Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
October 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 third quarter of 2016.

Judge Karas Holds Removal Was Timely in Denying Motion to Remand

In *Suttlehan v. MidFirst Bank*, No. 15-CV-8348 (KMK), 2016 WL 4491827 (S.D.N.Y. Aug. 25, 2016), **Judge Kenneth M. Karas** denied Plaintiffs' motion to remand their premises liability action to state court. In March 2015, plaintiffs Michael and Nancy Suttlehan sued defendant MidFirst Bank for injuries Michael allegedly sustained while on Defendant's premises (the "Suttlehan Action"). The Suttlehans' complaint did not indicate whether the amount in controversy exceeded $75,000. The following month, the Town of New Windsor commenced a separate action against Defendant based on the same events alleged in the Suttlehan Action (the "Town Action"). The Town's complaint alleged the Suttlehans' damages exceeded $168,000. In September 2015, Defendant served a demand for a Verified Bill of Particulars in the Suttlehan Action. When the Suttlehans' responses indicated that the amount in controversy exceeded $75,000, Defendant removed the Suttlehan Action to federal court on November 18, 2015. The Suttlehans moved to remand, arguing that the removal was untimely because one or more of the following constituted "other paper" indicating the case was removed under 28 U.S.C. § 1446(b)(3) and so the 30 day time limit to remove had long expired: (a) commencement of the Town Action in April 2015, (b) a September 2015 conference at which consolidation of the Suttlehan Action and Town Action was discussed, and (c) a July 2015 email in which consolidation was discussed. Judge Karas rejected each of these assertions. First, the Court ruled the Town's filing did not start the clock because filings in other lawsuits, as opposed to the action itself, are not contemplated by the removal statute. Judge Karas rejected the notion that the common nucleus of facts essentially rendered the two actions - which had not been

formally consolidated - one and the same. Second, the Court ruled the state court conference did not start the clock because, although a court conference where a record is transcribed *could* be deemed a "paper," there was no indication that the amount of damages was discussed at the conference. Finally, the Court ruled the email exchange did not start the clock because a defendant's subjective knowledge of grounds for removal is insufficient to trigger the 30 day time period under § 1446.

Judge Seibel Dismisses Police Officer's Employment Discrimination Claims

In *Gaffney v. Vill. of Mamaroneck Police Dep't*, No. 15-CV-5290 (CS), 2016 WL 4547499 (S.D.N.Y. Aug. 31, 2016), **Judge Cathy Seibel** granted Defendants' motion to dismiss Plaintiff's second amended complaint alleging age discrimination and hostile work environment claims. Plaintiff James Gaffney, a sixty-two year-old police officer who has been employed by defendant Village of Mamaroneck Police Department for forty years, sued the Department and various village officials, alleging he had been discriminated against due to his age in violation of the Age Discrimination in Employment Act. Plaintiff alleged that, beginning in 2008, he was repeatedly passed over for promotions, marginalized and otherwise discriminated against based on his age. Plaintiff filed an EEOC administrative charge in November 2014 and commenced his federal action in July 2015. After amending his complaint twice, Defendants moved to dismiss the lawsuit on the grounds that Plaintiff's claims were untimely. The Court agreed with Defendants and dismissed the action. Judge Seibel first found Plaintiff's age discrimination and hostile work environment claims were untimely because Plaintiff failed to file his EEOC charge within 300 days of the alleged violations as is necessary to preserve his right to litigation in New York. The Court further held that Plaintiff could not rely on the continuing violation doctrine because Plaintiff only pleaded a series of discrete discriminatory acts, rather than systemic discriminatory policies or mechanisms. Finally, the Court declined to exercise supplemental jurisdiction over Plaintiff's state law claims and *sua sponte* denied leave to further amend the complaint.

