This article is the first in a quarterly series reviewing decisions from the Federal District Court and State Supreme Court (Commercial Part) judges located in White Plains. This article reviews decisions from all four Federal District Court judges from the last quarter of 2013. There were no decisions reported from the Westchester County Supreme Court Commercial Part during that period.

Reliance on Documents Referenced in, but not Attached to, Complaint on Motions to Dismiss

In *James v. Correct Care Solutions*, 2013 WL 5730176 (S.D.N.Y. Oct. 21, 2013), Judge Nelson S. Román, without converting a motion to dismiss into a motion for summary judgment, dismissed a *pro se* plaintiff's complaint by relying on documents attached to the motion that were referenced in, but not attached to, the complaint. In his Section 1983 complaint, Plaintiff alleged, *inter alia*, that he suffered burns while working in the kitchen at the Westchester County Jail and was not seen by medical personnel until six hours after the accident. According to Plaintiff, this delay was sufficiently serious to constitute cruel and unusual punishment.

Defendant Correct Care Solutions, which administers medical services at the Westchester County Jail, moved to dismiss Plaintiff's claims, and attached as an exhibit to its motion the grievance report that Plaintiff had submitted to the warden as part of the jail's internal complaint procedure. The grievance report included a written statement signed by Plaintiff less than four hours after the accident, in which he stated that he had already seen a nurse who told him to put ice on the burn.

The Court held that Plaintiff's statement could be considered on the motion to dismiss, without converting the motion to one for summary judgment, because Plaintiff had incorporated the grievance by reference. Judge Román held that a document outside the complaint may be deemed incorporated by reference where the complaint "refers to" a document (as Plaintiff's complaint had) and the plaintiff has notice of that document. Judge Román found that Plaintiff had incorporated his grievance by reference by referring to the administrative channels he followed before filing his lawsuit, and that he had notice of the document and its contents because he signed the Warden's decision.

Relying on Plaintiff's statement contained in the grievance report, the Court found that Plaintiff had seen a nurse soon after his accident, and followed up with a nurse a few hours later. He therefore granted Correct Care Solution's motion to dismiss, finding that Plaintiff's allegations of delay suggested negligence at best, which was insufficient to state a Section 1983 claim.

In *Chamberlain v. City of White Plains*, 2013 WL 6477334 (S.D.N.Y. Dec. 10, 2013), Judge Cathy Seibel applied these same principles to decide various motions to dismiss Plaintiff's Section 1983 action alleging that police officers' use of deadly force against an emotionally disturbed public housing resident was unconstitutional. The Court considered both the evidence attached to the complaint, and audio-video recordings referenced in, but not attached to, the complaint. Finding that the complaint referred repeatedly to the recordings of the incident captured by the decedent's Life Aid communication device and a camera mounted on the Taser used by one of the police officers, Judge Seibel found that it was proper to consider those recordings in resolving the motions to dismiss.

Judge Seibel granted in part and denied in part Defendants' motions to dismiss Plaintiff's excessive force claims. Accepting the allegations in the complaint as true when viewed in conjunction with the audio and video recordings, the Court found that the officer's first discharge of the Taser was not excessive force, but that any discharge of the Taser after the first, when only one of the barbs had made contact with the decedent, stated a plausible claim for excessive force. Similarly, the Court held that an officer who allegedly used non-lethal force in the form of a beanbag gun to subdue the decedent was entitled to dismissal on qualified immunity grounds but that the officer who allegedly fired his handgun twice and fatally injured the decedent was not.

Finally, Judge Seibel applied the "intracorporate conspiracy doctrine" to dismiss Plaintiff's conspiracy claims. Under this doctrine, officers, agents and employees of a single corporate entity are considered legally incapable of conspiring together. Noting that the individual defendants were all officers with the White Plains Police Department, Judge Seibel held that the intracorporate conspiracy doctrine applied in the Section 1983 context and dismissed the conspiracy claim.

Action Dismissed After Motion to Compel Arbitration Granted

In *Katz v. Cellco Partnership d/b/a Verizon Wireless*, 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013). Judge Vincent L. Briccetti addressed the novel issue of whether a case should be stayed or instead dismissed when an arbitration clause is found to be enforceable. Plaintiff sought dismissal so that he might take an immediate appeal. Judge Briccetti noted that the Second Circuit has not addressed the issue of whether a district court has the discretion to dismiss an action when the court compels arbitration of all of the claims in the action, and that other circuits that have addressed the issue, and the district courts within the Second Circuit, are divided. However, citing decisions in the First, Fourth, Fifth, and Ninth Circuit Courts of Appeal, Judge Briccetti concluded that dismissal was the proper remedy because all of the issues presented in the lawsuit were arbitrable.

Copyright Action Dismissed

In *Banxcorp v. Costco Wholesale Corporation*, 2013 WL 5677225 (S.D.N.Y. Oct. 17, 2013), Judge Kenneth M. Karas granted summary judgment dismissing Plaintiff's claims that it had a valid federal copyright in its series of percentages of national average interest rates, and that Defendants unlawfully copied those percentages in a series of advertisements touting how much higher their particular deposit rates were than the national average as reported by Plaintiff.

Judge Karas concluded that Plaintiff's percentages were not copyrightable under several theories: (1) each individual average was an uncopyrightable fact; (2) each individual average was not itself a compilation, and therefore, could not be copyrighted as such; and (3) Plaintiff's arrangement of the weekly averages in tables chronologically by week were not copyrightable because they did not go beyond mere chronological or sequential listings of factual material, and contained no creativity at all. Alternatively, Judge Karas held that copyright protection was precluded by the merger doctrine, which holds that "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself." Finally, the Court observed that the national average rates were unprotectable as "analogous to short phrases or the titles of works." Judge Karas declined to rely on the "short phrases doctrine," however, because the Second Circuit has not "officially adopted the . . . position that short works like those here are uncopyrightable regardless of the amount of creativity expended to create them."