

Western District Case Notes



By KEVIN HOGAN

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In *Securities and Exchange Commission v. Bahgat et al.*, No. 17-cv-971-LJV (Apr. 6, 2020), after plaintiff failed to answer and plaintiff moved to enter a default judgment, the Court ordered plaintiff to show cause why its attempts to serve plaintiff via email comported with the requirements of the due process clause of the Fourteenth Amendment. Plaintiff submitted evidence that it attempted to serve defendant using the last known email address that plaintiff had actively used at least a year earlier.

The Court held that such service did not comport with due process and therefore denied plaintiff's motion for a default judgment. The Court rejected plaintiff's argument that the absence of an email "bounce back" established a reasonable likelihood that the defendant had actually received the email. The Court reasoned that, were that true, a plaintiff could prove traditional mail service by showing simply that a letter was not returned as undeliverable when, instead, the defendant may no longer live at the address and the new resident may have discarded the mail. According to the Court, sending an email to an address last used one year earlier is not reasonably calculated to apprise the defendant of the pendency of the action and afford him an opportunity to present his objections and, therefore, does not comport with the due process requirements of the Fourteenth Amendment.

In *Mayer v. United States Postal Service*, No.

19-cv-355-JLS (May 13, 2020) — a negligence claim brought under The Federal Tort Claims Act ("FTCA") — defendant moved to set aside a default and dismiss the complaint for insufficient service of process, because the FTCA precludes tort suits against federal agencies, making the United States the only proper defendant in the action, and Rule 4 therefore required plaintiff to serve the Attorney General and the United States Attorney's Office, which plaintiff had not done. The Court found that plaintiff had not complied with the 90 day deadline to accomplish service set forth under Rule 4(m) and was not entitled to relief under Rule 4(i)(4). The Court nevertheless granted plaintiff a discretionary extension of time to serve the complaint, declaring plaintiff's late service on defendant effective nunc pro tunc, despite acknowledging that the factors to be weighed in deciding whether to exercise such discretion were evenly balanced. On the one hand, plaintiff's action likely would be barred by the statute of limitations if it were refiled, and the federal agency had "some notice" of the claim due to an earlier administrative claim and correspondence. On the other hand, there was no evidence that defendant had attempted to conceal the untimely service or defect, and defendant would suffer harm if the service period were extended beyond the limitations period for the action. The Court also noted that discretion usually is exercised when a plaintiff has advanced some colorable excuse for her neglect, and here no excuse was proffered for plaintiff's failure to follow the proper procedures for serving the United States, especially after receiving an administrative denial letter that set forth the proper process. Notwithstanding an absence of an excuse for the neglect, and in spite of the evenly balanced factors, the Court exercised its discretion and granted the Rule 4(m) extension because of the Second Circuit's stated preference for resolving disputes on the merits and because the statute of limitations likely would bar any refiling of the lawsuit.

Motion to Compel Arbitration

In *Pool Deals, LLC v. United Parcel Service, Inc.*, No. 20-cv-47-JLS (Apr. 16, 2020), plaintiff

obtained a state court temporary restraining order enjoining defendant from collecting certain shipping costs charged to plaintiff. Defendant then removed the action and sought to compel arbitration of the parties' dispute based on a provision in defendant's terms of service, which it contended was incorporated by reference in the parties' underlying agreement. Plaintiff opposed, arguing that defendant's terms of service did not govern the parties' dispute because the dispute relates to billing, and not services. Consistent with "the strong federal policy favoring arbitration," the Court compelled arbitration and stayed the action, finding that plaintiff was presumed to know — and to have consented to — the contents of the parties' underlying agreement, which incorporated the terms of service, and its arbitration provision, into the agreement by reference. The Court then found that defendant had not waived the right to insist on arbitration because it made its motion before answering plaintiff's complaint, and prior to undertaking any discovery in the action.

