



**Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
October 2015**

*This article continues Yankwitt LLP's quarterly review of decisions from the Federal District Court and State Supreme Court (Commercial Division) in White Plains, New York.
This article reviews decisions from the third quarter of 2015.*

Judge Seibel Rules Vulgar Message on Parking Ticket is Protected by First Amendment

In *Barboza v. D'Agata*, 13 Civ. 4067, NYLJ 1202737448675 (S.D.N.Y. Sept. 10, 2015), **Judge Cathy Seibel** partially granted Plaintiff's cross-motion for summary judgment in a § 1983 civil lawsuit against the Village of Liberty and certain officials. Plaintiff was issued a speeding ticket in 2012 in Liberty, New York. Plaintiff pleaded guilty to speeding, but crossed out the word "Liberty" on the ticket payment form and replaced it with "Tyranny." He also wrote in all caps and underlined across the top middle section of the form, "Fuck your shitty town bitches." After the court clerks allegedly felt threatened by his statements, Plaintiff was charged with aggravated harassment in the second degree. The criminal charge was ultimately dismissed as violative of Plaintiff's First Amendment Rights and Plaintiff brought suit against the Village, the arresting officers and the prosecutor. On the parties' cross-motions for summary judgment, Judge Seibel granted judgment in favor of the arresting officers and against the prosecutor, and denied summary judgment as to municipal liability. The Court held the arresting officers were entitled to qualified immunity because their actions were objectively reasonable, as the arrest was executed on orders from the District Attorney's office. In ruling on the prosecutor's claim of absolute immunity, the Court relied on the distinction between filing a criminal information and procuring an arrest warrant on the one hand, and *executing* an arrest warrant on the other hand. Judge Seibel ruled he was entitled to absolute immunity for the decision to *charge* Plaintiff, but not for the decision to *arrest* Plaintiff. Judge Seibel also ruled the prosecutor was not entitled to qualified immunity because the arrest violated Plaintiff's clearly established constitutional right to engage in and be free from arrests because of protected speech. Accordingly, Plaintiff's motion for summary judgment as to liability was granted as to the prosecutor. Finally, the Court held it was a jury question whether the Village's conduct in Plaintiff and other criminal arrests constituted a practice of making arrests in violation of the First Amendment.

Judge Briccetti Grants Motion to Dismiss Due Process Claims for Failure to Exhaust Administrative Remedies

In *H.B. v. Byram Hills Cent. Sch. Dist.*, No. 14 CV 6796 VB, 2015 WL 5460023 (S.D.N.Y. July 20, 2015), **Judge Vincent L. Briccetti** granted Defendant's motion to dismiss Plaintiff's complaint alleging they were denied due process when they did not receive a timely written decision as to whether Byram Hills Central School District ("District") had offered their child a free appropriate public education ("FAPE"), as required by the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Plaintiffs H.B. and T.B. brought the action individually and on behalf of their 17-year-old disabled child, B.B., against the District, the New York State Education Department ("NYSED"), and NYSED Commissioner John B. King, Jr. B.B. attended public schools in the District through the 2010-11 school year, but his parents enrolled him in a private school for the 2011-12 and 2012-13 school years, believing the District had repeatedly and pervasively failed to provide B.B. a FAPE. In accordance with N.Y. Educ. Law. § 4404(1)(a), on October 5, 2012, B.B.'s parents requested a hearing before an Impartial Hearing Officer ("IHO") seeking reimbursement for tutoring services and private school tuition. After nearly two years without a decision from the IHO, Plaintiffs commenced this action, which also sought an injunction directing the State to remove all IHOs who do not have a license to practice law. The IHO finally issued a decision on October 15, 2014, granting Plaintiffs' request for reimbursement for tutoring expenses incurred while B.B. attended school in the District, but denying Plaintiffs' request for reimbursement for private school tuition. Plaintiffs and the District both appealed the IHO's decision to a State Review Officer ("SRO"). The State Defendants moved to dismiss the complaint arguing, *inter alia*, the Court lacked subject matter jurisdiction because Plaintiffs had failed to exhaust administrative remedies, as their appeal before the SRO was still pending; the District joined in this argument. The State Defendants also argued Plaintiffs lacked constitutional standing to seek an injunction removing non-attorneys from the lists of available IHOs. Judge Briccetti agreed with both of Defendants' arguments. First, the Court rejected Plaintiffs' argument that exhaustion would have been futile in light of the fact that the SRO affirmed the IHO's decision five months after the complaint was filed. Second, the Court agreed Plaintiffs did not have standing to pursue an injunction because Plaintiffs failed to meet their burden of showing a sufficient likelihood that they would be wronged again in a similar way. Accordingly, the Court lacked subject matter jurisdiction to issue such an injunction and dismissed that claim as well.

