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United States District Court,
W.D. New York.

Courtney DAVIS, Employees Committed for Justice, Olin Singletary, Gladys Alston and Carrie Rice, et al., Plaintiffs,
v.
EASTMAN KODAK COMPANY, Defendant.

No. 04–CV–6098.
|
July 19, 2007.

Attorneys and Law Firms

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DECISION AND ORDER

JONATHAN W. FELDMAN, United States Magistrate Judge.

***1** On March 29, 2007, this Court granted Kodak's motion for summary judgment with respect to three individual plaintiffs, Olin Singletary, Gladys Alston and Carrie Rice. *Davis v. Eastman Kodak Company,* 2007 WL 952042 (W.D.N.Y. March 29, 2007). My decision was based on agreements Singletary, Alston and Rice signed at the end of their employment with Kodak that released Kodak from the very race discrimination claims they sought to pursue by commencing this lawsuit. Now pending before the Court is a motion by Singletary, Alston and Rice ("plaintiffs") to amend the Court's Order dismissing their claims. (Docket # 232). In the alternative, Singletary, Alston and Rice ask this Court to enter a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure so as to allow them the immediate right to appeal the Court's decision dismissing their claims.

The facts relevant to the instant motion are fully set forth in this Court's prior Decision and Order, and need not be repeated in detail here. Plaintiffs' motion to amend respectfully alleges that the Court committed "a number of clear legal errors" in its decision granting summary judgment. First, plaintiffs allege that the Court erred in applying the federal common law principles of tender back and ratification in considering the plaintiffs' release of their federal claims. Second, plaintiffs claim that the Court failed to adequately consider the applicability of ERISA regulations to their argument that the releases were not supported by adequate consideration. Finally, plaintiffs contend that the Court "did not fully appreciate our disparate impact argument" and refer the Court to the Third Circuit's decision in *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719 (3 rd Cir.1995).

Before turning to the merits of the plaintiffs' application, it is useful to consider the standard upon which the motion is to be evaluated. While Rule 59(e) covers a broad range of motions, I construe the instant application as a motion to reconsider or alter my March 29, 2007 ruling. The standard for granting a motion for reconsideration is strict. *See Shrader v. CSX Transp.,* Inc., 70 F.3d 255, 257 (2d Cir.1995). A reconsideration motion "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Id. See also Munafo v. Metropolitan Transp. Authority,* 381 F.3d 99, 105 (2d Cir.2004) ("district courts may alter or amend a judgment to correct a clear error of law or prevent manifest injustice") (internal quotations omitted). A "motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id. See also In re Health Management Systems Inc. Securities Litigation,* 113 F.Supp.2d 613, 614 (S.D.N.Y.2000) (reconsideration is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources") (citation omitted). A Rule 59(e) motion is "not intended to be a vehicle for a party dissatisfied with a court's ruling to advance new theories that the movant failed to advance in connection with the underlying motion, nor to secure a rehearing on the merits with regard to issues already decided." *USA Certified Merchants, LLC v. Koebel,* 273 F.Supp.2d 501, 503 (S.D.N.Y.2003). Because I do not believe my previous decision (1) overlooked factual matters or controlling decisions that if considered would have required a different result or (2) put into effect a manifest injustice, I decline to reconsider or amend my previous decision granting summary judgment against the three plaintiffs at issue here.

***2** *Applicability of New York Substantive Law:* Singletary, Alston and Rice argue that the Court erred by not applying a particular New York statutory provision when it considered the validity of the releases they signed. In so arguing, plaintiffs rely on § 9(e) of the release which provides "[t]his Agreement shall be construed and governed by the laws of the State of New York." *See* Plaintiffs' Exhibit A at page 5. According to plaintiffs, this choice of law provision requires the application of New York law to their federal Title VII claims and, since the tender back doctrine was abolished with the enactment of the New York Civil Practice Law and Rules ("CPLR") § 3004, their claims should not have been dismissed because they failed to tender back their severance pay. *See* N.Y. C.P.L.R. § 3004 (McKinney 1991).

Plaintiffs' argument on the applicability of § 3004 fails to sustain their motion for reconsideration for two reasons. First, plaintiffs could have but failed to raise the choice of law argument in their underlying papers. A motion for reconsideration is not an appropriate forum for raising new theories or arguments. As stated in my original decision:

> The ratification doctrine was raised by Kodak in their moving papers [footnote omitted] and plaintiffs did not address it. Indeed, after oral argument of the instant motion, Judge Larimer issued his decision in *Wright v. Kodak* and this Court requested additional briefing on the applicability of the *Wright* decision to Kodak's motion here. Kodak's supplemental brief again relied on the ratification and tender back doctrines. Plaintiffs chose not to address either doctrine in their supplemental brief.

