

Western District Case Notes

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Motion to Amend

In *Orange Transportation Services, Inc., et al. v. Volvo Group North America, LLC*, No. 19-cv-6289-FPG (Dec. 22, 2021), defendant objected to a Decision and Order of the Magistrate Judge granting plaintiff a motion to amend the complaint to add fraud claims by a second plaintiff. The two plaintiffs were sister companies. They alleged that defendant fraudulently induced them into purchasing a number of semi-trucks that defendant knew had defective engines. Soon after the purchase, however, one plaintiff transferred ownership of the trucks it was induced to buy to the other plaintiff. Defendant objected to the Decision granting plaintiffs leave to amend the complaint to add fraud claims based on those transferred vehicles. The District Court agreed with the objection and vacated the Decision and Order. The Court held that the proposed Second Amended Complaint did not contain any plausible alle-



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gation that the second plaintiff, who owned the vehicles for only a short period of time before their transfer to the sister corporation, had suffered any damages, a required element of a fraud claim under New York law. The Court acknowledged that Rule 9(b) does not require a claimant to plead injury with particularity even in a fraud claim, and that courts routinely hold that plaintiffs need not plead exactly how they were damaged or the measure by which any damages should be calculated. But here, according to the Court, the issue was not that the second plaintiff had failed to allege precisely how it was injured, but rather that it had not alleged that it was injured at all. Plaintiffs resorted to a group pleading – where the allegations relating to damages were vaguely asserted with respect to the plaintiffs collectively – to no avail. The proposed amended complaint did not include any allegation specifying what damages the second plaintiff incurred while it owned the trucks and that were caused by the fraud. The proposed claim, therefore, was futile and leave to amend the complaint should be denied, even though such leave normally is freely given when justice so requires.

Federal Tort Claims Act
In *Rodriguez v. U.S.*, 17-cv-00251-WMS-JJM (Dec. 14, 2021) – a case under the Federal Tort Claims Act stemming from a United States Postal Service van colliding with the police

patrol car that plaintiff was driving – plaintiff moved to increase the ad damnum clause in his complaint from \$4 million to \$7 million due to the discovery of a concealed tear in his left shoulder, as well as a permanent disability designation. In evaluating the motion, the Court noted that an action under the Federal Tort Claims Act may not be commenced until after the claim is presented to the appropriate federal agency, and thereafter a plaintiff may not seek a sum in excess of the amount of the claim presented to the federal agency except where based on newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency. The Court also noted that the Federal Tort Claims Act must be strictly complied with since it constitutes a waiver of sovereign immunity. The Court then rejected plaintiff's argument that the permanence of his disability was unknown when his claim was filed because certain medical opinions finding that plaintiff was unable to return to his duties predated the filing of his claim, so he could have included disability as part of his alleged damages, meaning it was not newly discovered. Similarly, because there was no medical finding linking the concealed tear to the accident, and because plaintiff did not allege that the concealed tear was caused by the accident, the Court found that plaintiff failed to make a nexus between the concealed tear and the increase in damages he sought. As a result, the motion was denied.

Preliminary Injunction

In *Strong v. Zucker*, No. 21-cv-6532-DGL (Jan. 27, 2022), a state resident brought an action against the Commissioner of the New York State Department of Health challenging the constitutionality of the COVID-19 regulations that created the so-called “Excelsior Pass” and that drew distinctions between vaccinated and unvaccinated persons. Plaintiff filed a motion for a temporary restraining order and a preliminary injunction, which the Court denied after finding that plaintiff could not establish either irreparable harm or a likelihood of success on the merits. The Court questioned whether plaintiff could point to any actual harm, when his complaints focused on having to wear a mask at a gym, farmer’s market, or concert, and concluded in any event that such harms were of plaintiff’s own making and did not rise to the level of harm necessary to support preliminary injunctive relief. The Court also determined plaintiff was not likely to succeed with his lawsuit, when so many courts already had rejected similar claims, and courts are loath and ill-equipped to substitute their judgment for those of the health authorities charged with protecting public health. According to the Court, plaintiff fared no better under the alternative test that considers whether the plaintiff has raised serious questions (or a fair ground for litigation) and whether the balance of hardships weighed in his favor. Here, the Court held that the balance of hardships tipped decidedly away from plaintiff given the state’s strong interest in maintaining and protecting public health and the public’s interest in curbing the spread of COVID-19.

Discovery

In *Strike 3 Holdings, LLC v. John Doe*, No. 21-cv-1206-EAW (Dec. 15, 2021) — an action for copyright infringement based on allegations that defendant downloaded and distributed plaintiff’s motion pictures in violation of the United States Copyright Act of 1976 — plaintiff moved, ex parte, for leave to serve a third party subpoena prior to the Rule 26(f) conference. Plaintiff sought to serve the subpoena on defendant’s internet service provider (“ISP”) to determine the name and address of defendant in order to serve the complaint. The Court granted the motion, finding that good cause existed for immediate discovery notwithstanding the rule that such discovery normally is not permitted until the parties have conferred under Rule 26(f). The Court found that plaintiff had made a showing of a prima facie claim for copyright infringement, proposed a sufficiently specific discovery request, and established that expedited discovery was necessary to prevent the requested information from being lost forever, no alternative means existed to obtain the information, and plaintiff’s interest in learning defendant’s name and address outweighed any expectation defendant might keep that information private.