Judge Román Grants Defendant's Motion for Summary Judgment on Claims of False Arrest, False Imprisonment, Negligence, and Malicious Prosecution

In *Thompson v. City of White Plains*, No. 13-CV-6602 NSR, 2015 WL 4597433, (S.D.N.Y. July 29, 2015), **Judge Nelson S. Román** granted Defendant's motion for summary judgment dismissing Plaintiff's § 1983 action. Plaintiff was arrested in June 2013 in connection with a May 2013 robbery in front of the Starbucks located in Fountain Park in White Plains, NY. Plaintiff was ultimately released and the charges against him were dismissed. Thompson sued the City of White Plains and the White Plains Police Department alleging claims of false arrest, false imprisonment, negligence, and malicious prosecution arising under federal and state law. Plaintiff was allegedly a member of the "100 Gang," which frequently committed robberies around the Galleria Mall in White Plains. When police detectives went to Thompson's house to inquire about the robbery, his mother let them inside and Plaintiff agreed to talk to them. After being taken to the station and read his *Miranda*

rights, Plaintiff exercised his right, and was subsequently arrested for the robbery. The arrest was based on information from other admitted participants, Plaintiff's admission that he was in the Gang, and information from a social media report prepared by the Westchester County District Attorney's Office. In dismissing Plaintiff's state law claims, Judge Román found initially that Plaintiff failed to comply with New York's notice-of-claim requirement, which requires service of a notice of claim within ninety days after a claim arises. Furthermore, relying on *Boyd v. City of New York*, 336 F. 3d 72, 75 (2d Cir. 2003), Judge Román found that there was probable cause for both the arrest and subsequent prosecution, which provides a complete defense to false arrest and malicious prosecution claims. Finally, the Court dismissed Plaintiff's § 1983 and *Monell* federal claims because Plaintiff failed to show the challenged acts were performed pursuant to a municipal policy or custom.

Judge Karas Rules Plaintiff Failed to State a Claim Against his Employer under the FLSA

In *Cruz v. AAA Carting & Rubbish Removal, Inc.*, No. 13-CV-8498 KMK, 2015 WL 4393204 (S.D.N.Y. July 16, 2015), **Judge Kenneth M. Karas** granted in part and denied in part Defendants' motion to dismiss Plaintiff's complaint for failure to state a claim under the Fair Labor Standards Act ("FLSA"). Plaintiff alleged Defendants failed to pay him minimum wage and time and a half for overtime. Judge Karas first denied Defendants' motion to dismiss for lack of subject matter jurisdiction, agreeing with the majority of Second Circuit courts that the issue of whether an employer falls into an FLSA exemption is a merits question and not a jurisdictional threshold. Judge Karas also denied Defendants' motion for summary judgment on the ground that Defendants, sanitation carters and removers, were exempt from the FLSA under the motor carrier exemption. The Court concluded it would be premature to hold the exemption applied because there was insufficient evidence that interstate travel was a natural, integral, and inseparable part of Plaintiff's duties. The Court went on to grant Defendants' motion to dismiss, however, with respect to Plaintiff's FLSA minimum wage claim because Plaintiff failed to sufficiently allege that his average hourly wage fell below the federal minimum wage.

Justice Scheinkman Denies Health Insurer's Motion for Preliminary Injunction

In *UnitedHealthcare Servs., Inc. v. Asprinio*, 16 N.Y.S.3d 139 (N.Y. Sup. Ct. 2015), **Justice Alan D. Scheinkman** denied Plaintiff insurer's motion for a preliminary injunction compelling an out-of-network health care provider to accept the payments for services the insurer was willing to make on behalf of the insured. Plaintiff health insurer sued the defendant medical provider and his medical group, asserting claims for declaratory and injunctive relief regarding alleged overcharges, tortious interference with contract, and violation of New York General Business Law prohibiting deceptive trade practices. Plaintiff sought to prevent Defendants from collecting professional fees from United's members in excess of the payments made by United and from charging United members unlawful, unreasonable, or excessive amounts which were not agreed to in advance by the members. The Court opined that absent an applicable statute or a contractual agreement between the insurer and the health care provider, there was no legal basis for the Court to compel the health care provider to accept the payment the health insurer deems appropriate. Although the Legislature has provided for binding arbitration for charges related to emergency services of out-of-network physicians, the applicable statute did not go into effect until after the occurrence of the underlying dispute and was irrelevant to the instant dispute. The Court also concluded that Plaintiff failed to

show it would sustain any injury, let alone an irreparable one, absent an injunction. The Court rejected Plaintiff's alleged injury to its reputation and goodwill as speculative and a natural consequence of a competitive health insurance marketplace. Finally, Justice Scheinkman ruled the balance of equities was not shown to favor Plaintiff. Plaintiff offered no evidence as to how it determined what portion of Defendants' bill was excessive and has not shown that its refusal to pay any more than what has been paid will result in any savings to any insured persons. Furthermore, the issuance of the requested injunction would take away Defendants' incentive to provide the highly specialized care needed by out-of-network patients.

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