Davis v. Eastman Kodak Company. 2007 WL 952042 at *9. Even crediting plaintiffs' current assertion that they *did* respond to Kodak's "conflated argument" on ratification and release, there certainly can be no dispute that the response did *not* include their contention that CPLR § 3004 precludes federal courts from applying the tender back doctrine in Title VII cases. *See Frierson–Harris v. Hough,* 2007 WL 1343843, *2 (S.D.N.Y. May 8, 2007) (plaintiff's motion to reconsider was improper where he "did not present in his opposition to the motions to dismiss several of the arguments and state law cases on which he now relies").

More fundamentally, however, plaintiffs' substantive argument is unconvincing. Plaintiffs concede that the Court's March 29 th decision relied on cases within the Second Circuit "that have adopted a tender back rule as a precursor to bringing suit to challenge a voidable contract." *See* Plaintiffs' Memorandum of Law (Docket # 232) at page 7. The cases relied on are more "on point" than plaintiffs give credit. All of the cases relied upon in my original decision applied the tender back doctrine in the context of enforcing releases signed by employee-plaintiffs who sought to sue their employer in *federal* court for alleged employment discrimination pursuant to *Title VII.* Moreover, all were federal cases construing releases signed in New York State where CPLR § 3004 would, according to plaintiffs, require the tender back doctrine to be rejected. *See Tung v. Texaco,* 32 F.Supp.2d 115 (S.D.N.Y.1997), *aff'd,* 150 F.3d 206, 208 (2 nd Cir.1998); *Reid v. IBM Corporation,* 1997 WL 357969 (S.D.N.Y. June 26, 1997); *Livingston v. Bev–Pak, Inc.,* 112 F.Supp.2d 242 (N.D.N.Y.2000); *Cheung v. New York Palace Hotel.* 2005 WL 2387573 (E.D.N.Y. Sept.28, 2005); *Wright v. Eastman Kodak Company* 445 F.Supp.2d 314 (W.D.N.Y.2006).

***3** The purpose of applying federal law to interpreting federal statutory enactments is well settled. Allowing states to apply their own procedural or substantive statutes to actions enforcing federal rights brought in federal court would hamper effective and uniform implementation of protections afforded litigants under federal laws. The effective enforcement of federal statutes, particularly statutes as important as Title VII, "could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." *Dice v. Akron, Canton & Youngstown Railroad Co.,* 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952) (release of rights under Federal Employer's Liability Act (FELA) governed by federal rather than state law). *See Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc.,* 558 F.2d 1113, 1115 (2d Cir.1977) ("It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action.”). *See also Landau v. American International Group. Inc.,* 1997 WL 590854, n. 3 (S.D.N.Y. Sept.23, 1997) (court applied federal law and tender back doctrine in deciding whether plaintiff had released his federal claim); *Grabe v. Ziff Davis Publishing Co.,* 1995 WL 688912, n. 5 (S.D.N.Y. Nov.20, 1995) (same).

Accordingly, I disagree with plaintiffs’ contention that the reference to New York law in § 9(e) of the release “trumps” the otherwise applicable rule that federal law controls the validity of purported releases of causes of action under federal statutes like Title VII. *See Lancer Offshore, Inc. v. Dominion Income Management Corp.,* 2002 WL 441309, n. 4 (S.D.N.Y. March 20, 2002) (although parties’ settlement agreement stated that California law would govern, court applied federal law to release of federal securities claims); *Kenilworth Systems Corp. v. Lindo,* 204 B.R. 665, 669 (E.D.N.Y.1997) (despite defendant’s claim that New York law applied to his release, court held that state law was inapplicable because the release implicated the federal bankruptcy code). *See also Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.,* 448 F .Supp.2d 1172, 1181 (C.D.Cal.2006) (federal courts cannot allow the available defenses to a federal claim to be “dependent on the location of the federal court and the substance of the forum state’s laws. This would frustrate federal courts’ interest in prescribing rules of procedure applicable to federal claims, and in uniformity of federal law.”).[1]

