

Band Can't Yet Appeal Dismissal Of Claims Against Union

By Christine Powell

A New York federal judge rejected a Jewish band's request to immediately appeal the dismissal of breach of contract and other claims it asserted against a union after a multiemployer pension fund sued the band in an effort to collect a withdrawal fee.

On Friday, U.S. District Judge John G. Koeltl denied Neshoma Orchestra and Singers Inc.'s motion for permission to file an interlocutory appeal concerning the dismissal of its third-party complaint against the Associated Musicians of Greater New York. Local 802 AFM AFL-CIO.

Neshoma filed its third-party complaint against the union amid a dispute with the American Federation of Musicians and Employers' Pension Fund and its trustees over withdrawal liability. Neshoma previously contributed to the fund on behalf of certain employees who were members of the union, according to court records.

"Because Neshoma has failed to demonstrate that there is a substantial ground for difference of opinion regarding a controlling question of law or that an appeal would materially advance the resolution of this case, Neshoma's motion is denied," Judge Koeltl wrote in a brief Friday order.

The fund sued Neshoma in April 2017, seeking to collect \$1.1 million in withdrawal liability under the Employee Retirement Income Security Act.

Neshoma then filed a third-party complaint against the union, asserting claims for breach of contract, indemnification, fraud and negligent representation claims based on the union's alleged promise that the fund would not seek to recover withdrawal liability from the band.

On May 23, Judge Koeltl granted the fund partial summary judgment on its claim seeking withdrawal liability from Neshoma, finding that the band forfeited the right to challenge the validity of the withdrawal liability because it did not ask to arbitrate the fee until after the ERISA deadline to do so had passed.

That same day, the judge also granted the union's motion to dismiss Neshoma's third-party complaint, holding that the court lacked subject matter jurisdiction over the band's claims because they are preempted by the National Labor Relations Act.

Not long afterward, Neshoma asked for permission to file an interlocutory appeal of the dismissal of its third-party complaint. It argued that the union had contractually guaranteed the fund would rescind withdrawal liability against the band, that the union's promise was independent of a collective bargaining agreement and that the NLRA therefore did not apply to the deal.

But Judge Koeltl said Friday that allowing Neshoma to launch an immediate appeal would delay the conclusion of the litigation, which goes against the policy of granting interlocutory appeals only if doing so would speed things along.

“The only outstanding issue in this case is a final calculation of the pension contributions owed by Neshoma to the fund,” the judge wrote. “This issue should not be difficult or time-consuming to address and a final judgment can be entered as soon as it is resolved. The entire case can then be reviewed by the court of appeals. According, an interlocutory appeal would unnecessarily delay this case and would not aid in its resolution in any way.”

Harvey S. Mars of the Law Office of Harvey S. Mars LLC, who represents the union, told Law360 in a statement Monday that “Judge Koeltl has applied clear statutory standards regarding interlocutory appeals. Neshoma failed to satisfy its burden to demonstrate that those standards did not apply to it.”

Representatives for Neshoma and for the fund could not immediately be reached for comment Monday.

According to court records, the fund told Neshoma in August 2015 that it owed a \$1.1 million withdrawal liability because the band stopped making contributions to the fund in July 2012 after the expiration of a collective bargaining agreement it had with the union.

Neshoma responded that it had not withdrawn from the fund, arguing that the labor dispute between itself and the union excused it from making contributions, according to court records.

Neshoma is represented by Ira A. Sturm of Raab Sturm & Ganchrow LLP.

The fund and its trustees are represented by Patricia McConnell of Meyer Suozzi English & Klein PC.

The union is represented by Harvey S. Mars of the Law Office of Harvey S. Mars LLC.

The case is American Federation of Musicians and Employers’ Pension Fund v. Neshoma Orchestra and Singers Inc., case number 1:17-cv-02640, in the U.S. District Court for the Southern District of New York.