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WESTERN DISTRICT CASE NOTES

■ KEVIN M. HOGAN and SEAN C. MCPHEE SPECIAL TO THE RBJ

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PSEUDONYMOUS PLAINTIFFS

In *Doe v. M&T Bank Corp.*, 21-cv-01186-LJV (Apr. 14, 2022), a pro se plaintiff asserting claims of racial discrimination, state law tort claims, and a claim for breach of contract moved to proceed under a pseudonym. Noting first that Fed. R. Civ. P. 10(a) requires the title of the complaint to name all of the parties in order to serve the vital purpose of facilitating public scrutiny of judicial proceedings, and that pseudonyms are the exception and not the rule, the Court then evaluated the Second Circuit's 10-factor test for courts to consider when determining whether a party should be permitted to proceed under a pseudonym. In doing so, the Court found that only the first and seventh factors (whether the litigation involves matters that are highly sensitive and of a personal nature, and whether the plaintiff's identity has thus far been kept confidential) weighed "slightly" in plaintiff's favor. As for the other eight factors, none weighed in favor of allowing plaintiff to proceed anonymously because, among other reasons, plaintiff's concerns were "speculative" and "unsupported," and would call for anonymity in virtually any case alleging racial employment discrimination. Moreover, permitting the plaintiff to make his accusations from behind a cloak of anonymity while the defendant must defend against such allegations publicly would be prejudicial to the defendant. Finally, the Court found that sealing and redacting certain documents containing sensitive information are sufficient alternatives to anonymity. Ultimately, because plaintiff failed to demonstrate that his interests outweigh the public interest in disclosure, and would prejudice defendant, the motion was denied.

Kevin Hogan

Sean McPhee

SOLICITATION OF CLASS MEMBERS

In *Jerry Gradl Motors, Inc. v. ACV Auctions, Inc.*, 21-cv-00409-CCR (Mar. 30, 2022) — a putative class action in which plaintiffs allege that defendants used an online car auction platform to artificially inflate prices for automobiles to the detriment of consumers — one of the defendants moved for sanctions against plaintiffs' counsel, alleging improper in-person solicitation of prospective class members in violation of New York Rule of Professional Conduct 7.3. In its motion, defendant sought to restrict plaintiffs' counsel from contacting prospective class members going forward, as well as disclosure of prior solicitations, and attorneys' fees incurred in relation to the investigation and briefing of the issue. Observing that "federal courts may enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar," the Court found that plaintiffs' counsel's "primary purpose" in contacting the prospective class member was to gather information and, "[a]lthough a close question," there was no violation of applicable ethical standards. The Court then found that a "single instance of in-person communication supported by a mixed motive does not warrant court intervention" so as to restrict plaintiffs' counsel from contacting prospective class members going forward, in part because "Plaintiffs have a right to seek information from putative class members" in support of their claims. Finally, the Court found that an award of attorney's fees for either party was not warranted since there was no clear record of unethical conduct by plaintiffs' counsel and, conversely, defendant's motion for sanctions was not frivolous, as it presented a close question.

CLASS ACTION FAIRNESS ACT

In *Zona et al. v. Arnot Health, Inc. et al.*, 20-cv-6902-FPG (April 15, 2022) — a class action alleging improper compensation practices for "non-exempt" nurses — plaintiffs moved for class certification and defendants cross-moved for dismissal under Rule 12(b)(1) or alternatively for summary judgment. Under the Rule 12(b)(1) motion, defendants argued that the local controversy exception to federal jurisdiction under the Class Action

Fairness Act ("CAFA") applied and deprived the Court of subject matter jurisdiction. The Court agreed, finding that more than two-thirds of the class members were New York citizens, at least one key defendant was a New York resident, the alleged conduct causing injury occurred in New York State, and no other action had been filed during the last three-year period. With all elements of the local controversy exception established by a preponderance of the evidence, the Court concluded that it was required to decline to exercise jurisdiction over the case.

