Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
July 2018

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 2018.

Judge Briccetti Denies Pepsi's Motion to Dismiss Breach of Contract Claim

In *Betty, Inc. v. PepsiCo, Inc.*, No. 16 CV 4215 (VB), 2018 WL 2561028 (S.D.N.Y. June 4, 2018), **Judge Vincent L. Briccetti** denied defendant Pepsi's motion to dismiss an advertising agency's breach of contract claim. Plaintiff and Pepsi entered into a three-year, nonexclusive agreement, whereby Plaintiff would be considered for various marketing and communication projects for Pepsi. In connection with Pepsi's desire to air a commercial during the 2016 Super Bowl halftime show, it invited a number of companies, including Plaintiff, to pitch ideas. Plaintiff thereafter presented eight proposals for commercials, including one in which Pepsi expressed an interest. Pepsi ultimately enlisted another company to spearhead the final commercial, which Plaintiff alleged was derivative of, and fundamentally similar to, its initial proposal. Plaintiff thereafter brought suit against Pepsi for breach of contract and copyright infringement. Pepsi moved to dismiss the breach of contract claim, contending the alleged contract was an unenforceable "agreement to agree." The Court denied the motion, holding that the Complaint's allegations, although thin, plausibly alleged a claim for breach of a binding agreement to negotiate open issues in good faith, which the Second Circuit recognizes as a valid, alternative breach of contract claim. Judge Briccetti found the contract committed Plaintiff to certain obligations and also plausibly constituted a general framework upon which the parties would ultimately negotiate specific deliverables. The Court further held Plaintiff adequately pled a breach of the obligation to negotiate insofar as it alleged it had presented materials to Pepsi, which Pepsi ultimately misappropriated.

Judge Karas Grants Summary Judgment in Age Discrimination Case

In *Wurtzburger v. Koret*, No. 16-CV-7897 (KMK), 2018 WL 2209507 (S.D.N.Y. May 14, 2018), **Judge Kenneth M. Karas** granted the defendant employer's motion for summary judgment, dismissing Plaintiff's age discrimination claims. Plaintiff, a 64 year-old woman, sued defendants, Flory Corp. and some of its high-ranking employees/owners, under the Age Discrimination in Employment Act ("ADEA") and parallel New York statutes, alleging she was denied employment working the deli at Defendants' convenience store because of her age. The Plaintiff, however, failed

to first submit her claim to the EEOC. In granting summary judgment to Defendants, Judge Karas ruled that Plaintiff's failure to exhaust her administrative remedies was fatal to her ADEA claim. Similarly, her failure to submit a timely claim with the EEOC barred the assertion of any equitable defenses such as tolling in the district court. In that regard, the Court rejected Plaintiff's argument that tolling was appropriate because her attorney allegedly filed the case initially in the wrong forum, noting that, even if true, an attorney's mistake or negligence was insufficient to overcome the requirement that a plaintiff exhaust administrative remedies. As for Plaintiff's state law claims, although Judge Karas noted Plaintiff was not subject to the same administrative exhaustion requirements, the Court declined to exercise supplemental jurisdiction, in the absence of diversity jurisdiction, as doing so would effectively grant Plaintiff a merits analysis on her ADEA claim. Accordingly, the Court dismissed the action in its entirety.

Judge Román Dismisses Patent Suit on Venue Grounds

In *CDx Diagnostic, Inc. v. United States Endoscopy Grp.*, Inc., No. 13-CV-5669 (NSR), 2018 WL 2388534 (S.D.N.Y. May 24, 2018), **Judge Nelson S. Román** dismissed Plaintiff's patent infringement claims without prejudice, in light of recent Supreme Court precedent narrowing the patent venue statute. Plaintiffs brought suit in New York against Defendant, an Ohio corporation, alleging patent infringement in connection with Defendant's manufacture and sale of certain medical products. Although the matter was already in discovery, Defendant was granted leave to file a late-stage motion to dismiss for improper venue following the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S.Ct. 1514 (2017). In that case, and despite the Federal Circuit's longstanding interpretation to the contrary, SCOTUS held that the patent law's venue statute was *not* supplanted by general venue laws. Under that statute, in turn, venue is only proper "where the defendant resides [*i.e.*, its state of incorporation], or where the defendant has committed acts of infringement *and* has a regular and established place of business." Here, venue did not lie under the first prong because Defendant was incorporated in Ohio. As to the second prong, while there was evidence Defendant had committed acts of infringement in New York, it did not have an established place of business in that state. While Plaintiffs initially objected to the motion on timeliness ground (which Judge Román noted was erroneous because waiver of a defense cannot occur if said defense was not previously available), they ultimately withdrew their opposition and consented to the dismissal.

Judge Seibel Dismisses FMLA Complaint

In *Horsting v. St. John's Riverside Hosp.*, No. 17-CV-3230 (CS), 2018 WL 1918617 (S.D.N.Y. Apr. 18, 2018), **Judge Cathy Seibel** dismissed Plaintiff's Family and Medical Leave Act ("FMLA") claims against his former employers. Plaintiff, a security officer at a hospital, who was previously approved for FMLA leave in connection with a back condition, sought additional FMLA leave for a purported heart condition. Despite his request being denied, Plaintiff took it upon himself to go absent without leave for nearly a month and was subsequently terminated. Thereafter, Plaintiff commenced suit alleging FMLA interference and retaliation. Defendants moved to dismiss for failure to state a claim, arguing Plaintiff failed to sufficiently allege interference and that Plaintiff's termination was legitimate as it was in response to his extended, unexcused absence. With respect to Plaintiff's FMLA interference claim, Judge Seibel ruled that Plaintiff failed to allege he provided Defendants with sufficient notice of his intention to take leave because the certification Plaintiff provided in support of his request did not specify the anticipated duration of his heart condition or

the requested leave as required under Second Circuit precedent. As for his retaliation claim, Judge Seibel held that Plaintiff 's claim was implausible on its face because, for the same reasons his interference claim failed, Plaintiff failed to demonstrate he was actually entitled to the leave he sought. Accordingly, the Court dismissed the action in its entirety, and *sua sponte* denied leave to amend, finding no evidence further facts existed that would cure the complaint's deficiency.

Westchester Supreme Court Justice Ecker Denies Pre-Commencement Discovery

In *Saloman v. Porter*, 59 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2018), **Justice Lawrence H. Ecker** denied Petitioners' application for pre-commencement disclosure, holding such request was outside the scope of permissible discovery grounds. Petitioner commenced a special proceeding seeking to depose two respondents to substantiate the existence of alleged assets in New York to which he lawfully was entitled as the heir of his father's estate. Petitioner alleged Respondents had knowledge and information that would assist in his quest to recover those assets. Respondents, however, contended Petitioner failed to demonstrate their specific involvement in various transactions to justify such depositions. In denying Petitioner's application, the Court reiterated that while pre-commencement disclosure is appropriate to frame a complaint or identify prospective defendants, it is not available to aid a plaintiff in determining whether a cause of action exists. Here, Petitioner had not articulated a cognizable cause of action on behalf of the estate, nor did he show Respondents were in exclusive possession of any pertinent information that might aid in his pursuit. Justice Ecker further noted that if Petitioner actually suspected Respondents were liable for conduct towards his father's estate, he already knew their identities and they had submitted affidavits that they did not possess relevant documents. Those facts further undermined the need to depose Respondents before litigation commenced.