Jan 2019 | Publications

# Westchester County Roundup: January 2019

**NOTABLE DECISIONS OF THE WESTCHESTER FEDERAL AND STATE COURTS**

**Judge Román Grants in Part and Denies in Part Lyft's Motion to Dismiss Plaintiff's Complaint Alleging Disability Discrimination**

In *Harriet Lowell et al. v. Lyft, Inc.*, No. 17-CV-6251 (NSR), 2018 WL 6250661 (S.D.N.Y. Nov. 29, 2018),**Judge Nelson S. Román** granted in part and denied in part Defendant's motion to dismiss Plaintiffs' anti-discrimination Complaint under the Americans with Disabilities Act ("ADA"), New York State Human Rights Law ("NYSHRL"), and New York City Human Rights Law ("NYCHRL"). Plaintiffs Harriet Lowell, a disabled individual, and Westchester Disabled on the Move, Inc., a disabled services organization, brought suit alleging Lyft discriminated against the disabled because did not provide any wheelchair accessible vehicles in Westchester County, New York and provided an insufficient number in New York City. The Complaint alleged that while Lowell herself never attempted to secure a ride from Lyft, she had actual notice of its deficiencies from other disabled individuals. Lyft moved to dismiss arguing Defendants did not have standing and the Complaint otherwise failed to state a claim. Judge Román granted the motion as to certain of the state and local law claims but denied the motion to dismiss the ADA claims. The Court first concluded that Lowell had standing because she had "actual notice" that Lyft did not comply with the ADA and so did not need to engage in the "futile gesture" of attempting to secure a ride herself. Noting that the definition of actual notice is unsettled in the Second Circuit, Judge Román concluded that because Lyft was a web-based service, as opposed to a physical presence, it was sufficient that Lowell was told by numerous individuals that the Lyft's vehicles were wheelchair inaccessible. The Court went on to find that Westchester Disabled had associational standing to pursue its ADA claims on the grounds that its members would have standing to sue in their own right; the interests it seeks to protect relate to the organization's purpose; and neither the asserted claim nor the requested relief require the participation of individual members of the lawsuit. The Court dismissed the state law claims, however, because they included a request for compensatory damages, which required the participation of the group's individual members. Turning to the merits of Plaintiffs' ADA claims, the Court first held that the arbitration clause in Lyft's terms of service did not apply because it would be unfair to bind Plaintiffs to an arbitration provision for an application Lowell indisputably had never downloaded. Judge Román also rejected Lyft's argument that Plaintiffs failed to state a claim for relief because the Court cannot order Lyft to provide accessible vehicles, finding Plaintiffs sought various other forms of declaratory and injunctive relief that potentially were available. The Court did dismiss the NYCHRL claims, however, because Plaintiffs alleged only that there were long wait times for accessible vehicles in New York City and the statute requires Plaintiffs to plead Lyft entirely excluded the disabled from a public accommodation.

**Judge Briccetti Denies Motion to Intervene in Case Alleging Violations of the Telecommunications Act of 1996**

In *New York SMSA Limited Partnership, d/b/a Verizon Wireless et al.* v. Town of Philipstown, et al., No. 18 CV 1534 (VB), 2018 WL 6619737 (S.D.N.Y. Dec. 18, 2018), **Judge Vincent Briccetti** denied intervenor status to thirteen Philipstown residents in an action brought by Verizon against Philipstown after the Town denied Verizon's applications for permits necessary to construct a 180-foot tall cell tower. The residents sought to intervene because they owned property near the proposed cell tower, which would be negatively affected if the tower was constructed. The Court held that Plaintiffs failed to satisfy the requirements for either intervention as of right or permissive intervention. Judge Briccetti first concluded the intervenors failed to show an interest that Philipstown would not adequately protect. Although a showing of adequate protection imposes only a minimal burden, because the proposed intervenors and the town shared an identity of interest, the intervenors were required to rebut the presumption of adequate representation by the party already in the action by offering evidence of collusion, adversity of interest, nonfeasance, or incompetence by the party sharing the same interest. Here, the residents argued only that there was adversity of interest in that the Town may settle the case in a manner the intervenors did not approve. The Court rejected this argument, holding the "mere possibility of settlement does not alone render the Town's and the proposed intervenor's interests adverse." For similar reasons, the Court used its broad discretion to deny the residents permissive intervention as well. Judge Briccetti noted that the Town's and intervenors' interests were aligned and there would be undue delay if permissive intervention was granted.