QUI TAM CLAIMS

In *United States v. Canzoneri et al.*, 20-cv-505-LJV (Mar. 22, 2022), plaintiff-relator commenced a lawsuit alleging that defendants violated the False Claims Act ("FCA") and the New York False Claims Act ("NYFCA") based on alleged schemes to improperly solicit payments from plaintiff when he performed surgical procedures, and to reuse single-use medication vials for which claims for reimbursement were made to the state and federal governments. Defendants moved to dismiss the *qui tam* claims under the FCA and NYFCA because plaintiff had alleged only "upon information and belief" and without sufficient particularity that false claims were submitted to the governments. The Court agreed, finding that, although plaintiff was not required to allege particular false claims in order to state a viable cause of action, plaintiff's allegations still must give rise to "a strong inference that specific false claims were submitted to the government," which the amended complaint did not do. The Court also dismissed plaintiff's retaliation claims brought under the FCA and NYFCA based on the allegation that plaintiff was fired after reporting that defendant insisted plaintiff pay a sum of money to defendants for every procedure that plaintiff performed, even if defendant was not involved. Because the complaint failed to connect the demand for improper payments from plaintiff to the false claims submitted to the government for the improper reuse of single-use medication vials, the retaliation claims under the FCA and the NYFCA were not plausible. The Court also granted summary judgment dismissing a common law fraud claim that plaintiff asserted on behalf of the two governments, on grounds that there is no common law right to bring a qui tam action. Rather, a statute must authorize a private party to bring suit on behalf of the government and, without such a statute, plaintiff did not have standing to bring a *qui tam* common law fraud claim.

REOPENING DISCOVERY

In *N.Y. Cent. Mut. Fire Ins. Co. v. Electrolux Home Prods., Inc.*, 18-cv-00294-FPG-LGF (Mar. 31, 2022) — a products liability action concerning an allegedly defective clothes dryer — defendant moved for leave to reopen discovery two months prior to the scheduled jury trial, and two-and-a-half years after the close of discovery, contending that it "recently" uncovered evidence that was highly relevant to the issue of causation. Analyzing the motion under Fed. Rule Civ. P. 16(b)(4), which requires "good cause" and "the judge's consent," the Court noted that the party seeking to reopen disclosure also bears the burden of showing the absence of ample opportunity to pursue the evidence during the discovery phase of the action. The Court then applied the six-part test used in the Second Circuit and found that reopening discovery for limited purposes was warranted. While the first two factors (imminence of trial and whether the request is opposed) favored plaintiff, the remaining four factors (prejudice, diligence, foreseeability, and relevance) weighed "strongly" in favor of reopening discovery. In reaching this conclusion, the Court found that any lack of diligence was mutual; the new evidence is, potentially, highly relevant to the central dispute in the case; and defendant would be penalized and plaintiff would be rewarded for their shared misunderstanding regarding the recently discovered evidence. As a result, the Court issued a scheduling order that would allow the parties to fully investigate the newly discovered evidence without the need to adjourn the trial.

NEGLIGENCE

In *Wright v. Target Corp.*, 19-cv-6556-FPG-MWP (April 8, 2022), plaintiff sued defendant for negligence, alleging that she was injured after slipping and falling on a wet metal grate after entering defendant's store. According to the proof submitted to the Court, plaintiff did not see any water on the floor until after she fell, when she noticed her coat and slacks were wet; she had no idea where the water came from or how long it had been on the floor before she allegedly slipped and fell on it; before the fall, an employee of defendant placed a "caution wet floor" cone in the vicinity of where plaintiff fell because of a recent snow storm but not because the floor was wet; another employee inspected the area prior to the store opening; after plaintiff fell, other employees examined the area and confirmed by sight and touch that the ground was clean and dry; and, finally, an employee took several photos of the area after the fall showing that there was no wetness visible. The Court granted defendant's motion for summary judgment, finding that plaintiff failed to provide evidence of either actual or constructive notice. The Court noted first that, while New York State's summary judgment standard required the moving party to put forth evidence in support of its motion, the federal standard does

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not and instead permits a defendant to rely on an absence of evidence concerning actual notice and the creation of the condition to satisfy its burden under Rule 56. The Court found that plaintiff failed to raise a triable issue of fact concerning whether defendant created the alleged hazard or observed the hazard before the incident and, therefore, plaintiff could not establish at trial that defendant had actual notice or created the condition. Plaintiff also failed to establish a triable issue of fact concerning whether defendant had constructive notice because there was no evidence that the condition was visible and apparent and had existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.

