Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
April 2017

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 2017.

Judge Román Holds Certain Federal Claims are Time-Barred in Dispute Between Rockland County Towns Over Closure of Access Road

In *The Town of Ramopo et al. v. The Town of Clarkstown et al.*, No. 16 Civ. 2004 (NSR), 2017 WL 782500 (S.D.N.Y. Feb. 27, 2017), **Judge Nelson S. Román** granted in part and denied in part Defendants' motion to dismiss Plaintiffs' complaint asserting federal and state constitutional violations. For many years, Ramopo has experienced a growing population of Orthodox and Hasidic Jews. According to Plaintiffs, Defendants have undertaken numerous efforts to prevent Orthodox Jews from moving into Clarkstown. In particular, beginning in late 2012, Defendants undertook measures to barricade Samuel Road, which connects the two towns. In 2016, after Plaintiffs exhausted all judicial remedies in state court litigation over the barricade, Defendants installed a permanent barrier on Samuel Road, which allegedly prevents emergency vehicle access. Plaintiffs allege the installation of the barrier was discriminatory and has negatively impacted on the health, safety and welfare of Ramopo residents. Plaintiffs brought suit alleging violations of the federal right to interstate and intrastate travel, right to association, right to equal protection, right to assemble, and claims of religious discrimination and retaliation. Defendants moved to dismiss the Complaint on grounds that the claims were time-barred and barred by res judicata based on prior state court litigation. The Court granted the motion in part and denied it in part. With respect to the statute of limitations argument, the Court

agreed Plaintiffs' claims were time-barred insofar as they arose out of the erection of the barrier because that claim accrued in 2012 when the initial barrier was constructed. Judge Román rejected Plaintiffs' argument that the continuing violation doctrine should be applied to toll the statute of limitations based on Defendants' installation of the permanent barrier in 2016. At the same time, the Court denied Defendants' motion as to claims premised on religious discrimination and the delay in emergency response. The Court also rejected Defendants' argument that the remaining claims were barred by res judicata, finding those claims, which arose out of the erection of the permanent barrier, were not litigated in the prior state court litigation and stem from different transactions than the temporary barrier issues decided in that lawsuit.

Judge Karas Grants Conditional Class Certification in Home Health Care Aide Overtime Case

In *Alves v. Affiliated Home Care of Putnam, Inc. et al.*, No. 16-CV-1593 (KMK), 2017 WL 511836 (S.D.N.Y. Feb. 8, 2017), **Judge Kenneth M. Karas** granted Plaintiffs' motion for conditional certification of a collective action in an overtime wage case under the Fair Labor Standards Act and Article 6 of the New York State Labor Law. Plaintiff alleged that she was employed by Defendants as a home health care aide. In addition to the services typically provided by those in her position, Plaintiff alleged she was tasked with performing a variety of household tasks that were outside the scope of her employment and that she spent more than 20% of her working time on housework. Although Plaintiff regularly worked in excess of 40 hours per week, she never received overtime pay. The Court first noted that the Department of Labor's "Home Care Final Rule" became effective as of October 13, 2015. Pursuant to that Rule, the performance of general household work by home health care aides is no longer exempt from overtime under the FLSA if it represents more than 20% of the weekly hours worked. The Court further stated that Plaintiff need only make a modest factual showing to warrant conditional certification and Plaintiff's assertions, based on her "observations and conversations," that other employees were also underpaid, were sufficient. The Court thus authorized notice of the action to potential opt-in plaintiffs who were employed by Defendants no earlier than three years before the filing of the Complaint. Finally, the Court rejected Plaintiff's request for a nine month opt-in period, finding the Second Circuit routinely restricts that period to 60 days.

Judge Briccetti Dismisses Most Claims in Putative Class Action Against Washing Machine Manufacturers and Retailers

In *Famular et al. v. Whirlpool Corp. et al.*, No. 16 CV 944 (VB), 2017 WL 280821 (S.D.N.Y. Jan. 19, 2017), **Judge Vincent L. Briccetti** dismissed all claims against the defendant retailers and most claims against the defendant manufacturer Whirlpool Corporation on jurisdictional grounds. The nine Plaintiffs, who were all citizens of different states, brought suit on behalf of themselves and a putative class against Whirlpool and three retailers asserting claims for breach of express warranty, unjust enrichment, and violations of various state consumer protection statutes. Plaintiffs alleged that Defendants misrepresented the water and energy efficiency of a certain line of Whirlpool washing machines. Defendants moved to dismiss all claims for lack of personal jurisdiction with the exception of New York plaintiff Walt Famular's claims against Whirlpool. Judge Briccetti agreed personal jurisdiction was absent and granted the motion. First, the Court held there was no specific personal jurisdiction over Defendants except for Famular's claims against Whirlpool because none of the other machines were purchased in New York. Next, the Court declined to find general personal jurisdiction because none of the Defendants is incorporated in or maintains its principal place of business in New York and so none is "at home" in that state. Plaintiffs contended Defendants had consented to general jurisdiction because each is registered to do business as a foreign corporation in New York and each has a designated agent to receive process in New York. While noting the Second Circuit has not yet ruled on the issue, Judge Briccetti rejected Plaintiffs' argument, concluding the consent by registration theory of general personal jurisdiction is no longer viable in light of *Daimler AG v. Bauman*. Finally, the Court rejected Plaintiffs' request that it exercise pendent personal jurisdiction over all claims against Whirlpool, including the non-New York claims.