**Judge Seibel Grants Summary Judgment to Costco in Negligence Action**

In *Santora v. Costco Wholesale Corp.*, No. 17-CV-4415 (CS), 2018 WL 5886442, (S.D.N.Y. Nov. 8, 2018), **Judge Cathy Seibel** granted defendant Costco Wholesale Corp.'s motion for summary judgment dismissing plaintiff Joanne Santora's negligence claim resulting from a slip and fall on a clear liquid in the Costco located in Port Chester, New York. Plaintiff's husband witnessed the accident but neither he nor Plaintiff know how the liquid was caused to be on the floor or for how long it was there prior to Plaintiff's fall. There were no open bottles or packages in the area that could have caused the spill, and no Costco employees were in the aisle when Plaintiff fell. Costco, in turn, provided evidence of its cleaning and inspection policies and procedures, including that the warehouse floors are scrubbed and swept every morning before opening, and Costco employees walked the aisles throughout the day to confirm that no unsafe conditions or potential hazards existed. In this case, to prove a breach of duty, Plaintiff had to proffer evidence that Costco had actual or constructive notice of the liquid on which she slipped and fell. Importantly, in New York federal court, Costco, as the moving party, "may point to the absence of evidence that it caused or had notice of the hazard and thereby shift the burden to the Plaintiff to create an issue for trial through specific factual assertions." The Court further noted that, under New York law, the plaintiff must establish how long the hazard had existed in order to prove constructive notice. Applying these principles, the Court agreed with Costco that there was no evidence of notice and so the burden shifted to Plaintiff to raise a triable issue of fact. Finding Plaintiff conceded there was no actual notice and could not establish how long the liquid had been on the floor, Judge Seibel held Plaintiff failed to carry her burden of proof and so granted summary judgment in Costco's favor.

**Judge Karas Denies Parties' Joint Motion for Approval of a Proposed Settlement**

In *Tapia v. Mount Kisco Bagel Co. Inc.*, No. 18-CV-2864 (KMK), 2018 WL 4931542(S.D.N.Y. Oct. 10, 2018), **Judge Kenneth M. Karas** denied the parties' joint motion for approval of a proposed settlement under the Fair Labor Standards Act of 1938 ("FLSA"). Plaintiff, a baker, was employed by Mount Kisco Bagel from 2004 through 2017, and alleged that Defendants failed to provide legally mandated overtime compensation to employees who worked more than 40 hours per week, failed to pay earned wages, failed to keep accurate records of hours worked, and failed to give employees required pay notices and statements. The

parties reached a settlement of the litigation and sought the Court's approval of the settlement. Judge Karas held that, although the settlement was negotiated in good faith at arms' length and there was no fraud or collusion, the Court did not have sufficient information to determine whether the settlement sum was fair and reasonable. Specifically, the parties' submission provided that Plaintiff's recovery of $35,333.33 would be approximately 50% of the maximum allowable damages. However, the parties did not proffer sufficient data as to how the maximum allowable damages were calculated. In addition, the Court held that, although an application for attorneys' fees is proper in an FLSA case, Plaintiff's attorneys failed to provide billing records documenting their work and rates. Because the parties did not provide the Court with the data necessary to adjudicate the proposed settlement, the Court denied their motion without prejudice to resubmitting the settlement with the requisite data.

**Westchester Supreme Court Justice Ecker Denies Motion to Unseal Records Concerning Arrest and Adjudication of Minor**

In *New York Mun. Ins. Reciprocal v. Vill. Of Briarcliff Manor Police Dep't*, 61 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2018), **Justice Lawrence H. Ecker** denied New York Municipal Insurance Reciprocal a/s/o the Village of Briarcliff Manor's motion to unseal records related to the arrest of and adjudication of alleged arson by a minor at the Village Pool Pavilion located in Briarcliff Manor, New York. New York Municipal, which had paid out $2,500,000 to the insured Village, applied to unseal the records in contemplation of bringing an action against the minor to mitigate its damages. Justice Ecker held that CPL 720.35 requires that disclosure of the confidential records by court order must be issued by the court that rendered the youthful adjudication. Because the Court did not render the minor's adjudication, the Court did not have jurisdiction to grant the requested relief. In addition, the Court held that the minor did not waive privilege. Justice Ecker therefore denied New York Municipal's application in its entirety.

**Justice Press Dismisses Negligence Claim Alleging Restaurant was Responsible for Theft**

In *Dean v. Morton's the Steakhouse d/b/a Restaurant*, Index No. SC363/15 (White Plains City Ct. 2018), **Justice Eric P. Press granted** Yankwitt LLP's motion to dismiss a complaint against its hospitality client. Plaintiff Thelma Dean sued Morton's The Steakhouse when her designer handbag was stolen while she was dining at the restaurant. Plaintiff alleged the restaurant was negligent because the maître d' left her post and allowed two suspects to enter the dining area and steal her bag. The Court agreed with Morton's that, as a matter of law, it did not owe Plaintiff a duty of care to protect her property. Additionally, the Court held that no bailment was created, as Plaintiff did not deliver her bag to Morton's.