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Western District Case Notes

By KEVIN M. HOGAN and SEAN C. MCPHEE | December 7, 2021


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Temporary Restraining Orders

In Lake Region Medical, Inc. v. Pike, 21-cv-00844-LJV-LGF (Aug. 20, 2021) — an action for breach of contract, unfair competition, and tortious interference with contract — plaintiff sought a temporary restraining order and preliminary injunction against a former employee and his new employer (a direct competitor) based on a 26-week non-compete clause in plaintiff's "separation agreement" with the former employee. Noting that temporary restraining orders and preliminary injunctions are "drastic remedies" requiring the movant to establish, among other things, "a likelihood of success on the merits" and that it "is likely to suffer irreparable harm before a decision on the merits can be rendered," the Court found that these elements were lacking, and denied the motion. In doing so, the Court first determined that plaintiff was not likely to succeed on the merits because the non-compete clause only precluded plaintiff's former employee from undertaking duties at his new employer that were "substantially similar" to those undertaken for plaintiff, but his respective duties "appear[ed] to be very different." The Court then held that, because plaintiff failed to demonstrate that it is likely to prove the former employee breached the separation agreement, plaintiff also "failed to demonstrate irreparable harm" — i.e. "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages."

Appointment of Lead Class Action Plaintiff

In In re Eastman Kodak Securities Litigation, 21-cv-06418-EAW (Aug. 2, 2021), a consolidated class action seeking damages under the Securities Exchange Act of 1934, multiple motions for the appointment of lead plaintiff were filed. Many were later withdrawn, but three remained, and the Court was tasked with determining which plaintiff was "most capable of adequately representing the interests of class members." To make that determination, the Private Securities Litigation Reform Act directs the Court to consider, among other things, who has the largest financial interest in the relief sought by the class, which is primarily determined by the approximate amount of losses suffered. While one of the three competing plaintiffs argued that another had not suffered any losses attributable to the fraud because the latter sold its shares prior to any revelations of fraud, the Court disagreed and found that the latter had the greatest financial interest in the outcome of the litigation, notwithstanding its short sales of defendant's stock. And, because the latter otherwise satisfied the requirements of Fed. R. Civ. P 23, it was the most appropriate lead plaintiff.


Sean McPhee

Motion to Change Venue

In Fritz v. Realpage, Inc., 20-cv-7055-CJS-MWP (Aug. 20, 2021), a case referred to the Magistrate Judge for all non-dispositive pretrial matters, plaintiff alleged defendant had violated federal and state Fair Credit Reporting Acts when defendant issued allegedly inaccurate screening reports with respect to two apartments in western New York, causing the landlords to deny plaintiff's applications for tenancy. Defendant moved to transfer venue to Texas, where its headquarters, leadership team, and computer servers all were located. The Court first ruled that the motion to change venue fell within the scope of the referral order for non-dispositive pretrial matters, notwithstanding the view of some courts that such a motion was dispositive. The Court then applied the two part test under 28 U.S.C. §1404(a) that asks whether the action might have been brought in the proposed transferee forum and, if so, whether the transfer promotes convenience and justice. The parties did not dispute, and the Court held, that the action could have been brought in the Northern District of Texas. The Court, though, concluded defendant had not made a strong showing in favor of transfer. The Court considered nine factors, none of which was considered determinative, and held that the balance of those factors supported denying the motion. The lone factor in favor of transfer was the locus of operative facts. Yet five factors weighed against transfer, including deference to plaintiff's choice of forum, the convenience of witnesses and parties, the availability of process to compel the attendance of unwilling witnesses, and the relative means of the parties, and three other facts were neutral, including the location of relevant documents, the forum's familiarity with the governing law, and the interest of justice and judicial economy.

Arbitration

In Morrison v. Midland Funding, LLC, et al., 20-cv-6468-FPG (June 21, 2021), one defendant acquired all rights, title and interest in plaintiff's account from a non-party credit card company, filed an action against plaintiff seeking to collect on the outstanding credit card debt, obtained a default judgment in its favor, and attempted to collect on the judgment by filing an income execution. Plaintiff sued defendant, its affiliate and its attorneys, individually and on behalf of two classes, alleging that defendants violated the Fair Debt Collection Practices Act and New York's General Business Law because the income execution allegedly contained false statements and failed to comply with various requirements of the New York State Consumer Protection Law. In response, defendants filed a motion to compel arbitration and dismiss the complaint, based on an arbitration provision found in the credit card agreement between plaintiff and the credit card company. Plaintiff asserted that arbitration of her claim was improper because, under the so-called merger doctrine, the underlying debt merged with the state court judgment, extinguishing the debt, the credit card agreement, and the arbitration provision contained therein. The Court disagreed, ruling that the credit card debt might merge into the court judgment debt, but that merger does not extinguish the underlying contract and the rights and obligations therein, including those that govern the manner in which any debt may be collected. Moreover, the Court found the underlying credit card agreement contained clear language predicting the circumstances presented here, in which a lawsuit might be filed to collect on the debt and, if plaintiff responded by claiming wrongdoing, plaintiff could be compelled to arbitrate that claim. The Court also rejected plaintiff's argument that the right to compel arbitration in the credit card agreement was unique to the credit card company, and not one that could be assigned to defendant or asserted by its affiliate or attorney/agent. The Court held that defendants stepped into the shoes of the credit card company when they purchased "all rights, title and interest in the account" and, therefore, their right to compel arbitration was clear.

