

Western District Case Notes



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Notice of Motion Requirement Under Local Civil Rule 7(a)(1)

In *Kujawski v. Liberty Mut. Ins. Co.*, 19-cv-00603-WMS (Mar. 30, 2021) — an action for negligent infliction of emotion distress, negligent hiring, and breach of an implied contract — defendant filed a “Motion to Dismiss,” consisting of a

single document containing a one-paragraph summary of the relief requested and attaching a memorandum of law and an exhibit. Plaintiff moved to “strike” defendant’s motion, arguing it should be “summarily denied” because defendant failed to file a notice of motion. Observing that a notice of motion (stating the relief sought, the grounds for the request, the papers submitted in support, the return date (if known), and whether the movant intends to file a reply) “is required for all motions” under Local Civil Rule 7(a)(1), the Court found that defendant’s failure to provide the information required by the Rule resulted in prejudice to plaintiff. Therefore, to “encourage compliance” with the Court’s Local Civil Rules, plaintiff’s motion was granted. But, because doing so was a “drastic remedy,” the Court provided defendant with an opportunity to “properly renew[]” its motion within eight days.

E-filing Attempted During Scheduled Maintenance of CM/ECF Rendered Untimely

In *Nelroy Drugs, Inc. v. Rochester Drug Co-operative, Inc.*, No. 20-cv-06946-FPG (Apr. 19, 2021), appellants sought to appeal the Bankruptcy Court’s denial of their motion for reconsideration following the denial of their motion for relief from the automatic stay. The debtor moved to dismiss the appeal, claiming it was untimely because appellants’ motion for reconsideration was itself untimely. As a result, the debtor contended that the Court lacked subject matter jurisdiction to entertain the appeal. Appellants conceded that their motion for reconsideration was filed 17 days — rather than 14 days — after their



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initial motion was denied, but blamed the delay on “a technical failure of the [Bankruptcy Court’s] e-filing system.” The Court rejected that argument, noting that appellants’ inability to timely file their motion for reconsideration occurred as a result of scheduled maintenance to the CM/ECF system, and that appellants were not only made aware of the upcoming system outage, but also had advance notice to take proper steps to ensure that their filing was completed prior to the scheduled outage. The Court also noted that, although appellants attempted to email their motion to the Bankruptcy Court during the outage on the evening of the final day of their deadline, their email was sent to the Bankruptcy Court for the Eastern District of New York, rather than the Western District of New York. Thus, the proper Bankruptcy Court never received the filing by the deadline. The Court then observed that appellants’ predicament was the result of “multiple careless errors,” and cautioned that when parties “wait until the last minute to comply with a deadline, they are playing with fire.” Finally, the Court remarked that “if the Rules are to mean anything ... courts must enforce them, even if it means that cases must sometimes be finally determined on procedural grounds rather than on their substantive merits,” and dismissed the appeal because the motion for reconsideration giving rise to the appeal was untimely.

Implied Covenant of Good Faith and Fair Dealing

In *Khan v. Laninver USA, Inc.*, 18-cv-00561-JLS-LGF (Mar. 31, 2021), plaintiff asserted a claim against defendant for breach of an implied covenant of good faith and fair dealing in connection with the parties’ contract for the purchase/sale of plaintiff’s company. Defendant moved to dismiss, challenging the sufficiency of plaintiff’s allegations. The Court first recognized that, under New York law, a covenant of good faith and fair dealing

is implied in all contracts, and neither party shall do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Thus, to state a cause of action for breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff. The Court then found that plaintiff sufficiently alleged that defendant did not adhere to that implied obligation because, accepting plaintiff’s allegations as true, defendant prevented plaintiff from obtaining a bonus payout provided for in the contract. Finally, the Court remarked that it “remains to be seen whether plaintiff can substantiate his bad-faith theory, but at this stage he has sufficiently pleaded it to survive a motion to dismiss and proceed to discovery.” Accordingly, defendant’s motion was denied.

Products Liability

In *Thomas v. ConAgra Foods, Inc., et al.*, 20-cv-6239-EAW (Mar. 29, 2021), plaintiff brought a product liability action against defendants for injuries she suffered when a cooking spray can exploded during use. Plaintiff’s complaint asserted 15 causes of action against various defendants, including claims of design defect, manufacturing defect, failure to warn, a “non-specific defect,” and negligence. Defendants moved to dismiss the design defect, failure to warn, non-specific defect, and negligence claims. Although at the trial stage design defect claims and manufacturing defect claims are often mutually exclusive, the Court held that the plaintiff was “fully entitled” to plead both theories in the alternative at the pleadings stage. The Court also found that the specific warnings plaintiff alleged should have been provided were sufficient to put the defendants on notice of the information that plaintiff relies on for her failure to warn claim. Regarding the non-specific defect claim, the Court noted that a plaintiff with a product liability claim in New York may prevail by demonstrating that the product did not perform as intended and by excluding all other causes for the product’s failure, even if she cannot prove the specific defect. The Court, however, held that a claim for non-specific defect was merely an alternative

theory to support design defect and manufacturing defect claims and, therefore, was duplicative of those claims and should be dismissed as a stand-alone claim. The Court also ruled that, because the elements of negligence claims based on design defect, manufacturing defect and failure to warn theories are the same as those under strict liability, dismissal of the negligence claim was not warranted for the same reasons that the motion to dismiss the design defect and failure to warn claims was denied.