Plaintiffs also argue that the Court incorrectly held that by failing to promptly rescind the releases, plaintiffs ratified them. According to plaintiffs, they did not ratify the releases under New York law because they acted “as quickly as possible” to challenge the release by bringing this lawsuit within the EEOC’s statutory framework. I disagree with plaintiffs’ contention that they rejected the release “as quickly as possible.” The record is clear that plaintiffs accepted and retained substantial monetary benefits from Kodak and took no action to repudiate the releases upon which those benefits were premised until years later when Kodak sought to enforce the releases in this action. As discussed in my original decision: “By intentionally retaining the TAP benefits plaintiffs received in exchange for the release, even after they were aware of the alleged defects involved in procuring the release, Singletary, Alston and Rice have ratified the releases they signed.” *Davis v. Eastman Kodak Co.,* 2007 WL 952042, *9.

***4** *Application of ERISA:* Plaintiffs’ second basis for seeking reconsideration is the Court’s alleged failure to properly apply ERISA in analyzing plaintiffs’ claim that they did not receive adequate consideration in exchange for their releases. Specifically, plaintiffs raise the same argument they did on summary judgment, that Kodak failed to comply with ERISA’s notice requirements before changing its TAP plan to include a release. *See* Plaintiffs’ Memorandum of Law in Further Support at pages 4–5 (Docket # 160); Plaintiffs’ Supplemental Memorandum of Law at pages 2–7 (Docket # 168); Plaintiffs’ Memorandum of Law Concerning the Applicability of *Wright v. Kodak* at page 3 (Docket # 172). The Court considered and rejected plaintiffs’ arguments on this point of contention in its prior decision. *See Davis v. Eastman Kodak Co.,* 2007 WL 952042, *10. Nothing set forth in the motion for reconsideration compels this Court to now adopt plaintiffs’ views.[2] *Disparate Impact:* The third and final basis for plaintiffs’ motion is the allegation that the Court misconstrued plaintiffs’ argument that the release had a disparate impact on Kodak’s African American employees. Plaintiffs base their argument on the fact that upon commencement of the EEOC’s investigation in 1999, Kodak was thereafter on notice that its African American employees might have “ripe and substantial” claims with a “significant, estimatible value” whereas other employees were only waiving “unidentified, hypothetical” claims. *See* Plaintiffs’ Memorandum of Law at page 17.

In support of their disparate impact claim, plaintiffs rely on dicta in *DiBiase v. SmithKline Beecham Corp.,* 48 F.3d 719 (3d Cir.1995). In *DiBiase,* the plaintiff argued that the facially neutral release defendant required its laid off employees to sign in order to receive an enhanced severance package had a disparate impact on older workers because, unlike the younger workers, the older workers were protected by the ADEA, but were required to release any age discrimination claims. DiBiase claimed that the older workers should not have been required to waive their ADEA claims and that having the older and younger workers sign different releases would be “justified because older people as a group would otherwise pay more for the privilege than younger people.” *Id.* at 732. The Third Circuit rejected this argument finding that to embrace it would require an employer “to treat employees unequally in order to treat them equally.” *Id.* Moreover, the *DiBiase* court stated that where an employer “conditioned the right to the expanded benefits on an employee’s blanket waiver of all accrued claims; this treatment cannot be said to be disparate, because it is impossible to tell whose package of potential claims is more valuable.” *Id.* at 730. The releases at issue here were broad general releases[3] and every eligible employee, regardless of race, gender, age, religion, disability or ethnicity had to decide whether to sign the release. *DiBiase* does not support reconsideration.

***5** *DiBiase* was later cited in *Davis v. Precoat Metals, a Div. of Seaua Corp.,* 328 F.Supp.2d 847 (N.D.Ill.2004).

The plaintiffs in *Davis* claimed that defendant's severance agreement had a disparate impact on African American employees because they were required to give up their discrimination claims, but no non-African Americans were negatively affected by the severance agreement. *Id* . at 856. The court rejected the argument:

> although plaintiffs were the only ones who had pending discrimination claims, it does not follow that they were the only ones with discrimination claims to release. Further, the release was a general release. As a result, no employee received severance benefits without first releasing any and all employment-related claims, including, but not limited to, discrimination claims. To put it another way, every employee, regardless of race, had to decide whether to release their claims.

Id. The court in *Davis* recognized that the severance agreement had the same impact on each employee ... [i]f an employee chose not to sign the Release, he would not receive the severance package, regardless of his race. It was up to each [ ] employee to weigh the pros and cons of signing the Release, and to decide whether the value of his potential claims was worth more than the severance package. The fact that plaintiffs chose not to accept the severance offer because they did not want to release their employment-related claims does not mean that the severance agreement had a disparate impact on minorities. It simply means that plaintiffs reached the opposite conclusion in their cost-benefit analysis than their former coworkers who signed the Release.