Judge Seibel Grants Class Certification and Partially Denies Summary Judgment in FDCPA Case Arising Out of Defaulted Credit Card Debt

In *Madden v. Midland Funding, LLC et al.*, -- F. Supp. 3d. -- (2017), No. 11-CV-8149 (CS), 2017 WL 758518 (S.D.N.Y. Feb. 27, 2017), **Judge Cathy Seibel** granted Plaintiff's renewed motion for class certification and granted in part and denied in part Defendants' renewed motion for summary judgment. Plaintiff opened a credit card account in 2005, on which she incurred several thousand dollars in debt. In 2010, Plaintiff's credit card debt was sold and assigned to Defendants, who are in the business of purchasing and collecting defaulted debt. Defendants then sued Plaintiff in the White Plains City Court to collect the debt. Plaintiff filed suit in federal court asserting violations of the Fair Debt Collection Practices Act and various New York state laws, including civil and criminal usury. Following an appeal to the Second Circuit and subsequent remand, Defendants moved for summary judgment contending Delaware law, which has no usury cap, applies to the dispute and even if New York law applies, New York's usury laws do not cover defaulted debt

obligations. Plaintiff, in turn, renewed her motion for class certification. With respect to the choice of law question, Judge Seibel held New York law applied, notwithstanding the Delaware choice of law provision in Plaintiff's credit card agreement, because Delaware did not have a reasonable relationship with the dispute as Plaintiff is located in New York and Defendants are located in California. The Court also concluded that New York's usury prohibition constitutes a fundamental public policy and so New York's law should be applied irrespective of a choice of law provision. Turning to the application of New York law, Judge Seibel first noted that while civil usury laws did not apply to defaulted debts, the New York Court of Appeals has not decided whether criminal usury laws are similarly limited. Judge Seibel predicted, based on the Second Department's decision in *Emery v. Fishmarket Inn of Granite Springs*, 173 A.D.2d 765 (1991), that "New York's criminal usury cap applies to prevent a creditor from collecting interest above 25% on a defaulted debt." The Court further held that the criminal usury cap could serve as a predicate for Plaintiff's FDCPA claims. At the same time, the Court dismissed Plaintiff's civil and criminal usury claims because the civil usury cap is inapplicable to defaulted debts and the criminal usury law does not provide a private right of action. As so limited, the Court determined that Plaintiff satisfied the requirements for class certification under Fed. R. Civ. P. 23 and so granted Plaintiff's motion.

Westchester Supreme Court Justice Giacomo Denies Motion for Default Judgment Based on Failure to Obtain Personal Jurisdiction Over Defendant

In *Deutsche Bank National Trust Co. v. Calviello et al.*, -- N.Y.S.3d -- (2017), No. 54958/2015, 2017 WL 740872 (N.Y. Sup. Ct. West. Cty., Feb. 24, 2017), **Justice William J. Giacomo** denied Plaintiff's motion for default judgment against the appearing defendant Lori Del Secolo and dismissed the Complaint against her for failure to obtain personal jurisdiction. Plaintiff commenced the action to foreclose on property owned by defendants and ex-husband and wife Peter Calviello and Del Secolo. After those defendants failed to appear, Plaintiff moved for a default judgment. In support thereof, Plaintiff provided affidavits from the process server demonstrating that it had tried to personally serve Del Secolo eight separate times at the subject property and then resorted to nail and mail service at that location. Del Secolo argued that Plaintiff had not exercised due diligence prior to using nail and mail because it did not attempt to serve Del Secolo at her place of business, which it easily could have found from an internet search. The Court agreed and held Plaintiff never obtained personal jurisdiction over Del Secolo. Justice Giacomo noted that due diligence in the service context focuses on the quality not quantity of attempts at personal service and the failure to attempt service at Del Secolo's place of

employment was fatal to Plaintiff's due diligence claim. The Court did grant the motion for default judgment against Calviello, however, because he never appeared in the action and Del Secolo did not have standing to contest the validity of service as to her ex-husband.

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 partners and senior lawyers are former federal law clerks or prosecutors, or both.*

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