

THE DAILY RECORD

Friday, September 15, 2017 / Volume 109 / Number 179 / \$2.00 • Western New York's trusted source for legal and real estate news

Commentary

Western District Case Notes

Subject matter jurisdiction

In *U.S. Bank Trust, N.A. v. Licata*, No. 17-cv-6037(MAT) (June 21, 2017), plaintiff commenced an action on behalf of a trust to foreclose a mortgage, asserting diversity of citizenship as the basis for the court's subject matter jurisdiction. Specifically, plaintiff alleged that defendants are citizens of New York and that it is a national association with its principal place of business in Texas.

After defendants failed to appear in the action despite being served, plaintiff moved for a default judgment. In reviewing the motion, the court first noted that subject matter jurisdiction must clearly appear from the face of the complaint and, where it does not, the court is obligated to dismiss the case *sua sponte*.

Next, the court determined that plaintiff failed to adequately allege subject matter jurisdiction, citing a recent decision from the Northern District of New York in which that court dismissed an action filed by the same law firm on behalf of the same plaintiff for that precise reason. In doing so, the court observed that plaintiff's attorneys failed to provide the court with the information necessary to ascertain plaintiff's citizenship because the complaint lacked any information regarding plaintiff's articles of incorporation, and it did not identify whether plaintiff was a "traditional" or "business" trust.

Finally, rather than allowing plaintiff an opportunity to cure the pleading defects, the court dismissed the



By KEVIN M. HOGAN
Daily Record
Columnist

action and advised plaintiff's attorneys to "consider the requirements of Rule 11 when filing any future pleadings."

Subject matter jurisdiction

In *Carter, et al. v. CIOX Health, LLC, et al.*, No. 14-CV-6275(FPG) (May 26, 2017),

plaintiffs commenced a putative class action in federal court alleging that defendants had overcharged them for copies of medical records in violation of New York's Public Health Law and General Business Law and asserted that federal jurisdiction was afforded by the Class Action Fairness Act (CAFA).

The court first denied defendants' motion to remand under CAFA's local controversy exception, because defendants had not demonstrated that no other class action asserting the same or similar factual allegations have been filed against them within the last three years. The court also found that the lawsuit was of the type that would benefit from the safeguards Congress had intended to achieve by affording federal jurisdiction under CAFA, to ensure that class actions are decided consistently and adequately supervised, and that those with nationwide implications, such as this one, are handled by federal courts.

The court next dismissed plaintiffs'



By SEAN C. MCPHEE
Daily Record
Columnist

request for injunctive relief on grounds that plaintiffs lacked standing because they failed to plead facts sufficient to plausibly infer that they faced a real and imminent threat of being wronged in the future by any continuing violation by defendants. As a result, plaintiffs'

claims for damages under unjust enrichment were subject to a three-year statute of limitations, and any older claims therefore were time barred. The court then denied defendants' request to dismiss the surviving claims under the Voluntary Payment Doctrine because the court could not find, based on the facts alleged in the complaint, that plaintiffs had paid defendants with full knowledge of the facts.

Post-removal joinder and remand

In *Buffalo State Alumni Assoc., Inc. v. Cincinnati Ins. Co.*, No. 14-cv-383(MAT) (JJM) (May 4, 2017), plaintiffs commenced an action in state court seeking a declaratory judgment that they were entitled to defense and indemnification from defendants concerning a personal injury action pending in another court.

Defendants removed the action based on diversity of citizenship and filed answers to plaintiffs' complaint. Days

Continued on next page

Continued from previous page

later, plaintiffs filed an amended complaint as a matter of right under FRCP 15(a)(1)(B) and added an additional defendant, whose presence destroyed diversity. As a result, plaintiffs simultaneously moved to remand.

In opposition, the initial defendants argued that the court had discretion under 28 U.S.C. § 1447(e) to deny joinder of the new defendant. They also argued that the new defendant should either be dropped pursuant to FRCP 21, or be realigned so that diversity was preserved. In a “scholarly and thorough analysis,” the magistrate judge declined to apply 28 U.S.C. § 1447(e) (notwithstanding a prior WDNY decision that had) and recommended that the request for realignment be denied and the matter be remanded to state court, since complete diversity (and, therefore, subject matter jurisdiction) ceased to exist after the complaint was amended as of right.

The initial defendants objected to the magistrate judge’s report and recommendation, primarily because the “fundamental fairness” inquiry required under 28 U.S.C. § 1447(e) was not performed. In response, the district judge “assumed arguendo that the discretionary decision” called for by that section applied, even though the complaint was amended as a matter of right rather than by leave. Then, after conducting the two-part analysis, the district judge concluded that joinder was appropriate because there was no delay in the amendment, and judicial economy would be furthered by preventing the proliferation of multiple litigations.

Finally, the court found that, because plaintiffs’ proffered reasons for adding the new defendant were legitimate, the general policy in favor of joinder had not been overcome by the initial defendants. Therefore, the lawsuit was remanded to state court.

Lack of standing

In *AdsOn5th, Inc. v. Bluefin Media, Inc.*, 16-CV-143 (LJV) (July 13, 2017), an action originally commenced in state court but removed based on diversity of citizenship, plaintiff claimed that it was entitled to damages based on defendants’ breach of contract.

