for interlocutory appeal of the Court's August 14, 2018 Opinion (Doc. 84) as it pertains to the denial of his motion to dismiss Plaintiff's sex trafficking claim. As this Court recognized in its opinion, whether the Trafficking Statute, 18 U.S.C. § 1591, *et seq.*, applies in the absence of trafficking and an actual *quid pro quo* exchange of economic value is a matter of first impression. Moreover, in the event

the Second Circuit Court of Appeals agrees that Section 1591 should not be extended to apply to an alleged sexual assault arising from what the Court here characterized as the “casting couch,” the case is not only dispositive as to Harvey Weinstein, it is over. The Order also raises a constitutional challenge to the Trafficking Statute by creating a civil remedy for all sex crimes that lack economic activity and/or a commercial basis that are based on alleged false promises of future benefits rather than on immediate or future harm, which is a novel and expansive interpretation of the Trafficking Statute for which there is no precedent.

Lastly, in the interests of justice and to conserve resources, the underlying action should be stayed pending resolution by the Second Circuit Court of Appeals. The *status quo* will simply be maintained until a ruling by the Court of Appeals; thus, there will be no prejudice to Plaintiff, who filed this action outside the limitations period for sexual assault and who attempts to bootstrap the Sex Trafficking statute as a vehicle for monetary recovery against Harvey Weinstein. Accordingly, because Harvey Weinstein has presented a clear case for immediate interlocutory review that has not been adequately opposed by Plaintiff, the motion should be granted in all respects.

Argument

I. THE COURT’S ORDER EXTENDING THE TRAFFICKING STATUTE TO ALLEGED SEXUAL ASSAULTS LACKING ECONOMIC ACTIVITY IS A MATTER OF FIRST IMPRESSION RIPE FOR APPELLATE REVIEW

In her opposition memorandum, Plaintiff wholly ignores the Court’s finding in its Order that applying the Trafficking Statute to claims in which no economic activity occurred in connection with the purported sex act “requires navigating *uncharted waters*.” Order, p. 28 (emphasis added). Plaintiff also fails to remark upon the Court’s finding that Plaintiff’s “allegations present an extension of an element of Section 1591 on which *there is little to no prior authority*.” *Id.* (emphasis added). Instead, Plaintiff erroneously asserts that Harvey Weinstein’s motion is based solely on his assertion that the Court’s ruling is in error and therefore seeks reversal by the Second Circuit, relying primarily on *In re Facebook, Inc.*, 986 F. Supp. 2d 524 (S.D.N.Y.

2014). While *Facebook* sets forth the grounds for § 1292(b) certification, it does not support Plaintiff's opposition.

In *Facebook*, the defendants challenged the Court's denial of their motion to dismiss based on the sufficiency of the plaintiff's pleadings. In denying the defendants' motion for § 1292(b) certification, the *Facebook* Court determined that, unlike here, a reversal of the motion to dismiss order "may not dispose of all issues, which would not streamline discovery." 986 F. Supp. 2d at 532. Thus, the Court found, "[i]f any of the claims are not dismissed on appeal, the litigation will continue to advance in substantially the same manner as if the interlocutory appeal had never occurred." *Id.* Further, the *Facebook* Court also held that, unlike here, the issue for which interlocutory appeal was sought did *not* involve a controlling issue of law which "the reviewing court 'could decide cleanly without having to study the record.'" *Id.* at 535-36 (citing *In re Worldcom*, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2013) (quoting *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000)).

Contrary to Plaintiffs' assertion in opposition, the fact that Harvey Weinstein seeks interlocutory review of the Court's Order based on arguments set forth in his motion to dismiss does not defeat this instant motion. As shown above, here the Court itself has recognized that there is little or no prior authority extending Section 1591 to sex acts that lack a commercial or economic component. Thus, although interlocutory review is rare and only granted in exceptional cases, this is a case where it is justified. On the issue of first impression presented here, the appellate court may well construe the Trafficking Statute more literally than this Court and find that non-trafficking conduct in which the promised "thing of value" is a "career-making and life-changing" film role (Order, p. 30)—rather than the promise to be free from harm or conduct that threatens the victim's physical well-being and livelihood, as is found in reported civil sex trafficking cases—falls outside the civil remedy provisions of the statute.

Accordingly, because the Order at issue arises from the navigation of "uncharted waters," the issue for which interlocutory review is sought is exceptional.