Motion to Amend

In *Bank of America, N.A. v. Tenpay LLC et al.*, No. 19-cv-674-JLS (Apr. 21, 2020), a fraud action, plaintiff filed an amended complaint 20 days after one defendant moved to dismiss the original complaint and a second defendant answered that complaint, but more than 21 days after a third defendant had answered the complaint. Plaintiff argued that, when multiple defendants are sued, plaintiff has 21 days as to each defendant to amend as of right under Rule 15(a)(1)(B). The Magistrate Judge rejected that interpretation, concluding instead that plaintiff had only one opportunity within 21 days of the first defense response in order to amend its complaint as a matter of course, and therefore the amended complaint was not timely. The Court disagreed, and ruled that the 21-day period embodied in Rule 15 for amendments "as of right" should be applied to each defendant separately, and therefore plaintiff was entitled to file its amended complaint as of right as to the second defendant to answer and the defendant who moved to dismiss.

Statute of Limitations to Foreclose a Mortgage

In *West Coast 2014-7, LLC v. Mackinnon*, 19-cv-888-EAW-HKS (Apr. 21, 2020), plaintiff commenced an action to foreclose a mortgage encumbering defendants' real property, and defendants moved to dismiss. In support of their motion, defendants argued that the commencement of a prior foreclosure action in 2008 accelerated their entire indebtedness, rendering this subsequent action barred by the statute of limitations. The Court denied the motion, finding that defendants had not met their burden of establishing that the purported acceleration of their entire indebtedness — based solely on a different plaintiff's commencement of the 2008 foreclosure — was valid, because acceleration "is only valid if the party making the acceleration had standing at the time to do so." Here, because defendants failed to demonstrate that the plaintiff in the 2008 foreclosure action was the lawful holder or assignee of the note evidencing defendants' indebtedness, the motion would be denied.

Stay Pending Appeal

In *Up State Tower Co., LLC v. Town of Kiantone et al.*, No. 16-cv-69-FPG (Apr. 20, 2020) — an action alleging defendants violated the Telecommunications Act of 1996 by denying a special use permit to construct a public utility wireless telecommunications facility — defendants moved for a stay pending their appeal of

a judgment entered against them. The Court denied that stay upon finding that defendants had not shown that the relevant factors favored granting such a stay under Rule 62(d). Defendants failed to demonstrate the two "most critical" factors, that they would likely succeed on the merits of their appeal, and that they will suffer irreparable harm. Defendants had merely repeated the arguments that had already been made to and rejected by the Court in denying their motions for summary judgment and reconsideration, thus falling well short of the "strong showing" required to demonstrate a likelihood of success on the merits, and the harms defendants asserted would result from no stay were neither actual nor imminent but instead were "remote and speculative." The Court also determined that the third and fourth factors — whether issuance of the stay would substantially injure other parties and where the public interest lies — were at best neutral, particularly when the telecommunications tower could be removed if defendants prevailed on appeal and substantial evidence of a significant gap in wireless service, indicating the stay arguably would not be in the public interest.

Motion to Enforce Oral Settlement Agreement

In *Scalia v. Agave Elmwood Inc.*, No. 17-cv-605-EAW-HBS (Apr. 28, 2020) — an action by the U.S. Secretary of Labor alleging that defendants failed to pay restaurant employees minimum wage and overtime premiums — plaintiff

moved to enforce a purported settlement that was the subject of extensive negotiations, but which was never reduced to writing and signed by the parties. Noting first that a party seeking to enforce a purported settlement agreement has the burden of proof to demonstrate that the parties actually entered into an agreement, the Court considered the Second Circuit's four-part test for determining whether the parties intended to be bound in the absence of a document executed by both sides. In weighing those factors, the Court found the parties had not. In particular, even though defendants had not expressly reserved the right not to be bound in the absence of a signed writing, the Court recognized that settlement agreements of this nature are typically committed to writing. And, while observing — without deciding — that a one-week interruption in the prosecution of the action, based on plaintiff's cancellation of certain depositions, may constitute partial performance of the purported agreement, the Court ultimately found the purported agreement "was not fully negotiated," requiring denial of the motion.

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