



**Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
July 2016**

This article continues Yankwitt LLP's quarterly review of decisions from the Federal District Court and State Supreme Court in White Plains, New York. This article reviews decisions from the second quarter of 2016.

Judge Briccetti Rules Judgment Reduction Credit Should be an Equitable Figure

In *Perez v. First Bankers Trust Servs., Inc.*, No. 12 CV 8649 (VB), 2016 WL 2343889, (S.D.N.Y. May 3, 2016), **Judge Vincent L. Briccetti** ruled in favor of the non-settling defendant that the bar order sought by both parties should reflect a later-determined equitable figure. Plaintiff, United States Department of Labor Secretary Thomas E. Perez, brought an ERISA action against defendant Frank Firor, the CEO and Chairman of the Board of Rembar Company, Inc., and defendant First Bankers Trust Services ("FBTS"), the trustee of Rembar's employee stock ownership plan, alleging Defendants violated their fiduciary duties by causing shares to be purchased in Rembar for least \$5 million greater than fair market value. Perez and Firor reached a settlement, which was expressly conditioned on a bar order granting Defendants a mutual bar against claims for indemnification or contribution and providing a judgment reduction credit to FBTS. While Firor argued the credit should be calculated on a *pro tanto* basis, FBTS contended any award should be reduced by the greater of either the *pro tanto* amount or Firor's proportionate share of liability. Judge Briccetti found FBTS' proposed "greater-of" calculation to be an appropriate method because it emphasized Defendants' relative fault and ensured FBTS did not pay more than its equitable share of liability. The Court rejected Perez's argument that this methodology could impede full recovery at trial, noting this was an inherent risk of the settlement. With respect to ERISA's mandatory civil penalty against a violating

fiduciary equal to 20 percent of the applicable recovery amount, which is paid directly to the United States, the Court disagreed with FBTS that Firor's penalty should be included in its judgment reduction credit. Judge Briccetti opined that the settlement's restitution and penalty amounts were agreed to as separate amounts that served separate purposes, and he found no merit in FBTS' contention that the penalty requires an adjudication of the fiduciary's breach prior to the assessment of civil penalties.

Judge Karas Awards Attorneys' Fees as Sanction for Intentional Spoliation of Evidence

In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, No. 07-CV-6304 (KMK), 2016 WL 3030253 (S.D.N.Y. May 25, 2016), **Judge Kenneth M. Karas** partially granted Plaintiffs' motion for sanctions in the form of attorneys' fees and costs. The Congregation Rabbinical College of Tartikov ("Tartikov"), along with other Plaintiffs, sued the Village of Pomona and its officials, contending that certain zoning and environmental ordinances violated the First and Fourteenth Amendments to the U.S. Constitution, the Religious Land Use and Institutionalized Persons Act of 2000, the Fair Housing Act, and New York State Law. In September 2015, the Court granted Tartikov's motion for adverse-inference and monetary sanctions against the Village due to intentional spoliation of evidence, and Tartikov then moved for \$63,406.15 in costs and attorneys' fees associated with the motion for sanctions. Relying in part on an affirmation from Yankwitt LLP's managing partner, Russell Yankwitt, who provided an opinion as a local practitioner without an interest in the case, the Court found a blended rate of partners and associates of \$375 per hour - a rate well below what is acceptable for comparable work - to be reasonable given counsels' extensive experience. Judge Karas, however, found that the vague and duplicative nature of some of the billing entries, along with an excessive amount of hours spent on the sanctions motion, called for a 30 percent across-the-board reduction in the requested award. Judge Karas also ruled Tartikov was not entitled to recover travel-related expenses of out-of-state counsel as the matter could have been staffed locally. After accounting for the reduction, the Court awarded Tartikov \$43,040.45 in fees and costs.

Judge Román Dismisses Case for Lack of Subject Matter Jurisdiction

In *Sendon v. Torres*, No. 15-CV-04538 (NSR), 2016 WL 1746111 (S.D.N.Y. Apr. 28,

2016), **Judge Nelson S. Román** dismissed Plaintiff's complaint for lack of subject matter diversity jurisdiction. Plaintiff sued individual defendants, the Chi Phi Fraternity and the Pi Zeta chapter of the Chi Phi Fraternity for injuries she sustained when she slipped and fell at a party thrown by Pi Zeta at Binghamton University. Plaintiff, a New York domiciliary, brought suit based on alleged diversity of citizenship. Defendants argued there was no diversity jurisdiction because Pi Zeta is an unincorporated association and therefore adopts the citizenships of each its members. Thus, Defendants argued that Pi Zeta is a New York citizen because at least one of its members is a New York domiciliary. Plaintiff contended that Pi Zeta is not an unincorporated association but, rather, an extension and agent of Chi Phi, which is a citizen of Georgia. Consistent with federal and state precedent, the Court agreed with Defendants that that Pi Zeta is an unincorporated association that is separate and distinct from Chi Phi. Accordingly, Judge Román dismissed the case for lack of complete diversity of citizenship.

