



**Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
April 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 first quarter of 2016.

Judge Seibel Dismisses Plaintiff's Disability Discrimination and Retaliation Claims and Denies Leave to Amend

In *Miller v. McHugh*, No. 14-CV-5026 (CS), 2016 WL 698147 (S.D.N.Y. Feb. 19, 2016), **Judge Cathy Seibel** dismissed Plaintiff's second amended complaint alleging claims under the federal Rehabilitation Act. Plaintiff, who suffered from conditions that impeded her ability to walk, stand, and climb stairs, was employed as a legal technician at the Department of the Army. Plaintiff rejected numerous accommodations offered by the Army for her existing position and then rejected its offer of a position as a legal assistant within her medical restrictions. Based on Plaintiff's inability to perform her job and decision not to accept an alternate position, the Army terminated her. Plaintiff commenced this action in 2014, and, upon the Court's instruction, filed a second amended complaint, which asserted various claims under the Rehabilitation Act, including hostile work environment, failure to accommodate, discriminatory termination, and retaliation. Judge Seibel first dismissed the hostile work environment claim because of Plaintiff's failure to provide any details, incidents, or the identity of individuals that would enable the Court to plausibly infer that a hostile work environment existed. The Court concluded that, to the contrary, the Army's repeated efforts at accommodating Plaintiff demonstrated her work environment was not hostile. The Court next dismissed the failure to reasonably accommodate claim because Plaintiff failed to allege the Army's proposed accommodations were not reasonable. Judge Seibel also dismissed the discriminatory termination claim because Plaintiff failed to allege a plausible causal connection between Plaintiff's disability and her termination. Finally, the Court dismissed

Plaintiff's retaliation claims because of her failure to specify a protected activity and because the temporal gap was too wide to infer retaliation. Judge Seibel denied leave to further amend the complaint because Plaintiff had already been given an opportunity to cure the deficiencies in her pleadings and failed to do so.

Judge Karas Denies Summary Judgment on Plaintiff's Breach of Contract Claims But Dismisses Defendant's Counterclaims and Third-Party Complaint

In *Amto, LLC v. Bedford Asset Mgmt., LLC*, No. 14-CV-9913 (KMK), 2016 WL 1030141 (S.D.N.Y. Mar. 10, 2016), **Judge Kenneth M. Karas** denied Plaintiff's motion for partial summary judgment, partially granted its motion to strike Defendant's affirmative defenses, granted its motion to dismiss Defendant's counterclaims, and granted the Third-Party Defendants' motion to dismiss the third-party complaint. In 2009, Energokom LLC loaned \$154,000 to defendant Bedford Asset Management, LLC, which then defaulted on the loans. Energokom later assigned its rights under the Bedford loans to plaintiff AMTO, LLC. Separately, in 2010, non-party Tompkins, Ltd. loaned \$300,000 to Energokom pursuant to a loan agreement governed by English law, the rights to which were eventually acquired by Bedford. In 2014, AMTO commenced the instant action alleging breach of contract, account stated, and unjust enrichment arising out of Bedford's default on the 2009 loans. Bedford counterclaimed against AMTO and asserted third-party claims against Energokom and Ivan Kuznetsov, alleging fraudulent conveyance and civil conspiracy to commit tortious interference in connection with the Tompkins loan. AMTO then moved for partial summary judgment on its breach of contract claims, to strike Bedford's affirmative defense for set-off and to dismiss Bedford's counterclaims, and the Third-Party Defendants moved to dismiss the third-party complaint in its entirety. In granting the motion to strike and the motions to dismiss the counterclaims and third-party claims, the Court held valid and enforceable the forum selection clause in the Tompkins loan agreement, which designated England as the proper forum for all disputes arising out of that agreement. Specifically, Judge Karas relied on recent Second Circuit precedent in rejecting Bedford's assertion that its defenses and claims were secondarily connected to and relatively attenuated from the Tompkins loan, finding instead that those defenses and claims undeniably relied on the validity and enforceability of the Tompkins loan agreement. At the same time, the Court denied AMTO's summary judgment motion and directed the parties to conduct further discovery, finding unresolved factual issues surrounding the validity of the assignment of the Bedford loans from Energokom to AMTO.