Id. at 856–57. Based on this reasoning, the court rejected plaintiffs' claim that their employer should have paid them the severance benefits without requiring a release of their discrimination claims, noting that "[i]n taking this position, plaintiffs are essentially claiming a right to preferential treatment for anyone who had a pending discrimination claim—namely plaintiffs. In plaintiffs' view, they should have received severance benefits while retaining the right to pursue their pending claims, even though everyone else was required to release their claims in order to receive severance benefits." *Id.* The court concluded that the plaintiffs had "no right to such preferential treatment under Title VII." *Id. citing DiBiase,* 48 F.3d at 732. Similarly, I find that there is no disparate impact claim to be made as a result of the general releases at issue here. Thus, I decline to amend or reconsider my prior ruling.

Entry of Partial Final Judgement under Rule 54(b): The remaining issue is plaintiffs' application for entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) permits the court to direct entry of a final judgment as to fewer than all of the parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed R. Civ. Proc. 54(b). In determining Rule 54(b) applications, the "court must take into account judicial administrative interests as well as the equities involved." *Curtiss–Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980). While "sound judicial administration does not require that Rule 54(b) requests be granted routinely," the "task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of the case." *Id.* at 10, 12.

***6** After careful consideration of the competing factors present here, I conclude that plaintiffs' motion for Rule 54(b) certification should be granted. First, there can be no dispute that my March 29, 2007 Decision and Order terminated Olin Singletary, Gladys Alston and Carrie Rice's actions and therefore constituted final judgments as to all of their federal claims. Second, the reasons underpinning my decision as to the three plaintiffs herein are plainly separate and distinct from the substantive merits of the underlying discrimination allegations that survive as to the remaining named plaintiffs and discovery on the merits of those discrimination claims continues regardless of any intermediate appeal.

Third, it seems to me that sound judicial administration favors Rule 54(b) certification. The validity of the releases and the applicability of the tender back and ratification doctrines implicate distinct legal issues totally separable from the merits of plaintiffs' discrimination claims. As noted in the Court's summary judgment decision, some courts have determined that enforcing the ratification and tender back doctrines defeats the remedial purposes of federal civil rights statutes. *See, e.g., Cole v. Gaming Entertainment, L.L.C.,* 199 F.Supp.2d 208, 215–217 (D.Del.2002) (under facts presented, employee was not required to tender back monetary consideration before commencing Title VII action); *Rangel v. El Paso Natural Gas Company,* 996 F.Supp. 1093, 1099 (D.N.M.1998) (tender back doctrine did not require employee to return severance pay before filing Title VII lawsuit, but could constitute an offset to any recovery). Intermediate appellate review of this issue would be efficient in terms of managing the future course of this litigation and potentially avoid the possibility of duplicative trials.

The class certification motion has not yet been filed and thus the existence or scope of any class is uncertain. Nevertheless, appellate review of whether the tender back and ratification doctrines apply to Title VII discrimination actions would likely provide finality to a legal issue facing other named plaintiffs as well as members of the putative class. If the Second Circuit were to affirm this Court's decision, their resolution of the issue would likely govern all named plaintiffs as well as members of the putative class. On the other hand, if this Court's decision were reversed, Olin Singletary, Gladys Alston and Carrie Rice's claims might be reinstated in time for trial together with the other named plaintiffs, thus potentially avoiding a costly second trial.[4] *See Stadler v. McCulloch,* 882 F.Supp. 1524, 1527 (E.D.Pa.1995) (district court directed Rule 54(b) final judgment as to claims of one plaintiff in class action where dismissal was based on fact that release signed by particular employee precluded her from asserting substantive claim). *See also Freeplav Music, Inc. v. Cox Radio, Inc.,* 2005 WL 2464571, *2 (S.D.N.Y. Oct.5, 2005) (court entered partial final judgment where disputed claims were "largely identical" to those involving other parties); *Grand River Enterprises Six Nations, Ltd. v. Prvor*, 2004 WL 2480433, *2 (S.D.N.Y. Nov.3, 2004) (court granted Rule 54(b) certification where an immediate appeal of the dismissed claims could avoid the need for separate trial in the event of a reversal), *aff'd* 425 F.3d 158 (2d Cir.2005); *Blue Cross of California v. SmithKline Beecham Clinical Laboratories, Inc.,* 108 F.Supp.2d 125, 130 (D.Conn.2000) (intermediate appellate review serves judicial economy in determining status of dismissed parties early in the litigation, thereby preventing the possibility of a second trial and further appeals).