II. REVERSAL OF THE COURT'S ORDER WILL NECESSARILY TERMINATE THIS CASE

Plaintiff attempts to contradict Harvey Weinstein's assertion that interlocutory review may result in the termination of this litigation by claiming that the appellate court would benefit from a full record. Yet Plaintiff fails to cite what, exactly, the "full record" would contain that could assist the appellate court other than what she has already pleaded in her complaint. As discussed above and in the moving papers, the Second Circuit's resolution of the issue of whether the Trafficking Statute applies to the non-trafficking type of conduct alleged here has the potential to terminate the litigation.¹ See 28 U.S.C. § 1292(b). The *Facebook* case cited in Plaintiff's opposition does not hold otherwise because the issue there was not dispositive of the action. In *Facebook*, the Court found, in rejecting a request to certify under Section 1291(b), "a dismissal on appeal of both issues would not end the multidistrict litigation" and recognized that "the appeal could at most lead only to a remand for repleading." 986 F. Supp. 2d at 531 (citing *In re Manhattan Inv. Fund Ltd.*, 288 B.R. 52, 56 (S.D.N.Y. 2002)). Here, in contrast, reversal of the Court's statutory construction of the Trafficking Statute would not result in "a remand for repleading," nor does Plaintiff claim that it would.

Plaintiff's reliance on *Goldberg v. UBS AG*, 690 F. Supp. 2d 92 (S.D.N.Y. 2010), is also misplaced. In *Goldberg*, a case brought under the civil remedies provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333(a) (the "ATA"), the Court denied the defendant's motion to certify for interlocutory appeal several issues raised in the defendant's motion to dismiss, including the proper interpretation of the phrase "substantially the same" under the ATA as applied to remedies offered by Israeli courts compared to those available in American courts. The Court's ruling did not hinge on whether the litigation would terminate in the event the appellate court disagreed with the district court's interpretation. Rather, the court denied the motion because the defendant could not "show

¹ The Court granted Defendant Robert Weinstein's motion to dismiss Counts III and V of the Amended Complaint alleged against him. Order, pp. 36-43. Further, as of the date of this Motion, Plaintiff has still not filed a motion for relief from the bankruptcy stay as to Defendants The Weinstein Company LLC and Weinstein Company Holdings, LLC.

that there is a substantial reason to doubt the correctness of Judge Sifton's conclusion that defendant UBS' conduct is subject to the ATA, or to conclude that the question *is a difficult issue of first impression warranting certification.*" 690 F. Supp. 2d at 106 (emphasis added).²

In addition, given the fact that the Court's opinion with respect to expanding Section 1591 is essentially untested, it is curious that Plaintiff would argue against an interlocutory appeal at the outset of the litigation. It would certainly be in the parties' and the Court's best interest to preserve judicial resources at the pleading stage and to avoid expensive discovery efforts in the event the Order is reversed.

III. A STAY IS APPROPRIATE PENDING INTERLOCUTORY REVIEW

If the Court certifies the Order for a § 1292(b) appeal, the case should be stayed in this Court until the Second Circuit resolves that appeal. The Court has not issued a case management order, and the parties have not initiated discovery. Thus, a stay will not change the *status quo* in this case. In her opposition, Plaintiff claims that other pending cases against Harvey Weinstein are in the discovery phase, and requests that discovery efforts be coordinated with those other cases. However, no discovery is proceeding against Mr. Weinstein in the other civil cases and, due to the pending criminal charges against Harvey Weinstein, he will petition to stay discovery against him in each of the courts in which civil claims are brought until such time as the criminal charges are resolved. Further, even if Harvey Weinstein's request to stay discovery in other cases is denied, there is no dispute that discovery into events alleged to have occurred years ago in varied locations in the United States and in foreign countries (such as those alleged here) will be expensive and time-consuming. A stay will defer, and potentially moot, all of this burden and expense.

Lastly, there is no prejudice to Plaintiff if a stay is granted. Plaintiff waited four years after the alleged incident to file her complaint for sex trafficking, which was well after the statutes of

² The *Goldberg* Court also denied certification because the issue posed by the defendant, unlike the issue here, was "an inquiry requiring resolution of disputed facts rather than an issue of pure law. . . ." 690 F. Supp. 2d at 1111.

limitation had expired on her traditional sexual assault claims. An immediate appeal will test the applicability of the Trafficking Statute to her claim, which lacks a commercial component, and will provide the Court of Appeals the opportunity to issue a definitive ruling on the law of this Circuit. Consequently, considerations of case management and equity weigh in favor of a stay of this action.

Conclusion

WHEREFORE, for the reasons set forth above and in the moving papers, Defendant Harvey Weinstein respectfully requests that the Court grant his motion in its entirety.

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Los Angeles, California

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