Takings and Equal Protection Claims

In *Drake, et al. v. Village of Lima, et al.*, 20-cv-6112-EAW (Mar. 30, 2021), plaintiffs sued a village and its Department of Public Works for damages caused when a nearby sewer line became clogged and the backup caused damage to the residence and contents. In addition to state tort claims, plaintiffs asserted federal takings and equal protection claims. The Court first held that plaintiffs' takings claim was not plausibly alleged and must be dismissed, because a takings plaintiff bears the burden to prove that a government action, rather than inaction or failure to act, caused the injury. Thus, for instance, a theory that the government failed to maintain or modify a government-constructed project may state a tort claim, but it does not state a takings claim. Here, because plaintiffs' claim was premised on defendants' alleged negligence in maintaining and operating the sewer line, this was "precisely the type of government inaction that has been found insufficient to support a takings claim." The Court also ruled that the equal protection claim was not plausibly alleged, because the complaint only contained conclusory allegations that other unspecified portions of the municipality sewer system had been better maintained, operated and designed in some unspecified way, but failed to offer any more specific allegations concerning the purportedly better-maintained sections of the sewer system and the properties connected there. Given the early stage of the proceedings, that the remaining causes of action involved "quintessential areas of state law," and that the action had originated in State Court, the Court

declined to exercise supplemental jurisdiction and remanded the remaining State law claims.

Negligence

In *Alger v. Von Maur, Inc.*, 19-cv-6698-FPG (May 17, 2021), plaintiff sued defendant alleging she was injured after slipping and falling on a wet floor that defendant allegedly caused, created or permitted to exist at its retail store. Defendant moved for summary judgment, arguing that no evidence had been adduced during discovery to support a finding that defendant created the hazard or had actual or constructive notice of the allegedly dangerous condition. The Court granted the motion, noting first that, unlike New York's summary judgment standard — in which the moving party is required to put forth affirmative evidence in support of its motion — the federal standard requires defendant to show only that an absence of evidence in the record prevents the nonmoving party from prevailing at trial. The Court then held that plaintiff failed to raise a triable issue of fact concerning whether the defendant caused or had actual knowledge of the allegedly wet floor, because there was no evidence in the record that an employee created the hazard, that an employee observed the wet floor prior to the incident, nor that any customer had complained about the condition prior to the fall. The Court also held that there was insufficient proof to raise a question of material fact concerning defendant's constructive notice of the condition prior to the incident, because there was no evidence that the condition was visible and apparent prior to the incident. Without evidence that the condition was visible and apparent before the incident, the Court also ruled that a jury could not determine that there was sufficient time for defendant's employees to have discovered and remedied the condition.

Motion in Limine

In *Horne, et al. v. Medical Marijuana, Inc., et al.*, 15-cv-701-JWF (April 29, 2021), defendants filed various motions in limine on the eve of trial. The Court advised that, "although the Federal Rules of

Evidence do not explicitly authorize in limine rulings," the practice has developed pursuant to the Court's inherent authority to manage the course of trials. Such rulings though are viewed as a "preliminary opinion given to allow the parties to formulate their trial strategy and allow the court to manage the trial in the most efficient way possible." But the Court is not bound by an in limine ruling and has the discretion to change its determination when facts are developed that warrant that change "or even if nothing unexpected happens at trial." Once such motion in limine sought to exclude the results of the urine test on grounds of hearsay, authentication, and failure to disclose an expert under Rule 26. The issue posted the question whether a business record that contains an opinion must satisfy both Rule 702 governing expert opinions and Rule 803(6) governing business records. Plaintiffs argued the test results were admissible as a record of a regularly conducted activity and their admissibility was not subject to the additional requirements of Rule 702. Siding with what it regarded as the "majority view," the Court held that an opinion properly admitted under Rule 803(6) does not also need to satisfy the requirements of Rule 702, especially when those opinions were obtained and processed in the regular course of business, the laboratory had not reason to falsify the test results, the testing was not requested for purposes of this or any other litigation, and the results were relied on and trusted by the recipient, even when that recipient is one of the litigants.

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