Defendants filed a motion to dismiss,

which included evidence outside the complaint, and argued that plaintiff lacked standing because it was neither a party to the contract nor mentioned anywhere in it. Plaintiff initially opposed on the ground that it was a named party to the contract, but later adopted a slightly different approach, arguing that it was a party to the contract, “albeit under its alias.”

In framing the scope of defendants’ motion, the court first discussed the distinction between “prudential standing” and “constitutional standing,” and then reviewed the procedural principles implicated by each. Next, the court found that it was “entirely appropriate” for defendants to submit extrinsic evidence concerning the issue of plaintiff’s standing because the issue being raised by defendant was “more prudential than constitutional.” For that reason, however, the motion to dismiss was converted to a motion for summary judgment.

Ultimately, the court found that defendants’ extrinsic evidence, as well as the contract itself, demonstrated that defendants had contracted with a non-party, and not with plaintiff. As a result, plaintiff’s complaint was dismissed for lack of standing.

Tax law

In *Estate of Florence W. Kirsch, et al. v. United States*, No. 16-CV-6599(EAW) (July 13, 2017), plaintiff sought a refund of taxes paid in 2008 and 2009, pursuant to a tax return not filed until 2014, which according to plaintiff was late due to her “financial disability” and because she had not authorized anyone to file a return and refund claim on her behalf until 2013.

The government moved to dismiss for lack of subject matter jurisdiction on grounds it had not waived sovereign immunity. Congress waived sovereign immunity to suits for recovery of erroneously paid taxes only when a claim for refund or credit has been “duly filed” with the IRS. To be duly filed, a claim must be filed within the statute of limitations, unless the limitations period is tolled because the taxpayer is “financially disabled.” To be financially disabled, a taxpayer must submit proof of the disability to the IRS in the

form and manner required by its regulations and must not have authorized another person to handle their financial matters.

In this case, the written statements from plaintiff’s doctor and son failed for two reasons. First, the doctor’s written statements did not attest to the specific time period during which the taxpayer was prevented from managing her financial affairs. Second, the statement submitted by her son stated, unequivocally, that he was authorized to act on his mother’s behalf during the time period of her disability.

For both reasons, the statements submitted by plaintiff failed to toll the statute of limitations and preserve the government’s waiver of sovereign immunity and, as a result, the court lacked subject matter jurisdiction.

Forum non conveniens

In *First Source, LLC v. RJW Transport, Inc.*, No. 16-CV-1000S (May 15, 2017), a candy wholesaler headquartered in this district filed suit against a transportation provider headquartered in Illinois, asserting claims under 49 U.S.C. § 14706 (Liability of Carriers Under Receipts and Bills of Lading) and for breach of contract.

Defendant moved to change venue based on forum non conveniens, arguing that the Northern District of Illinois was a more appropriate venue because the alleged breach of contract took place at its warehouse there and its employees (who are also located in Illinois) would be material witnesses. In evaluating whether a transfer was appropriate, the court noted that it was required to first determine whether the action could have been brought in the Northern District of Illinois and answered that question in the affirmative. The court then undertook a seven-factor analysis, observing that while no single factor is controlling, each must be balanced in reaching a decision.

Ultimately, the court found that even though defendant’s warehouse facility in Illinois was a locus of operative facts, it was not the only relevant locus. And, because the remainder of the factors weighed equally in favor of either

Continued on next page

Continued from previous page

forum, the court found that defendant had not met its burden to make a “clear and convincing showing” that the balance of convenience favored a transfer to Illinois. Rather, transferring the action would merely have shifted the burden of inconvenience from defendant to plaintiff.

Discovery

In *Thomas v. Prinzi, et al.*, No. 15-CV-6061(EAW)(MWP) (July 21, 2017), the court denied three motions to compel discovery because they were not accompanied by the certificate of good faith that is required by Rule 37(a)(1). One of the motions also lacked merit because it sought to compel defendant to explain why it had denied certain requests to admit when simple denials were deemed adequate.

The court reminded the parties that Rule 36 requests to admit should not be used unless the statement of fact sought to be admitted is phrased so that

it can be admitted or denied without explanation.

Bankruptcy

In *In re Flour City Bagels LLC*, No. 16-CV-6667(FPG) (April 24, 2017), the bankruptcy court denied both the Chapter 11 debtor’s motion to sell substantially all of its assets including a number of bakery franchises, and the franchisor’s motion to compel the sale of the bakeries and associated equipment pursuant to the franchise agreements. The district court then denied the franchisor’s motion for leave to appeal the bankruptcy court’s denial of its motion to compel the sales.

The court held that the franchisor was not entitled to an appeal as of right because the decision denying the motion to compel the sales was not a final order. Rather than resolve a discrete claim, the decision determined only that the franchisor must resort to an action for damages, rather than specific performance, under the franchise

agreements. The district court also decided that the franchisor failed to show that an interlocutory appeal was warranted. The franchisor disputed how the bankruptcy court applied the relevant legal standard, rather than which standard should have been applied, failed to show that the appeal would materially advance the ultimate termination of the litigation, and did not identify any exceptional circumstances to overcome the general aversion to piecemeal litigation.

Kevin M. Hogan is the Managing Partner at Phillips Lytle LLP. He concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com or (716) 847-8331. Sean C. McPhee is a partner with Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com or (716) 504-5749.