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Western District Case Notes

Stay of State Court Proceedings

In *FTC v. 4 Star Resolution, LLC*, No. 15-CV-112S (Aug. 8, 2016), the Federal Trade Commission obtained an *ex parte* temporary restraining order freezing defendants' assets and appointing a Receiver, which was later converted into a preliminary injunction. Among other things, the injunction prohibited defendants and all other persons and entities from taking any action to establish or enforce any claim against defendants' assets. Thereafter, two of defendants' former employees commenced actions against defendants in state court for sexual harassment. Although the Receiver informed the state court plaintiffs' attorney of the District Court's injunction, they nevertheless sought, and were granted, default judgments against defendants. They then served information subpoenas and restraining notices on the Receiver. When the Receiver refused to respond to the information subpoenas, the state court plaintiffs filed a motion for contempt against the Receiver in state court and the Receiver filed a motion to enforce the stay provisions of the preliminary injunction in the District Court.

In opposition to the Receiver's motion, the state court plaintiffs first argued that the District Court lacked jurisdiction to enjoin their state court actions under the Anti-Injunction Act, but the District Court rejected this argument because "it is well-established that the Anti-Injunction Act does not apply when the United States or a federal agency such as [the FTC] seeks to stay a proceeding in state court." The District Court also rejected the state court plaintiffs' argument that the Court lacked personal jurisdiction over them, holding that the All-Writs Act vests the Court with authority to enjoin and bind non-parties to an action when needed to enforce its decisions in a case over which it has proper jurisdiction.

Finally, in response to the state court



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plaintiffs' contention that they were not seeking to deplete receivership assets, the District Court held that the restraining notices would prevent the Receiver from accessing and utilizing the funds of the receivership estate, thereby frustrating the purpose of the receivership. As a result, the state court plaintiffs were ordered to withdraw their motion for contempt against the Receiver and their state court actions were stayed.

Employment Discrimination

In *Salters v. Hewitt-Young Electric, LLC*, No. 15-CV-6040T (Aug. 1, 2016), a union electrician who was hired by a subcontractor sought damages against the subcontractor for aiding and abetting racial discrimination because he was allegedly terminated based on his race at the direction of the general contractor. The subcontractor moved to dismiss the complaint on the grounds that it was procedurally barred because the subcontractor was never named as a respondent in plaintiff's discrimination proceeding filed with the Equal Employment Opportunity Commission ("EEOC"), and because the complaint contained no specific, plausible allegations of discrimination against him.

The Court granted the motion and dismissed the complaint as against the subcontractor holding that, even if an

exception to the general rule -- that a party must be named in the EEOC proceeding before it can be sued in federal court -- had applied, plaintiff's claim against the subcontractor was nonetheless subject to dismissal for failing to allege that the subcontractor was aware of any discriminatory reason for terminating plaintiff when he acquiesced to the general contractor's request. As a result, plaintiff failed to allege a plausible inference of aiding and abetting race discrimination.

Standard of Review

In *Pinkoski et al. v. County of Monroe, et al.*, No. 12-CV-6358T (August 10, 2016), after plaintiffs failed to appear for a status conference and to respond to the Court's Order to Show Cause why their lawsuit should not be dismissed for failure to prosecute, the Magistrate Judge recommended the lawsuit be dismissed with prejudice. In reviewing that report and recommendation, the District Court noted the different standard of review that it applies when a party lodges objections to a report and recommendation or, as was the case here, fails to object altogether. When specific objections are made to a report and recommendation, the Court makes a *de novo* determination of those particular proposed findings or recommendations to which the objections are made. But when only general objections are made, or no objection is made, the District Court reviews that portion of the report and recommendation for clear error or manifest injustice. After reviewing the Magistrate Judge's thorough and well-reasoned report and recommendation, the Court found no clear error or manifest injustice and ordered the lawsuit dismissed.

Electronic Discovery

In *Thurmond v. Boman et al.*, No. 14-CV-6465EAW (August 10, 2016), a

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housing discrimination lawsuit, defendants moved for sanctions arising from the suspected destruction of certain Facebook posts of plaintiff. After noting that a party bringing a spoliation motion must demonstrate that the party who purportedly destroyed the evidence had a duty to preserve it and destroyed it with a culpable state of mind, and the destroyed evidence was relevant to the litigation, the Court denied the motion.