Judge Briccetti Denies Stay of Action While Bankruptcy Proceeding is Pending

In *Fratto v. D. Wilson Elec., Inc.*, No. 15 CV 7966 (VB), 2016 WL 524651 (S.D.N.Y. Feb. 5, 2016), **Judge Vincent L. Briccetti** denied Defendants' motion to stay based on defendant D. Wilson Electric, Inc.'s bankruptcy filing. In their complaint, Plaintiffs alleged Defendants were alter-egos of each other and operated as a single entity, funneling work through defendant Larossa Electric, Inc. to avoid meeting Wilson Electric's pension and benefit fund contribution obligations in violation of the Labor Management Relations Act, ERISA and a collective bargaining agreement. After an automatic stay of the claims against Wilson Electric was triggered when it filed for bankruptcy on January 22, 2016, defendants Joseph Wilson, Joseph M. Larossa, and Larossa Electric argued the stay should be extended to apply to them as well. In denying the stay motion, Judge Briccetti noted that a debtor's bankruptcy petition does not stay claims against non-debtor co-defendants unless the claims will have an immediate adverse economic consequence on the debtor's estate, such as when: (a) the debtor is the sole-owner of the non-debtor against whom the claim is brought; (b) the debtor is a guarantor for the non-debtor's obligation to pay the claim; (c) the claim is against the debtor's insurer; or (d) there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant. The Court found none of those examples applicable to the *Fratto* litigation and a judgment against the moving defendants would not have an immediate adverse economic impact on Wilson Electric. Judge Briccetti also rejected Defendants' arguments that Plaintiffs' claims against Defendants were inextricably intertwined and that severance was not appropriate because Plaintiffs were only in privity of contract with Wilson Electric.

Judge Román Rules on Motions in Limine Concerning Burdens of Proof and Damages Calculations

In *Fed. Ins. Co. v. Mertz*, No. 12-CV-1597-NSR-JCM, 2016 WL 164618 (S.D.N.Y. Jan. 12, 2016), **Judge Nelson S. Román** denied Plaintiffs' motion *in limine*, partially granted Defendants' motion *in limine*, and reserved judgment on the remaining issues in anticipation of an upcoming trial on Plaintiffs' claims for fraud, breach of fiduciary duty, and violation of the Connecticut Unfair Trade Practices Act. Defendants were general contractors whom Plaintiffs retained to provide independent and accurate home repair estimates on insured property losses. Plaintiffs alleged Defendants submitted fraudulently inflated estimates so larger insurance awards would be paid out, but provided substantially lower bids to the insureds so Defendants would be retained to make the home repairs. After they were retained by the homeowners, Defendants allegedly pocketed the difference. Both sides brought motions *in limine* concerning the burden of proof on damages and the proper theory and measure of damages. Plaintiffs argued that upon proving a fiduciary breach, the burden should shift to Defendants to prove what portion of the claim payment reflected the actual cost of covered repairs. Judge Román denied that motion, holding Plaintiffs had the

burden of demonstrating both a breach of fiduciary duty *and* the amount of damages suffered. Plaintiffs next argued the wrongdoer rule, which places the risk of damage uncertainty on the wrongdoer instead of the injured party, entitled them to a full refund from Defendants. The Court rejected this argument as well, finding Plaintiffs bore the burden of proving a reasonable inference of damages and those damages could not be the entirety of the claim payments. The Court then held the applicability of the agency theory of damages and evidence as to out of pocket loss were fact issues for trial. Finally, the Court reserved judgment on the proper calculation of damages for breach of fiduciary duty because that calculation was dependent on factual determinations as to the nature of the parties' relationship and any wrongs committed.

Justice Scheinkman Dismisses Contract, Fraud and Statutory Claims as Duplicative of Legal Malpractice Claim

In *Kallista, S.A. v. White & Williams LLP*, No. 62753/15, 2016 WL 156931 (N.Y. Sup. Ct. Jan. 7, 2016), **Justice Alan D. Scheinkman** dismissed various claims against a law firm arising from its prosecution of applications for trademark registration. Defendants White & Williams LLP and one of its attorneys, Randy Freidberg, were retained by plaintiff Kallista, a skincare start-up, to register the trademark "KALLISTA" in anticipation of the company's launch. Unbeknownst to Kallista, another soap and skincare company held the similar trademark "KALLISTE." Plaintiffs alleged a proper trademark search would have revealed the competing trademark's existence, but Freidberg advised that the search was unnecessary. Based on Freidberg's advice, Kallista instructed Defendants to proceed with registration of the marks. Because of the confusingly similar KALLISTE trademark, the KALLISTA trademark application was denied. Plaintiffs alleged they were not informed of the denial and so launched their products using the KALLISTA mark. Defendants eventually advised Plaintiffs of the denial, which forced Plaintiffs to recall tens of thousands of dollars of unsellable products and close down their business. Plaintiffs Kallista and Linda Gillette Parodi, its co-founder, filed suit for legal malpractice, fraudulent concealment, breach of contract, and violation of § 487 of the New York Judiciary Law. Defendants then moved to dismiss the contract, fraud and statutory claims, as well as Parodi's legal malpractice claim and Plaintiffs' claims for lost profits and sunk costs damages. The Court granted the motion as to all but the sunk costs claim. First, the Court dismissed the fraudulent concealment and breach of contract claims as duplicative of the legal malpractice claim and because there is no independent cause of action in New York for concealing malpractice. Justice Scheinkman also dismissed the Judiciary Law claim because the statute is only applicable to judicial proceedings, and Plaintiffs' claims related to an administrative proceeding. The Court next dismissed Parodi's legal malpractice claim because Kallista was Defendants' client and Parodi was therefore not in privity with

Defendants. Finally, Justice Scheinkman dismissed Kallista's claim for lost profits as too speculative because the company had not yet launched, but permitted the sunk costs claim to proceed because it was fair and reasonable to infer that Plaintiffs had invested money in Kallista in anticipation of its launch.

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*