

Western District Case Notes



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Diversity Jurisdiction

In *Power Authority of the State of New York v. Advanced Energy Industries, Inc.*, No. 19-cv-1542-LJV (Oct. 9, 2020) — a case originally commenced in state court — a qui tam relator claimed that defendant violated the New York False Claims Act. Defendant removed the action on the basis of diversity jurisdiction and the qui tam relator

moved to remand, arguing that diversity was lacking, since the Power Authority is an arm or instrumentality of the State of New York, meaning it is not a “citizen” for purposes of diversity jurisdiction. Noting first that a state, or an entity that is an arm or instrumentality of a state, is not a citizen of any state and therefore destroys diversity of citizenship, the Court then analyzed the six factors for determining whether an entity is an arm of the state. It then found that three of the factors were neutral, one favored remand, and two cut against remand. Thus, because all of the factors did not point in one direction, the Court was next required to consider whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk. Ultimately, the Court concluded that, because the Power Authority is financially independent from New York State, and because the state is not responsible for any judgment against the Power Authority, the Power Authority is not an arm of the state. Therefore, the Court has jurisdiction over the action and, as a result, the motion to remand was denied.

Litigation Stay

In *Holve v. McCormick & Co.*, No. 16-cv-6702-FPG (Oct. 9, 2020), a putative class action lawsuit alleging defendant deceptively marketed certain food products as “natural,” the Court stayed the litigation in an earlier Order pending the promulgation of standards from the United States Department of Agriculture regarding the labeling of bioengineered foods and guidance from the Food and Drug Administration regarding what types of foods may be labelled as “natural.” Noting then that an indefinite



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stay would be imprudent, the Court stayed the case for approximately six months and, since then, received two status reports from the parties, each indicating that it was not clear when definitive guidance from either agency would be issued. Following its receipt of the second status report, the Court concluded that it is within its discretion to lift the stay.

With no indication that guidance from either agency would be forthcoming, and notwithstanding the rationale for imposing the stay in the first place under the primary jurisdiction doctrine, the Court concluded it should not stay the case indefinitely, especially when the stay had been in effect now for two years and it had been nearly four years since the action began.

Supplemental Jurisdiction

In *Weber v. Quest Diagnostics of Pennsylvania, Inc.*, et al., No. 20-cv-324-CCR (Oct. 29, 2020), plaintiff sought to bring a class action claim under New York General Business Law Section 349 on behalf of all New York residents and health insurers for New York residents who were billed by defendants for testing and confirmation testing that did not occur. After defendants removed the action under the Class Action Fairness Act, plaintiff amended her complaint as a matter of right, withdrew her class action allegations, but continued to assert the New York General Business Law claim only in her individual capacity in addition to various state common law claims. When defendant moved to dismiss the amended complaint, plaintiff cross moved to remand the case back to state court. Considering the motion to remand first, the Court declined to exercise supplemental jurisdiction over plaintiff’s remaining state law claims, finding that those state claims not only predominated but were the sole claims pending before it. According to the Court, each of the remaining claims raised novel questions of state law concerning common law judicial immunity and litigation privileges that New York State courts should decide. The Court also concluded that

issues of judicial economy, convenience, fairness and comity favored remand, in part because the Court had not issued any scheduling orders, no discovery had taken place, and the Court had not decided any dispositive motions.

Patent Infringement

In *Ausco Products, Inc. v. Axel, Inc. et al.*, No. 19-cv-6798-EAW (Nov. 30, 2020), defendants moved to dismiss the complaint and plaintiff cross-moved for leave to amend in the event the Court found the complaint was inadequately pleaded. Defendants first argued that the complaint resorted to impermissible “group pleading,” in violation of Rule 8(a), by failing to give each defendant fair notice of the claims against it. The Court rejected this argument, finding that plaintiff had explained in the complaint what role each defendant played in the alleged patent infringement. Defendants next argued that the complaint failed to state a claim against one of the defendants, who was the Chief Executive Officer of the other two corporate defendants. The Court agreed and found that the complaint did not state a viable direct or indirect patent infringement claim against the executive, because it did not contain any factual allegations that would support piercing the corporate veil, making the direct patent infringement claim implausibly pleaded, and did not allege any facts to establish that the executive played the kind of personal role in the patent infringement to support individual liability for indirect patent infringement. The Court then held that plaintiff had adequately alleged induced infringement with specific facts to support such a claim, but not contributory infringement because it merely recited the statutory language and no supporting facts in support. The Court then denied plaintiff’s motion for leave to amend because plaintiff did not submit a redlined version of its proposed amended complaint and did not attach to its proposed amended complaint the exhibits referenced therein, both in violation of Local Rule of Civil Procedure 15.

