



Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
October 2014

*This article is the fourth in a quarterly series reviewing decisions from the Federal District Court and State Supreme Court (Commercial Division) judges located in White Plains.
This article reviews decisions from the third quarter of 2014.*

Judge Briccetti Holds Ex-Husband's Auto-Forwarding of Ex-Wife's Emails States Claim Under Federal Wiretap Act

In *Zaratzian v. Abadir*, 2014 WL 4467919 (S.D.N.Y. Sept. 2, 2014), **Judge Vincent L. Briccetti** granted in part and denied in part cross-motions for summary judgment on Plaintiff's claims under, *inter alia*, the federal Wiretap Act. In 2001, while Plaintiff and Defendant were still married, Defendant opened an email account for Plaintiff (his then wife) and enabled the account's auto-forwarding function so that he received all emails sent to Plaintiff. Defendant continued receiving Plaintiff's emails until June 2009, long after the couple separated. When she discovered Defendant's action in 2010, Plaintiff commenced the lawsuit.

In a matter of first impression in the Second Circuit, Judge Briccetti held that Defendant's auto-forwarding of Plaintiff's email account constituted an actionable "interception" under the Wiretap Act because it satisfied the presumptive requirement that an interception must be contemporaneous with the communication. At the same time, the Court granted summary judgment in favor of Defendant's divorce attorney on Plaintiff's claim that the attorney had "intentionally used the contents of intercepted communications" when he used Plaintiff's 2008 tax returns, which Defendant had obtained through the email auto-forward, in certain family court proceedings. Judge Briccetti found Plaintiff had made an insufficient showing that the attorney knew or had reason to know that Defendant had obtained the information from Plaintiff by improperly accessing her email account.

Judge Seibel Dismisses Suit Brought By Publisher of Inmate News Against Department of Correctional Services

In *Inside Connect, Inc. v. Fischer*, 2014 WL 2933221 (S.D.N.Y. June 30, 2014), **Judge Cathy Seibel** converted Defendant's motion to dismiss to one for summary judgment, granted the motion, and dismissed Plaintiff's complaint. Plaintiff publishes a flyer entitled *Inmate News*, which purports to be a newspaper but is in actuality a commercial advertisement for inmate phone services. After Defendant refused to distribute his flyer in state correctional facilities, Plaintiff brought claims under

42 U.S.C. § 1983, seeking declaratory and injunctive relief and monetary damages. During the pendency of the case, however, the department modified its directive to allow delivery of the flyer so long as it was accompanied by a warning to inmates that use of Plaintiff's services was unlawful and could result in punishment. In dismissing the complaint, the Court held that Plaintiff's requests for declaratory and injunctive relief were barred by the Eleventh Amendment and/or were moot because the department had modified its policy on the distribution of *Inmate News*. The Court went on to conclude that Plaintiff could not sustain a First Amendment claim because *Inmate News* was commercial speech that concerned unlawful activity and so failed the test for constitutional protection set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

Judge Román Grants Defendant's Motion for Rule 11 Sanctions Based on Plaintiff's Filing of Unsupportable Contentions in Her Pleadings

In *Hutter v. Countrywide Bank*, -- F. Supp. 2d --, 2014 WL 4207588 (S.D.N.Y. Aug. 22, 2014), **Judge Nelson S. Román** denied Plaintiff's motion to amend her complaint for the fourth time and granted Defendant's motion for sanctions under Federal Rule of Civil Procedure 11. In analyzing the imposition of sanctions under Rule 11, the Court found that Plaintiff and her attorney had engaged in a pattern of willful and improper conduct by filing repeated complaints under the New York Deceptive Practices Act and New York Banking Law based on facts that they knew would not be substantiated. In addition, Plaintiff added unnecessary time and expense to the litigation process by flip-flopping on her allegations from one amendment to the next and by asserting legal theories in support of her motion to amend that were "meritless and brought in an underhanded fashion." At the same time, the Court rejected Defendant's request that sanctions be awarded in the form of dismissal of the action, finding dismissal to be an "extreme sanction" that was not warranted at that stage of the proceedings. Instead, the Court awarded Defendant its reasonable attorneys' fees incurred in opposing Plaintiff's motion to amend and ordered Plaintiff to pay a penalty to the Court.

Justice Connolly Interprets Provision of New York Education Law Governing Choice of School Districts

In *Palm v. Tuckahoe Union Free School District*, -- N.Y.S.2d --, 2014 WL 3843760 (N.Y. Sup. Ct. Aug. 5, 2014), **Justice Francesca E. Connolly** (Westchester County Supreme Court, 9th Judicial District) addressed an unusual fact pattern under New York Education Law § 3203(1), which permits the owner of property located on the boundary line between school districts to designate the school to which the owner wishes to send his/her children if the statute's requirements are met. Plaintiff sued individually and on behalf of all condominium owners of the Pasadena Green Condominium, whose common property bisected the boundary line between the Tuckahoe School District and the Mount Vernon City School District. Plaintiff argued that because the condominium community bisected that line, all condominium owners had the right under the Education Law to elect to send their children to the Tuckahoe School District.

At trial, the jury decided unanimously in favor of Plaintiff and held that Defendant should be equitably estopped from denying the condominium owners the right to designate their school district of choice. On a post-trial motion for a directed verdict, however, the Court reversed the jury's verdict, finding that Plaintiff could not satisfy either of the requirements set forth in § 3203(1). First,

§3203(1) was not applicable because the boundary line bisected the condominium's common property as opposed to a dwelling itself. Second, the Court declined to adopt Plaintiff's expansive interpretation of Education Law § 3203(1) and held that the statute did not apply to a condominium community because the property was improved by multiple dwelling units and so was not "an owner-occupied single family dwelling unit." Finally, the Court awarded Defendant a directed verdict on Plaintiff's equitable estoppel claim, holding Plaintiff had not proffered sufficient evidence to establish the existence of exceptional circumstances required to impose equitable estoppel on a government agency.

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