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Western District case notes

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Personal jurisdiction

In *Albino v. Global Equip. USA, Ltd.*, No. 14-cv-06519(MAT) (Aug. 18, 2016), plaintiff asserted strict products liability and negligence causes of action against an out of state distributor, claiming that the distributor brokered the sale of a defective product that injured him. After limited jurisdictional discovery, the distributor moved to dismiss the claim based on lack of personal jurisdiction. In response, plaintiff argued that the distributor was subject to specific jurisdiction in New York because the distributor committed a tortious act without the state, which caused injury within the state.

The court first determined that the distributor could reasonably anticipate being hauled into a New York court because the record established that the distributor knew the product was destined for New York. The court next found that, having described itself on its website as one of the largest distributors of the product in the world, with customers in 48 states (including New York) and 62 countries, the distributor derived substantial revenue from interstate and international commerce sufficient for purposes of long-arm jurisdiction.

The court then considered whether exercising personal jurisdiction over the distributor was consistent with due process protections provided by the United States Constitution. In finding that it was, the court noted that the distributor purposefully directed a portion of its business activities to New York, as evidenced by the fact that the distributor had a New York sales territory, an employee designated to work in that territory, and a database of New York customers for use by its sales representatives, and regularly solicited business in New York from at least 25 companies. Finally, the court determined that the exercise of long-arm jurisdiction over the distributor was reasonable under the circumstances given New York's interest in adjudicating the case, plaintiff's interest in obtaining convenient and effective relief, and the interstate judicial system's interest in obtaining the most efficient resolution of the controversy. As a result, the court denied the motion because exercising personal jurisdiction over the distributor would not offend traditional notions of fair play and substantial justice.

Pro Se motions to appoint counsel

In *Lenhard v. Colographics of Rochester*, No. 15-CV-6166(JWF) (Sept. 6, 2016), a pro se plaintiff sued her former employer for civil rights violations under Title VII of the Civil Rights Act and the Americans with Disabilities Act. Arguing that she did not have the sufficient legal "experience and knowledge" to prosecute her claim, plaintiff moved for the court to assign counsel. The motion was denied, without prejudice to renew, on grounds that an appointment of counsel at this time was unwarranted.

Even assuming that plaintiff's allegations satisfied the initial threshold showing of merit, the court determined that the factors set forth in the Second Circuit's decision in *Hodge v. Police Officers*, when deciding whether to assign counsel, were not met except for plaintiff's alleged unfamiliarity with federal court. Her complaint was detailed in nature, the factual circumstances surrounding her claims did not appear to be unusually complicated, and the legal issues were not so complex as to make it impossible for her to proceed without counsel. Given the limited resources available with respect to pro bono counsel, the Court found no "special reason" why appointment of counsel would be more likely to lead to a just determination of the lawsuit.

Expert disclosures

In *Roberts v. Los Alamos National Security, LLC, et al.*, No. 11-CV-6206(JWF) (Aug. 19, 2016), plaintiff sought damages for injuries sustained during a work place accident. Following initial expert disclosures by the parties and an order permitting plaintiff to disclose rebuttal expert reports in response to two defense experts, defendant moved to strike plaintiff's rebuttal expert opinions on grounds that the rebuttal disclosure included new opinions not previously disclosed and rebutted a third defense expert. The court denied that part of the motion that sought to strike the new opinions because, although novel, the new opinions nevertheless addressed the "same subject matter" as the two defense reports for which rebuttal had been expressly permitted. On the other hand, because the court's order limited rebuttal only to those two experts, that portion of the rebuttal report that addressed a third expert violated the order and was not allowed.

Summary judgment motions

In *United States v. Campbell, et al.*, No. 15-CV-6315(FPG) (Sept. 19, 2016), plaintiff moved for summary judgment in a foreclosure action on a residential mortgage. The court denied the motion, without prejudice, on grounds that plain-

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tiff's statement of material facts not in dispute was deficient. Local Rule 56(a)(3) requires that each party's statement of material facts must be followed by citations to admissible evidence, including the relevant pages, paragraphs or lines of the authority cited. With no citations to the record or other admissible evidence, the matters contained in plaintiff's statement of material facts not in dispute could not be considered by the court, resulting in the motion's denial.

Motions in limine

In *Yin v. Alvarado*, No. 11-CV-780(EAW) (Sept. 20, 2016), defendant moved in limine to preclude medical evidence in a personal injury lawsuit brought by plaintiff, on grounds that plaintiff failed to disclose her treating physicians as witnesses or experts, and failed to produce any written reports for those experts, all of which was required by Rule 26(a). Despite acknowledging that precluding evidence should be a sanction of last resort for discovery violations, the Court granted defendant's motion. The court first found that plaintiff failed, as required under Rule 26(a)(1)(A)(i), to identify the treating physicians among her initial disclosures of witnesses that plaintiff may use to support her claims. And, even though disclosure of full expert reports was not required under Rule 26(a)(2)(B), plaintiff also failed to disclose the more limited information required under Rule 26(a)(2)(C) for treating physicians.