DAUBERT AND PRODUCTS LIABILITY

In *Hernandez v. Pitco Frialator, Inc.*, 15-cv-1079-RJA (Mar. 30, 2022) — a products liability lawsuit asserting design defect, negligence, and failure to warn claims — plaintiff sustained injuries when a deep fryer manufactured by defendant tipped over while he was moving the equipment to clean behind it. The Court granted defendant's motion to disqualify plaintiff's expert witness. The Court first held that the expert, who had a Ph.D. in mechanical engineering, was sufficiently qualified as an expert even though he lacked experience with commercial fryers and a professional engineering license. Although well credentialed, his opinion was subject to disqualification because he failed to articulate the scientific or technical basis for his opinion. The expert testified that he performed no tests, built no prototypes, did no calculations, performed no risk analysis, and conducted no inspection of the fryer. Although any of those shortcomings on its own would not preclude the expert from testifying, when viewed together the Court concluded there was no discernible method to the expert's allegedly feasible alternative designs and, therefore, his opinions were unreliable. Without that expert's testimony, plaintiff could not demonstrate the existence of a feasible alternative design and could not show that the lack of such a design rendered the fryer unreasonably unsafe and a substantial factor in causing his injuries, resulting in the dismissal of his design defect claim. For similar reasons, the Court concluded the negligence claim also must be dismissed because there was no evidence the deep fryer's alleged top heaviness rendered the fryer unreasonably dangerous. The Court held that the failure to warn claim also was subject to dismissal because plaintiff admitted he did not read two warnings located on the fryer and did not propose an alternative warning that would have caused him to take notice and prevented the accident.

ATTORNEYS' FEES UNDER 28 U.S.C. § 1927

In *Jackling v. Brighthouse Life Ins. Co.*, 20-cv-06899-MJP (Mar. 21, 2022), defendant moved for an award of attorneys' fees under 28 U.S.C. § 1927, arguing that plaintiff's counsel's actions forced defendant to engage in unnecessary motion practice to secure the dismissal of certain unnecessary defendants from the action. Prior to making the motion, defendant presented plaintiff's counsel with evidence that those defendants should not have been named in the lawsuit and offered additional opportunities for plaintiff's counsel to dismiss the unnecessary defendants, but those requests went unanswered. Thereafter, the Court dismissed the unnecessary defendants and held a hearing in connection with defendant's request for attorneys' fees. Noting that 28 U.S.C. § 1927 requires a showing that the challenged claim was without a colorable basis and was brought in bad faith, the latter of which can be inferred when the actions taken "are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose," the Court found that plaintiff's counsel lacked evidentiary support for the factual contention that the unnecessary defendants needed to be included in the lawsuit. Thus, based on the repeated failures to remove those defendants, the Court inferred bad faith and determined that assessing attorneys' fees on plaintiff's counsel was warranted. As for the amount of fees to be awarded, defendant sought $5,610.00 and the Court analyzed the request under the "loadstar method," in which courts calculate the appropriate amount by multiplying the number of hours reasonably expended by a reasonable hourly rate. In doing so, the Court found the requested hourly rate of $300.00 was reasonable but determined that some of the hours logged were redundant or unnecessary and could have been performed by a more junior lawyer. As a result, the Court applied a 30% reduction "as a practical means of trimming fat," and awarded $3,927.00 to defendant.

Kevin M. Hogan is the Managing Partner at Phillips Lytle LLP. He concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com or (716) 847-8331.

Sean C. McPhee is a partner with Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com or (716) 504-5749.