Judge McCarthy Recommends Nearly \$3 Million in Compensatory Damages but Discredits Claim for Punitive Damages

In *Jordonne v. Ole Bar & Grill, Inc.*, 13 CV 1573 (VB) (JCM), 2016 WL 3409088 (S.D.N.Y. Apr. 26, 2016), **Magistrate Judge Judith C. McCarthy** recommended an entry of judgment awarding plaintiff Brunel Jordonne \$2,715,000 and plaintiff Kelson Sainvilus \$25,000 in compensatory damages, but declined to recommend punitive damages, for injuries sustained as a result of an assault in the parking lot of defendants Ole Bar & Grill and La Hacienda Bar. The matter was referred to Judge McCarty by Judge Briccetti for an inquest following the entry of default against Defendants. At the hearing, Plaintiffs testified they attended a concert and talent show at a venue that is allegedly the site of frequent violent and criminal incidents of which Defendants were or should have been aware. When a fight broke out during the show, Plaintiffs were allegedly forced to leave through a back door at which point they were violently assaulted. Jordonne suffered extensive and traumatic brain injuries. As a result of the incident, he is unable to work, is forgetful, is nearly illiterate, is easily agitated, suffers from depression, lives with his mother, and is not allowed to be alone with his son. Sainvilus suffered a contusion, concussion, and has a permanent scar from a laceration. In reaching its damages determination, the Court considered the testimony of Jordonne and his brother, Jordonne's medical records, news reports offered to show Defendants were on notice of the allegations of violence, deposition transcripts of unavailable witnesses, a video of the incident, and

photographs of Jordonne following the incident. The Court noted the difficulty in quantifying pain and suffering, but used other cases involving similar injuries to craft what it deemed a reasonable award for each Plaintiff. Because Judge McCarthy found Plaintiffs proffered insufficient evidence demonstrating Defendants' conduct amounted to malice or a reckless disregard for Plaintiffs' rights, however, the Court recommended there be no award of punitive damages.

Justice Scheinkman Rules Statute of Limitations Had Not Run in Breach of Contract Action

In *Calltrol Corp. v. DialConnection, LLC*, 51 Misc. 3d 1221(A) (N.Y. Sup. Ct. 2016), **Justice Alan D. Scheinkman**, the Administrative Judge for the Ninth Judicial Circuit and Presiding Judge of the Westchester County Supreme Court Commercial Division, denied Defendant's motion to dismiss on statute of limitations grounds. Calltrol Corporation ("Calltrol") commenced a breach of contract action against DialConnection, LLC a/k/a/ Vesper Technologies, L.L.C. ("Vesper"). The claim arose out of a 2001 reseller agreement between Calltrol and Vesper pursuant to which Vesper agreed to market and sell certain software products. Calltrol alleged that other than Vesper's failure to make certain payments due under the contract, the parties fully performed. The parties renewed the contract in 2010, and, in that renewal, acknowledged a \$419,000 indebtedness to Plaintiff. In its motion to dismiss, Defendant contended the breach of contract claim was governed by the UCC's four year statute of limitations, and that the May 2010 contract renewal did not reinstate the debt or serve to circumvent the statute. Plaintiff argued that the UCC was inapplicable because the acknowledgement in the 2010 renewal amounted to a promissory note for past-due licensing fees, which carries a six year statute of limitations. Justice Scheinkman first noted that the 2010 renewal may have tolled or restarted the running of the statute of limitations, because partial payment was made after the execution of the renewal. The Court went on to deny the motion to dismiss concluding there were factual issues as to whether or not the contract was covered by the UCC and so whether a four or six year statute of limitations applied.

Yankwitt LLP is an elite trial and litigation firm located in White Plains, New York. Our New York lawyers are prominent members of the Westchester and New York City bars, who utilize their broad experience and expertise to produce exceptional outcomes for our clients. All of our New York lawyers are former federal law clerks or prosecutors, or both.

Contact us at 140 Grand Street, Suite 501, White Plains, NY 10601

(914) 686-1500
www.yankwitt.com