***7** Finally, a balance of the equities favors Rule 54(b) certification. As stated earlier, a motion for class certification has yet to be filed and considered by the Court and, depending on the outcome, discovery on the merits of the discrimination claims will follow. While future proceedings in this case are particularly difficult to predict, there is a significant possibility that Singletary, Alston and Rice would have to wait an inordinate length of time before the merits of this case and all the claims presented have been resolved. My dismissal of Singletary, Alston and Rice's claims rested on the application of distinct legal doctrines unrelated to the substantive merits of their discrimination allegations and I can discern no real prejudice to Kodak in having to defend my decision now. In my view, the balance of fairness and equities tips in favor of Rule 54(b) certification.

Conclusion

For the reasons set forth above, plaintiffs' motion for reconsideration of the Court's Decision and Order of March 29, 2007 pursuant to Federal Rule of Civil Procedure 59(e) is **denied.** Plaintiffs' request for entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b) is **granted.**

SO ORDERED.

All Citations

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Footnotes

1 Plaintiffs' reliance on *Clark v. Buffalo Wire Works Co.,* 3 F.Supp.2d 366 (W.D.N.Y.1998) is unpersuasive. In that case, plaintiffs raised two causes of action: one was a federal claim for age discrimination under the Older Workers Benefit Protection Act ("OWBPA") and the other claim was pursuant to the New York State Human Rights Law. The parties agreed that the tender back doctrine was inapplicable to the federal age discrimination claim based on the Supreme Court's decision in *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422, 428, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998), which held that tender back was not a prerequisite to bringing a claim under the OWBPA. With regard to the state law cause of action, the court declined to apply the tender back doctrine because of CPLR § 3004. Thus, Clark is distinguishable from the instant lawsuit where the federal cause of action at issue is Title VII. Moreover, given that this Court declined to exercise pendant jurisdiction over the remaining state law claims, plaintiffs are free to argue in state court that CPLR § 3004 precludes application of the tender back doctrine on their state law claims.

2 Plaintiffs rely on *Cirulis v. UNUM Corp.,* 321 F.3d 1010, 10 .13–14 (10th Cir.2003) as support for their contention that the Court erred in granting summary judgment. In *Cirulis,* the court held that although welfare benefit plans are exempt from many of ERISA's requirements, before unilaterally enacting an amendment an employer must ensure that it is done "in accordance with written amendment procedures provided on the face of the plan" and it must "provide notice of the amendment to participants and beneficiaries within 210 days after the end of the plan year in which the change is adopted." *Id.* at 1014 quoting 29 U.S.C. § 1024(b)(1). *Cirulus* does not require invalidation of the releases at issue here. First, the TAP plan provided adequate notice of the release to Kodak employees because it specifically states that in order to be eligible for TAP, an employee must "execute a waiver, release and covenant not to sue." *See* Exhibit F to Plaintiffs' Motion at page 8. Second, the plan specifically authorizes the procedure for written amendments on its face, stating that "Eastman Kodak Company may amend, suspend, or terminate the Plan in whole or in part at any time, for any reason." *Id.* at page 23. Third, the Plan was amended to add the release requirement in 1997 and was included in the employee handbook provided to all employees that year. Accordingly, to the extent ERISA applies to severance plans, the Third Circuit's *Cirulis* decision does not provide the legal basis for granting plaintiffs' reconsideration motion.

3 By signing the release and accepting the severance benefits, plaintiffs agreed to release Kodak "from all claims, actions and causes of action of any kind, which you, or your agents, executors, heirs, or assigns ever had, now have, or may have, whether known or unknown, as a result of your employment by or termination of employment from Kodak." *See* Exhibit "C" to Metras Affidavit, (Docket # 116).

4 The Court recognizes that its decision granting summary judgment against Singletary, Alston and Rice rested on application of the tender back and ratification doctrine and thus the Court did not have to evaluate some of the more individual and fact specific issues required by *Bormann v. AT & T Communications, Inc.,* 875 F.2d 399, 403 (2d Cir.1989). Whether there exist material issues of fact sufficient to defeat summary judgment as to the unconsidered *Bormann* factors is, of course, undecided at this point and left for another day, if necessary.