The Court found, first, that all but three of plaintiff's Facebook posts that were the target of the spoliation motion had only been hidden from defendants' view due to a change in plaintiff's security settings, rather than been destroyed. The Court held further that the other three Facebook posts had been deleted inadvertently and defendants failed to establish that they were relevant. Thus, there had not been any wholesale destruction, as defendants contended, and the circumstances did not establish that the inadvertent destruction constituted gross negligence, nor would such gross negligence, even if it had existed, automatically result in a finding that the evidence was relevant as a matter of law.

Electronic Discovery

In *Armstrong Pump, Inc. v. Hartman*, No. 10-CV-446S (June 3, 2016), plaintiff moved for an order compelling the production of documents and allowing it to review the source code for defendant's software. Before the motion was filed, the parties made arrangements for plaintiff to review the documents and source code and agreed on the parameters of the review, which included loading the source code and documents on to a computer. During the review, however, plaintiff became dissatisfied with the level of access it was given to the information, prompting its motion to compel. In support of the motion, plaintiff's expert claimed that

password protections on the computer blocked him from reviewing numerous files on the computer. In response, defendant argued that not only did it offer to train plaintiff concerning the use of the computer's software prior to the scheduled review, but also that plaintiff made no inquiry during the review about the information it was supposedly unable to access.

After noting that plaintiff undermined its position on the motion by not seeking training on the software and by failing to request passwords for the computer application during the on-site review, the Court found that the best way to resolve the discovery dispute was to have the parties repeat the review under the same conditions previously agreed to, but required plaintiff to pay for all reasonable costs related to the preparation of the materials. And, although "the party responsible for production generally bears the cost," the Court required plaintiff to pay defendant's expenses for an attorney, a paralegal, and a technical expert to monitor the second review.

Insurance

In *Cinninnati Insurance Company v. Roy's Plumbing, Inc., et al.*, No. 13-CV-1000S (June 10, 2016), plaintiff, an insurance company, sought a judgment declaring that it did not owe indemnity or defense to defendant in an underlying action involving claims that negligent work on sewers caused nearby residents to be exposed to hazardous chemicals released from a nearby landfill. Defendant, the insured, counterclaimed for a judgment declaring plaintiff had a duty to defend and indemnify it in the underlying litigation.

When both parties cross-moved for summary judgment, the Court granted plaintiff's motion, denied defendant's motion, and ordered the lawsuit dismissed. According to the Court, the so-called Total Pollutant Exclusion in plaintiff's policies were not overly broad in scope, and were clear and unambiguous in excluding

coverage in cases of environmental pollution even if the insured was not responsible for generating that pollution.

In addition, even if the underlying lawsuit alleged that some of the personal injuries were brought about by exposure to sewage, rather than toxic chemicals, the Total Pollutant Exclusion nevertheless applied because it was the "polluting" character, as opposed to the "flood like" character, of the sewage that triggered the insurance provision's application. Finally, although an insurer's duty to defend is broader than its duty to provide coverage, there was no "reasonable possibility" of coverage under the policy due to its Total Pollutant Exclusion and, therefore, plaintiff had demonstrated that it was not obligated to provide a defense to the underlying litigation.

Final Judgment

In *Cederman v. Palisades Acquisitions XVI, LLC et al.*, No. 12-CV-11A(JJM) (August 1, 2016), plaintiff moved under Rule 60(d)(6) to reopen the case following entry by the Court of a final judgment after the parties reported that the matter had settled. The Court granted the motion and ruling that defendant engaged in "misconduct" by failing to provide plaintiff with a proposed settlement agreement, as defendant had agreed to do, and then ignoring the proposed settlement agreement supplied by plaintiff. Defendant's repeated failure over several months to respond to plaintiff's inquiries also constituted good cause to relieve plaintiff of the requirement, set forth in the Court's original order, to move to reopen the matter within sixty days of the final judgment.

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