Turning to Rule 37(c)(1), the court concluded that plaintiff's failure to disclose the two treating physicians was neither substantially justified nor harmless, and that the four factor balancing test weighed in favor of precluding the evidence because plaintiff offered no explanation for failing to comply with the two disclosure rules, her failure had caused significant prejudice to defendant, and a continuance on the eve of trial would further prejudice defendant by wasting the resources, time and effort he had already spent in preparing for the trial.

Rule 68 offer of judgment

In *Maddox v. The Bank of New York Mellon Trust Co.*, No. 15-CV-1053A (Aug. 31, 2016), plaintiffs brought a putative class action against defendant, claiming it was strictly liable for statutory damages of up to $1,500 per occurrence based upon defendant's alleged failure to timely record mortgage satisfactions after the mortgages were paid in full. Shortly after the action was commenced, defendant's attorneys served plaintiffs with an offer of judgment under Fed. R. Civ. P. 68 in the amount of $5,001 (comprising $1,501 in damages and $3,500 for reasonable attorneys' fees and costs). The offer of judgment was also accompanied by a check in that amount. Plaintiffs rejected the offer and defendant moved to dismiss the action based on lack of subject matter jurisdiction, claiming that the offer provided plaintiffs with everything they could hope to recover in the case, rendering the claims moot.

In denying defendant's motion, the court first noted that the Supreme court "largely answered this question" in its recent decision in *Campbell-Ewald Co. v. Gomez*. There, the Supreme Court held that "[a]n unaccepted settlement offer- like any settlement offer- is a legal nullity, with no operative effect." And, while defendant's offer in this case was accompanied by a check, which was not the case in *Campbell-Ewald*, the court found that distinction to be immaterial because "a rejected tender is no different than a rejected offer." The court then held that, because the parties had not reached an agreement on defendant's offer, plaintiffs' claims were not moot.

Prejudgment interest

In *Dunda v. Aetna Life Ins. Co.*, No. 15-cv-6232(MAT) (Sept. 15, 2016), plaintiff challenged the termination of her long-term disability benefits under the Employee Retirement Income Security Act ("ERISA"). After defendant was ordered to pay past due benefits, plaintiff sought an award of pre-judgment interest on the amount of those benefits at the New York statutory rate of 9 percent. Defendant opposed, arguing that 9 percent interest is excessive, and that any interest awarded should be at the post-judgment rate set forth in 29 U.S.C. §1961(a).

The court first noted that, in an ERISA enforcement action, the question of whether or not to award pre-judgment interest is ordinarily left to the discretion of the district court. Then, consistent with a recent case in the Southern District of New York, the court determined that 4 percent interest was more appropriate because "the decades-old statutory New York State law rate of interest . . . is so much higher than the cost of borrowing in recent times" and 4 percent interest "more closely resembles current and recent borrowing costs." Finally, the court held that interest should be calculated from a midpoint date in the delinquency period, because that is consistent with what courts in this circuit routinely do.

Attorneys' fees

In *Myers v. Bd. of Ed. of the Batavia City School Dist.*, No. 13-CV-342S (Sept. 7, 2016), plaintiffs sought injunctive and equitable relief, claiming that defendant discriminated against female student softball players by providing superior facilities and equipment to the boys' baseball program. A year after the action was commenced, the court approved a consent decree that was jointly presented by the parties, finding that it was reached as a result of good faith, arms-length bargaining between experienced counsel and addressed nearly all the concerns raised in plaintiffs' complaint. Thereafter, plaintiffs sought an award of nearly $66,000 in attorneys' fees under Title IX. Defendant opposed the application, arguing that attorneys' fees should be denied or reduced. After noting that the product of a reasonable hourly rate and the reasonable number of hours required by the case creates a presumptively reasonable fee (i.e. the "lodestar"), the court found that plaintiffs' attorneys' hourly rates ranging from $185 to $305 were in line with rates prevailing in the community for similar services.

Next, the court rejected defendant's argument that certain time entries reflected excessive billing, stating that it had carefully reviewed the attorneys' time sheets and was satisfied that the hours expended were reasonable. The court then rejected defendant's contention that plaintiffs received little success, finding that this argument was directly at odds with defendant's attorney's affirmation in support of the joint motion for approval of the proposed consent decree.

Finally, the court rejected defendant's argument that attorneys' fees should be

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denied or reduced on the ground that defendant is a public entity, holding that defendant failed to cite a single case in the Second Circuit where the status of a public entity (and the possible cost to taxpayers) formed the basis for a reduction to an award of attorneys' fees.

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