Motion to Stay Discovery Pending Determination of Motion to Dismiss

In *Nieves v. Just Energy N.Y. Corp.*, No. 17-cv-00561-S (Nov. 16, 2020), plaintiff brought a putative class action challenging defendant’s pricing practices for electrical rates imposed on New York cus-

tomers. Defendant moved to dismiss and, after the motion was fully briefed, but before it was decided, plaintiff served document demands and interrogatories on defendant. Defendant then moved under Fed. R. Civ. P. 26(c) to stay discovery pending the determination of its motion to dismiss, which plaintiff opposed. After observing the factors that must be met in order to obtain relief under Fed. R. Civ. P. 26(c), the Court noted that neither party addressed whether the discovery was premature in the first place. The Court then analyzed Fed. R. Civ. P. 26(d) (1), which provides that discovery does not begin until after the parties: (i) have met in a Rule 26(f) conference; (ii) stipulated to conduct early discovery; or (iii) obtained an Order to begin discovery prior to the Rule 26(f) conference. Because none of those events had occurred, the discovery sought by plaintiff should not have commenced, and the Court granted the motion to stay discovery pending the determination of the motion to dismiss, albeit for reasons other than those argued by defendant.

Expert Discovery

In *Wile v. James River Ins. Co.*, No. 17-cv-1275-WJS-HKS (Oct. 9, 2020), plaintiff sought supplemental uninsured/underinsured motorist coverage from her insurance provider following a motor vehicle accident. Before the Court was defendant's request to compel plaintiff to reimburse defendant's expert witnesses for reasonable deposition fees, and plaintiff's request, among others, to compel defendant to produce its expert for a supplemental deposition. With regard to defendant's expert witness deposition expenses, Rule 26(b)(4)(A) requires the party seeking discovery to pay the opposing party's expert a reasonable fee for time spent in responding to that discovery, including traveling to, preparing

for, and testifying at the deposition. The Court noted that Rule 26 aims to calibrate the expert's fee so that a party may hire a quality expert while its adversary is not burdened by unfairly high fees that prevent feasible discovery or result in windfalls to the expert. The motion here involved two experts. For the first expert, the Court concluded that \$650 per hour was a reasonable hourly rate for deposition testimony, three hours was a reasonable time to prepare, and \$250 per hour was a reasonable travel charge. For the second expert, the Court accepted the same amount of time spent in preparation but concluded that \$1,000 per hour was excessive and set \$500 as a reasonable hourly rate. The Court then ordered defendant to produce its expert for a supplemental deposition via video conference at plaintiff's expense for the deposition time and defendant's expense for any preparation time, after the expert failed to produce at her prior deposition either notes of her medical examination of plaintiff or emails relating to the plaintiff, both of which were part of her file. Both the medical examination notes and the emails were required by Rule 26(a)(2)(B) to be disclosed because they constituted facts and data considered by the expert witness in forming her opinions concerning the plaintiff.

Arbitration and Confirmation of Award

In *Naylor v. Valicenti*, 20-cv-06397-CJS (Nov. 9, 2020), the parties initially mediated their disputes and entered into a Mediated Settlement Agreement. Following the mediation, the parties had a series of post-settlement disputes, which the mediator unsuccessfully attempted to resolve. Thereafter, petitioner requested that the mediator conduct an arbitration to resolve the disputes, pointing to a provision in the Mediated Settlement Agreement as authority for the

mediator to render an arbitration award. Respondent denied its obligation to arbitrate and declined to appear at the hearing. The mediator later issued an arbitration award, and petitioners sought to confirm it under the Federal Arbitration Act ("FAA"). Respondent opposed, arguing that the FAA does not apply, and that the award was not binding. Noting first that, because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he has not agreed to submit to arbitration, the Court next analyzed the relevant provisions of the Mediated Settlement Agreement and found that it was ambiguous. The Court then held an evidentiary hearing where the mediator testified that the parties agreed that any further disputes would first be mediated but, if still unresolved, would then be arbitrated. As a result of that testimony, the Court found that there was an unequivocal agreement to arbitrate. The Court then rejected respondent's argument that the FAA did not apply, finding that the transaction giving rise to the parties' disputes involved "commerce," which is all the FAA requires. Finally, the Court confirmed the arbitration award, noting respondent failed to timely seek to vacate, modify or correct it within three months, as required under the FAA.

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