Permissive Joinder and Remand

In Barber v. Somal Logistics, Ltd., No. 20-cv-00854-WMS (May 27, 2021) — an action arising out of a motor vehicle collision that was originally commenced in New York State Supreme Court but removed based on diversity of citizenship — plaintiff sought permissive joinder of two additional defendants she sued in a separate state court action for injuries allegedly suffered in a different motor vehicle accident that occurred nine months after the accident giving rise to this action. Because joinder of the additional defendants would eliminate diversity of citizenship, plaintiff also sought remand to state court. In support of her motion, plaintiff argued that the extent to which each accident caused her injuries is a factual question central to both actions, "making the two actions part of the same series of occurrences, and sharing common questions of law and fact." Defendants opposed, contending that joinder was sought only to defeat diversity and secure remand to state court. Observing that joinder "is generally favored," the Court undertook a two-part analysis to determine: (i) whether joinder is permissible under Fed. R. Civ. P. 20(a)(2); and (ii) if it is fundamentally fair to defendants to permit "diversity-destroying" joinder. In answering both questions in the affirmative, the Court first found that the two accidents "constitute a series of occurrences" giving rise to common questions of fact regarding the cause of plaintiff's injury and the extent of her damages. As for the latter, the Court determined that defendants were not prejudiced because: (i) plaintiff did not delay in seeking to join the additional defendants; (ii) a joint trial would result in no prejudice given the fact that the case "is in its early stages and no discovery has yet taken place"; and (iii) "joinder and remand would reduce the chance of multiple litigation and potentially inconsistent outcomes." As a result, plaintiff's motion was granted and the case was remanded to state court where presumably, but not necessarily, it will be consolidated with the non-removed action that plaintiff commenced against the defendants who were joined in the federal action prior to its remand.

Intervention in Qui Tam Action

In U.S. ex rel. Ross v. Independent Health Corp., 12-cv-00299-WMS (Aug. 9, 2021), a qui tam action brought under the False Claims Act in which the plaintiff/relator alleges that defendants submitted false and inflated claims for reimbursement to the federal Medicare program, the United States government moved to intervene seven years after its initial deadline to do so. Specifically, under the False Claims Act, the government had 60 days to determine whether it would intervene, but rather than make the election at the outset, it began requesting (and receiving) 180-day extensions while investigating the relator's allegations. After obtaining 15 such extensions, the government eventually elected not to intervene, but noted that its investigation remained ongoing. The relator then amended her complaint and defendants moved to dismiss it. The day the motion to dismiss was fully briefed, the government moved to intervene, arguing there was good cause to allow its untimely intervention. The Court agreed, finding first that the public interest is best protected by allowing the government to bring "its considerable expertise and resources to bear against those alleged to have defrauded it." Next, the Court found that the government's identification of post-declination disclosures made by defendants also weighed in favor of intervention, since the previously undisclosed documents were material to the scope of the alleged fraud. Finally, because the relator consented to intervention, and because defendants would suffer no prejudice (since they have been on notice of the government's continuing investigation and because no formal discovery had been undertaken during the nine-year pendency of the action), the government met its burden to establish good cause for its untimely intervention.

Insurance Coverage (Criminal Investigation)

In Rochester Drug Cooperative, Inc. v. Hiscox Ins. Co., Inc., 20-cv-6025-EAW (June 25, 2021), an action for coverage under a Private Company Management Liability Insurance Policy, plaintiff sought leave to add a claim seeking coverage for a criminal investigation following service of a grand jury subpoena. Defendant opposed the motion, arguing plaintiff improperly delayed in making it and the proposed amendment was futile in any event. The Court granted the motion, holding first that plaintiff had not unduly delayed in bringing its motion because the case was awaiting a Rule 16 scheduling conference and, therefore, was still in its earliest stages, and because defendant had not demonstrated that any meaningful prejudice would result if leave to amend were granted. Turning to whether the new claim to be added would be futile, the Court concluded it was plausible that defendant was estopped from denying coverage based on its own conduct, in which case the new claim would not be futile. Accepting as true the allegations in the proposed amended complaint, the Court ruled that defendant did not assert policy defenses or reserve the privilege to do so when notified initially of the criminal investigation, but instead acted in a way that led plaintiff to believe that coverage would be provided. At this early stage in the proceeding, before discovery and without a more fulsome record, the Court also declined to consider the merits of various exclusions in the policy that Defendants had raised in opposition to the motion to dismiss.

Insurance Coverage (COVID 19)

In Salvatore's Italian Gardens, Inc., et al. v. Hartford Fire Insurance Co. Ins., 20-cv-659-GWC (July 7, 2021) — an action seeking a declaration that New York State Executive Orders in response to the COVID-19 pandemic triggered coverage under the Civil Authority and Business Income provisions of a Special Multi-Flex Business Insurance Policy — defendant moved to dismiss the complaint. Plaintiff argued that the policy afforded specific coverage for any mandated suspension of business operations at the insured's location by order of government authority. The Court, however, found that coverage under the policy was afforded only when a government order was issued in response to direct physical loss or damage in the vicinity of plaintiffs' premises and prevented plaintiffs' access to those premises. In the complaint, plaintiff did not plausibly allege either that the New York Executive Orders were issued in response to direct physical loss or damage in the vicinity of plaintiffs' premises, or that those Orders prevented plaintiffs from accessing their premises. The Court noted that several courts applying New York law have determined that the Coronavirus did not constitute a direct physical loss or damage to property, and that the Executive Orders were not issued in response to specific instances of physical loss and damage but rather in response to the spread of the coronavirus. In addition, the complaint lacked non-conclusory allegations regarding a physical loss or damage to the subject premises, or that the Executive Orders specifically prohibited plaintiffs' access. For similar reasons, the Court also held that plaintiffs had not demonstrated an entitlement to coverage under the policy's Special Business Income Coverage, and the motion to dismiss was granted.

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