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Westchester County Roundup: October 2018

Judge Román Denies Motion to Dismiss Complaint Arising Out of Classic Car Sale

In *Niedernhofer v. Wittels*, 2018 WL 3650137 (S.D.N.Y. July 31, 2018), **Judge Nelson S. Román** denied Defendant's motion to dismiss the Plaintiff's complaint alleging rescission, breach of express warranty, fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, breach of good faith and fair dealing, and unjust enrichment. Defendant used a third-party intermediary to auction his 1958 Lancia B24S convertible over the internet. Relying on Defendant's representation that the car had no leaks and was fully restored, Plaintiff placed the winning bid for $350,000. However, upon delivery of the vehicle, Plaintiff allegedly discovered various cosmetic and mechanical defects in contravention of Defendant's online and oral representations. After Defendant refused to rescind the contract, Plaintiff filed the instant lawsuit. Defendant moved to dismiss on the grounds that Plaintiff's claims were barred by the statute of frauds. The court disagreed holding the statute of frauds defense was premature at the motion to dismiss stage because communications between the parties may prove sufficient to satisfy the statute of frauds. Judge Román also held two exceptions to the statute of frauds may apply: (1) Defendant may have admitted that a contract for sale was made in his motion papers; and, (2) if payment was made and accepted, the statute of frauds defense would be inapplicable.With regard to Plaintiff's fraud claims, after making the preliminary determination that New York law applied, Judge Román held that, because Defendant certified that the written description of the vehicle was true and accurate, a fact finder could conclude that Plaintiff reasonably relied on Defendant's representations. Lastly, the Court denied the motion to dismiss Plaintiff's negligent misrepresentation claim. Judge Román first made the threshold determination that Florida law applied because Plaintiff was in Florida when Defendant made the alleged misstatements. Under Florida law, unlike New York, proof of a special relationship is not required to prove a claim of negligent misrepresentation. Therefore, Plaintiff sufficiently pled that cause of action under Rule 12(b)(6).

Judge Briccetti Dismisses ADA Associational Discrimination Claim

In *Kelleher v. Fred A. Cook, Inc.*, 2018 WL 3611965 (S.D.N.Y. July 26, 2018), **Judge Vincent L. Briccetti** granted Defendant's motion to dismiss Plaintiff's claim alleging associational discrimination under the Americans with Disabilities Act ("ADA"). In 2014, Plaintiff began working for Defendant as an Operator in the Vactor Division of Defendant's sewage cleaning business. His position required 12 to 14-hour shifts with availability to work emergency overtime. In 2015, Plaintiff told Defendant that his daughter had a medical condition and requested an accommodation of eight-hour workdays to help at home. Defendant denied that accommodation and ultimately terminated Plaintiff after he was forced to leave work early and subsequently arrived to work late. After submitting his claim to the EEOC, Plaintiff commenced this action. Defendant moved to dismiss, arguing the claim was time-barred and otherwise failed to state a claim. The Court agreed and granted the motion. Judge Briccetti first addressed Defendant's argument that the claim was time-barred because Plaintiff had not filed the lawsuit within 90 days of his

receipt of a right to sue letter from the EEOC. In discrimination cases, the general presumption is the letter is received three days after mailing. However, a plaintiff may present testimony or other admissible evidence rebutting this presumption. In this case, Plaintiff's right to sue letter was dated August 10, 2016, yet he did not file the instant lawsuit until July 18, 2017. To rebut the presumption of untimeliness, Plaintiff provided a sworn statement from a legal assistant at the firm representing Plaintiff attesting that their office did not receive the letter until May 4, 2017. In opposition, Defendant submitted evidence that the letter was mailed on August 10, 2016. Construing all inferences in Plaintiff's favor, Judge Briccetti held that Plaintiff sufficiently alleged that he received the letter on May 4, 2017. Turning to the merits of Plaintiff's allegations, however, the Court held that Plaintiff failed to state a claim of associated discrimination under the ADA. A claim for associational discrimination requires allegations that: (1) plaintiff was qualified for the job at the time of the adverse employment action; (2) plaintiff was subjected to an adverse employment action; (3) plaintiff was known at the time to have a relative or associate with a disability; and, (4) the circumstances of the adverse employment action raise a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision. Here, Defendant's motion focused on the fourth element - discriminatory inference. In the Second Circuit, there are three situations that raise a discriminatory inference: (1) expense, (2) disability by association, and (3) distraction. Here, the Complaint proceeded only on the third situation - distraction. Critically, the distraction theory requires Plaintiff to show that he was fired because Defendant was concerned that he would be distracted, not because he actually was distracted. This is because, as a non-disabled individual, Plaintiff was not personally entitled to any accommodation under the ADA. Judge Briccetti held Plaintiff did not allege distraction as required in the Second Circuit, but only that he was fired because he left the job site early and arrived late. Those allegations could not sustain an associational discrimination claim because Plaintiff himself was not disabled.