New York Borrowing Statute & the Statute of Frauds

In *Nanjing CIC Int’l Co., Ltd. v. Schwartz*, 20-cv-07031-EAW-MWP (Jan. 19, 2022), plaintiff — a trading company based in China — alleged it had a verbal contract with defendants to act as its exclusive agent in the United States. The parties’ relationship eroded and eventually ended in 2016. Four years later, plaintiff commenced this action for, among

other things, breach of contract. Defendants moved for summary judgment, contending that all of plaintiff’s claims are barred under CPLR 202, the so-called “borrowing statute,” and that plaintiff’s contract-based claims are barred by the statute of frauds. Regarding the former, when a nonresident sues on a cause of action accruing outside of New York, CPLR 202 requires the cause of action to be timely under the limitations periods of both New York and the jurisdiction where the cause of action accrued in order to prevent forum shopping. According to defendants, the claims in plaintiff’s complaint were untimely under the borrowing statute because they are subject to a three-year statute of limitations under Chinese law, and those claims allegedly accrued in China. Plaintiff did not dispute that the borrowing statute applies, or that the statute of limitations under Chinese law is three years. Instead, it argued its claims were nonetheless timely because the statute of limitations does not begin to run under Chinese law until the plaintiff has sufficient facts to know both that it has been damaged and who caused the damage. And under that accrual rule, this action is timely. In response, the Court determined that, on the record before it, there are questions of fact as to when plaintiff knew or should have known that it had allegedly been damaged by defendants and denied the statute of limitations aspect of defendants’ motion. As for the statute of frauds, plaintiff acknowledged that it is implicated by its alleged oral contract with defendants, but sought to be excused from compliance based on promissory and equitable estoppel. While the Court recognized that the statute of frauds can be trumped by those equitable doctrines, that is only

where a plaintiff demonstrates “unconscionable injury,” which is lacking where the alleged injuries consist solely of lost revenue and profits, reputational harm and lost business opportunities. Because those were precisely the injuries plaintiff alleged it suffered, the narrow exception plaintiff sought to rely on could not apply as a matter of law, and plaintiff’s contract-based claims were dismissed under the statute of frauds.

Insurance

In *New York Life Ins. Co. v. Oldham et al.*, No. 19-cv-669-EAW (Feb. 1, 2022), plaintiff commenced an interpleader action to deposit the proceeds of two life insurance policies pending a determination of rights to recovery by the two defendants, both of whom had been named beneficiaries. The moving defendant filed a motion for summary judgment seeking recovery of all of the proceeds on grounds that the non-moving defendant was responsible for the death of the decedent, thus barring him from any recovery under the so-called Slayer Rule. The non-moving defendant was found to be incapacitated by the Office of Mental Health and unfit for trial, and later was indicted on a charge of murder in the second degree, which remained pending at the time of the motion. The Court denied the motion because disputed issues of fact precluded the Court from finding, by a preponderance of the evidence, that the non-moving defendant had acted recklessly or intentionally to cause the death of decedent as is required by the Slay-

er Rule. The non-moving defendant had not been convicted of the murder, the Grand Jury indictment alone did not constitute sufficient proof of a reckless or intentional death, and the non-moving defendant had been adjudicated an incompetent person, all of which made an award of summary judgment on the facts presented premature.

Fed. R. Civ. P. 54(b) and Partial Final Judgments

In *Horn v. Med. Marijuana, Inc.*, No. 15-cv-00701-JWF (Jan. 24, 2022), defendant moved to dismiss plaintiff’s two remaining claims just four days before trial, contending it identified potentially dispositive defects with those claims. The trial was cancelled and, after motion practice, the Court dismissed plaintiff’s civil RICO claim and rescheduled the trial on plaintiff’s sole remaining claim for fraud. Plaintiff then moved under Fed. R. Civ. P. 54(b), seeking entry of a partial final judgment concerning the dismissal of his civil RICO claim so that he could immediately appeal the Court’s ruling. Noting first that Rule 54(b) creates an exception to the general principle that a final judgment is proper only after the rights and liabilities of all parties to the action have been adjudicated in order to preserve the historic federal policy against piecemeal appeals, the Court then observed that the determination of whether to grant a motion under Rule 54(b) is committed to its sound discretion. In exercising that discretion, the Court should consider, among other things, judi-

cial administrative interests, as well as the equities involved. For example, a motion under Rule 54(b) should not be granted if the same or closely related issues remain to be litigated. But here, the Court found that plaintiff sought to appeal a discrete question of statutory interpretation that does not implicate the remaining fraud claim, so there was no risk that the Second Circuit would be forced to review identical legal issues in the event of a subsequent appeal. In addition, pretrial resolution of the RICO issue would mitigate the financial and personal hardships that plaintiff would suffer in connection with duplicative trials if the Court’s ruling on the RICO claim was reversed after a trial on the fraud claim. Finally, as defendants pointed out, definitive appellate resolution of plaintiff’s civil RICO claim could dramatically alter the potential damages available to plaintiff and may help facilitate settlement. For those reasons, the Court concluded that there is no just reason to delay the appeal and granted plaintiff’s motion.

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