Judge Briccetti Denies Summary Judgment in Parking Lot Slip and Fall

In *Pera v. Lopez*, No. 14 CV 2281 (VB), 2016 WL 4688868 (S.D.N.Y. Sept. 7, 2016), **Judge Vincent L. Briccetti** denied Defendants' motion for summary judgment in an alleged 2014 slip and fall. Plaintiffs Adrian and Maria Pera sued defendant landowners for injuries Adrian allegedly sustained when he slipped on snow and ice

while in between two vehicles in Defendants' parking lot. Defendants contended they were entitled to summary judgment because: (i) the snow and ice was open and obvious and not inherently dangerous; (ii) they did not breach a duty owed to Adrian because they maintained the property in a reasonably safe condition; and (iii) Adrian's decision not to take a path that would have avoided the snow and ice, as opposed to any negligent conduct on their part, was the proximate cause of his injuries. The Court rejected each of these arguments and held Defendants failed to establish as a matter of law that their property was maintained in a reasonably safe manner. First, Judge Briccetti determined that summary judgment was not appropriate even if the snow and ice was open and obvious because such a fact would be relevant to the issue of comparative negligence rather than an absolution of liability. Second, Judge Briccetti found that it was up to a jury to decide whether Defendants' choice to clear snow from certain areas of the parking lot, but not between the vehicles where Adrian slipped, constituted maintenance in a reasonably safe condition. Finally, the Court rejected Defendants' proximate cause argument because a question of fact remained as to whether Adrian could have taken an alternative route that would have avoided the snow and ice, and the circumstances of this case did not warrant an exception from the general rule that comparative negligence is a question of fact to be determined by a jury.

Judge Román Dismisses Deceptive Practices Suit Over OnStar Service

In *Rephen v. Gen. Motors Corp.*, No. 15-CV-5206 (NSR), 2016 WL 4051869 (S.D.N.Y. July 26, 2016), **Judge Nelson S. Román** denied Plaintiff's motion to amend his class action complaint while granting Defendant's cross-motion to dismiss. Plaintiff Bradley Rephen entered into a lease agreement with defendant General Motors Corporation, which provided for a free six-month trial of OnStar services. Prior to the expiration of his trial, Plaintiff's OnStar services were mistakenly canceled, and Plaintiff had to call OnStar to reinstate the service. Plaintiff also received an email five days before the trial was set to expire, indicating his services would be canceled if he did not accept OnStar's terms of use and service. Plaintiff sued GM, but not OnStar, for violations of NY GBL §§ 349 and 350, which prohibit deceptive trade practices and false advertising, as well as for breach of contract. After the Court identified certain deficiencies in the initial complaint, Plaintiff sought leave to file a second amended complaint to add OnStar as a defendant and to assert his claims on behalf of the class of GM customers who had been similarly injured. GM cross-moved to dismiss all claims. Judge Román denied the motion for leave to amend and granted GM's motion to dismiss. First, the Court dismissed both GBL claims because it found the alleged conduct was not materially

misleading. The Court also dismissed Plaintiff's breach of contract claim because Plaintiff never experienced a disruption in his services or suffered any cognizable damages. In addition, Judge Roman held Plaintiff's claim that he suffered severe emotional distress from receiving "abusive" termination notices was meritless. Because all of Plaintiff's claims were dismissed, the Court declined to address the class allegations and denied leave to amend the complaint as futile.

Justice Ruderman Precludes Evidence of Defendant's DWI Conviction in Personal Injury Trial

In *Medina v. Ferrari*, 52 Misc. 3d 1216(A) (N.Y. Sup. Ct. Aug. 3, 2016), **Justice Terry Jane Ruderman** granted Defendant's motion *in limine* precluding reference to his DWI conviction and a claim for punitive damages. Plaintiff sued Defendant seeking damages for personal injuries sustained in a rear-end collision. On the eve of trial, Plaintiff sought to introduce evidence that Defendant was intoxicated and convicted of a DWI, in an attempt to collect punitive damages. Defendant had already conceded liability and argued that this late-stage assertion of punitive damages was prejudicial. Justice Ruderman agreed and granted Defendant's motion to preclude such damages. The Court opined that neither the complaint nor any subsequent demand sought punitive damages and the evidence produced in discovery did not support such a claim. In particular, punitive damages require the plaintiff to demonstrate that the defendant engaged in wanton or reckless conduct. The only possible support for punitive damages came from the use of the term "reckless" in Plaintiff's bill of particulars, but the Court found the use of that word with no explicit request for punitive damages was insufficient to put Defendant on notice that such damages were being sought. Justice Ruderman further ruled that amending the pleadings on the eve of trial to include a punitive damages claim would result in undue prejudice to Defendant.