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Western District case notes

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Remand

In *Miller v. Geidel*, No. 13-CV-90(MAT) (Dec. 12, 2016), plaintiffs filed a summons with notice in state court based upon an allegedly fraudulent financial scheme. Although a complaint had not been served, defendants removed the action, claiming that federal question jurisdiction existed because plaintiffs' claims would likely be the same as those raised against them by another group of plaintiffs in a previously filed federal action, which included claims under the Securities and Exchange Act of 1934. Plaintiffs later moved to remand, and defendants cross-moved to dismiss under Rule 4(m) because plaintiffs had not timely served a complaint. In support of their motion, defendants argued that the Court should consider their motion to dismiss prior to evaluating the threshold issue of the Court's subject matter jurisdiction, but the Court declined to do so.

Rather, consistent with the holding in the related federal action, the Court held that plaintiffs' state law claims were not preempted by federal securities law, and plaintiffs had not alleged that defendants failed to perform a statutory duty created under federal law. Absent a substantial federal question, remand to state court was required. The Court denied plaintiffs' request for costs and fees under 28 U.S.C. § 1447(c), however, because plaintiffs compounded the delay caused by defendants' improper removal by failing to take any action in the case for over six months.

Employment Law

In *Padovano, et al. v. FedEx Ground Package Sys, Inc.*, No. 16-CV-17(FPG) (Dec. 5, 2016), plaintiffs filed a putative



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class action claiming that defendant misclassified them as independent contractors, as opposed to employees, and took illegal deductions from their pay. As a result, plaintiffs asserted causes of action under New York Labor Law and New York common law, and for unjust enrichment. Defendant moved to dismiss the complaint, noting that its operating agreements with plaintiffs expressly classified them as independent contractors. Plaintiffs opposed, arguing that, although they may have been called independent contractors in the operating agreements, defendants nonetheless controlled the manner and means by which they performed their work. For example, plaintiffs alleged that they were required to use specific signage and logos on their vehicles and uniforms; had to coordinate vacations and days off with defendant's station managers; and had no control over the price charged to customers for their services.

Noting that it is a fact-intensive determination as to whether a given worker is an employee, and that the manner in which the parties labeled their relationship is not determinative, the Court found that plaintiffs had plausibly alleged that they were employees under New York law. The Court then held that, under New York law, a worker can state a claim for unjust enrichment even if

the existence of a contract might ultimately preclude recovery on that claim. Therefore, the Court found that it would be improper to decide at this stage of the proceeding that the parties' relationship was governed by their operating agreements, and defendant's motion to dismiss was denied.

FOIA/FOIL

In *Sklariski, et al. v. Niagara Falls Bridge Commission, et al.*, No. 09-CV-633(MAT) (Nov. 23, 2016), plaintiffs sued under the federal Freedom of Information Act ("FOIA") and the state Freedom of Information Law ("FOIL") to compel defendants to produce information relating to the resignation of their general manager. After the Court dismissed the claim under FOIL on grounds that the defendant commission was not an agency of the state, defendants moved to dismiss the complaint under Rule 12(b)(6) and plaintiffs cross-moved for summary judgment under Rule 56.

The Court converted defendants' motion to one for summary judgment after defendants requested the Court consider matters outside the record, and then granted that motion upon finding that the defendant commission also was not an agency of the federal government and therefore was not subject to FOIA. The Court ruled that plaintiffs had not submitted evidence that the commission was in any way subject to substantial federal control or supervision, and that the parties did not dispute that the commission's employees were not federal employees, the commission did not receive federal funds, and the federal government did not recommend or appoint its commissioners.

TCA

In *Up State Tower Co. v. Town of Kiantone, et al.*, No. 16-CV-69(MAT) (Dec. 9, 2016), plaintiff sued various municipal

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defendants under the Telecommunications Act (“TCA”), alleging that defendants unreasonably failed to act on its application for permission to install a cellphone tower within the timeframe required by the statute and the Federal Communications Commission’s so-called Shot Clock Order, and that this alleged failure to act constituted an effective prohibition of wireless communications services in violation of the TCA. Plaintiff and defendants cross-moved for summary judgment, and the Court granted in part and denied in part the motions.

First, the Court held that the Town failed to act within a reasonable period when it did not issue any decision, favorable or unfavorable, within 150 days of plaintiff filing its application. Contrary to the contentions of defendants, the Court found that the parties had not mutually agreed to extend the Shot Clock deadline, and that the Town had not provided a timely and proper notice that the application was incomplete when the Town attorney advised plaintiff that the Town “will notify” plaintiff of additional information that the Town was lacking and needed to properly evaluate the application.

On the other hand, the Court determined that it could not conclude that the Town’s failure to act on the application constituted an effective prohibition on wireless

service because a precondition under the TCA was that the Town have denied the application and, in this case, the Town had not yet issued any decision. The Court, instead, ordered defendants to render a decision on the application within 20 days of its decision and order.

Discovery

In *Armstrong Pump, Inc. v Hartman, et al.*, No. 10-CV-446S (Dec. 13, 2016), a licensing dispute involving claims that defendant shipped products from its factory with fully operational software already installed, plaintiff moved to compel production of certain documents that defendant considers the functional equivalent to its proprietary source code but which plaintiff contended did not contain actual programming and could be produced under the parties’ protective order for discovery without any additional protections. The documents sought by plaintiffs had already been inspected twice by defendants, first when plaintiff encountered difficulty navigating the software defendants used for its source code, and later with one but not both of plaintiffs’ experts.

The Court denied plaintiff’s motion to compel, relying primarily on the new proportionality requirement found in Rule 26(b)(1) that requires discovery to be both relevant to a party’s claim or defense and proportional to the needs of the case. Ac-

ording to the Court, discovery in the case had reached the point of diminishing returns. After six years of discovery, defendants had furnished 1.5 million pages of documents, the parties had conducted at least a dozen depositions of engineers and other employees, and plaintiffs had already had two opportunities to review all of defendants’ source code and ample opportunity to depose key employees of defendants’ clients, send experts to inspect defendants’ factories, and review documents that might discuss the alleged factory implementation. Nor had plaintiffs made a compelling case that defendants improperly concealed any relevant information.

Following its own in-camera review of the requested documents, the Court directed defendants to produce any documents containing one of eight specified terms that could pertain to the improper factory implementation, after which discovery in the case will close.

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