Judge Karas Grants Chase Bank's Motion Dismissing Plaintiff's Fair Credit Reporting Act Claims

In *Kiss v. Chase Bank USA, N.A*, 2018 WL 3242273, at *1 (S.D.N.Y. July 3, 2018), **Judge Kenneth M. Karas** granted Defendant Chase Bank USA, N.A's motion to dismiss Plaintiff's Fair Credit Reporting Act claims for failure to state a claim under Rule 12 (b)(6). After Chase Bank commenced debt collection proceedings against Plaintiff, Plaintiff attempted to address with the defendant credit reporting agencies alleged inaccuracies in his credit report pertaining to his Chase Bank account. When the credit reporting agencies refused to correct the alleged errors and Chase Bank failed to respond to Plaintiff's communications, Plaintiff brought suit alleging Chase Bank and other Defendants violated four provisions of the Fair Credit and Reporting Act ("FCRA"): (1) violation of 15 U.S.C. § 1681e(b) , for failing to follow "reasonable procedures to assure maximum possible accuracy in the preparation of Plaintiff's credit report and credit files;" (2) violation of 15 U.S.C. § 1681i9a)(1) for failing to conduct a reasonable reinvestigation into alleged inaccuracies in his credit report; (3) violation of 15 U.S.C. § 1681i(a)(4) for failing to review all information allegedly submitted; and, (4) violation of 15 U.S.C. § 1681i(a)(5)(A) for failing to delete disputed and inaccurate information from Plaintiff's credit report. In its motion to dismiss, Chase Bank argued that Plaintiff failed to state a claim against it because the provisions Plaintiff identified in his Complaint all apply exclusively to credit reporting agencies and the Complaint does not allege that Chase Bank is such an agency. Judge Karas agreed, holding each of the statutory provisions relied upon in the Complaint apply only to credit reporting agencies, and not to creditors. Judge Karas noted that Plaintiff could have brought a claim against Chase Bank under 15 U.S.C. § 1681s-2(b), which provides a private cause of action for a furnisher's failure to investigate a credit dispute; but the Complaint failed to allege such a cause of action. Judge Karas therefore dismissed the Complaint against Chase Bank without prejudice to Plaintiff amending his Complaint to address the errors in his initial pleading.

Judge Seibel Dismisses Complaint Alleging Fraudulent Mortgage Lender Practices

In *Weir v. Cenlar FSB*, 2018 WL 3443173, at *2 (S.D.N.Y. July 17, 2018), **Judge Cathy Seibel** granted Defendants' motion to dismiss a class action complaint alleging violations of the federal RICO statute, the Fair Debt Collection Practices Act ("FDCPA"), the Real Estate Settlement Procedures Act ("RESPA"), New York General Business Law § 349(g) ("NYGBL"), and unjust enrichment. Plaintiffs filed the class action lawsuit on behalf of themselves and similarly situated persons alleging that Defendants participated in a scheme to maximize profits by ordering "repetitive, unfair and excessive property inspections which are then charged to defaulted borrowers' accounts." Defendants were mortgage lenders servicing Plaintiffs' mortgages under a security instrument that provided the "Lender, and others authorized by Lender, may enter on and inspect the Property. They will do so in a reasonable manner and at reasonable times." Plaintiffs' claimed that Defendants' computer automated process, which automatically ordered property inspections when a borrower defaulted on a loan, was excessive, unreasonable, and amounted to multiple violations of law. In an extensive analysis of the Plaintiffs' claims, Judge Seibel granted Defendants' motion to dismiss in its entirety. First, Judge Seibel dismissed Plaintiffs' RICO claims because Plaintiffs did not plausibly allege a RICO enterprise. Specifically, Judge Seibel held that Plaintiffs failed to show that the vendors who inspected the properties shared the alleged common purpose with the named Defendants, because the property inspectors were merely an instrumentality responding to automatic messages from Defendants' computer system. Judge Seibel further held that, because the two defendants were a parent and its subsidiary, respectively, they could not constitute an enterprise as a matter of law. Finally, the Court concluded that the alleged enterprise was not distinct from the alleged pattern of fraudulent conduct and so the Complaint failed to state a RICO claim. Second, the Court dismissed Plaintiffs' FDCPA claim finding Defendants were not debt collectors under the FDCPA. Defendants were mortgage servicers - rather than debt collectors - because they began servicing the Plaintiffs' mortgages before the Plaintiffs were in default. And even if Defendants' were debt collectors, Judge Seibel held the FDCPA claim would fail because Defendants' conduct did not constitute false representations as required by the statute. Turning to Plaintiffs' state law claims, the Court first examined whether it had federal question jurisdiction over those causes of action under the Class Action Fairness Act. The Court concluded it did not have that jurisdiction, because Plaintiffs did not plausibly allege an amount in controversy exceeded $5 million, as required under that act. In an abundance of caution, however, Judge Seibel examined the state law claims on their merits and found that none stated a claim under Rule 12(b)(6). Based on her RICO analysis, Judge Seibel held that Plaintiffs' NYGBL claim failed because Defendants did not engage in a deceptive practice. The Court then dismissed Plaintiffs' unjust enrichment claim because that claim is only available in the absence of an enforceable contract, and the Complaint alleged misconduct arising out of the parties' mortgage servicing agreements. Finally, Judge Seibel declined to grant Plaintiffs leave to amend the Complaint a second time.

Westchester Supreme Court Justice Ecker Orders Traverse Hearing on Service of Process

In *Hudson North Management, LLC v. Hudson North Management Westchester Corporation*, 2018 WL 1913880, at *1 (N.Y. Sup. Ct. West. Cty. April 19, 2018), **Justice Lawrence H. Ecker** addressed two motions by defendants alleging improper service of process, holding that service of process on the individual Defendant Perusini was ineffective because Plaintiff failed to satisfy the due diligence standard under CPLR 308(4) and that a traverse hearing was necessary to resolve issues of fact related to whether service upon Defendant Hudson North Westchester was effective. In a matter to enforce a contract for the sale of Plaintiffs' business, Defendants Perusini and Hudson moved to dismiss the summons and complaint for lack of personal jurisdiction due to improper service of process. Plaintiffs made three attempts to serve Perusini at his residence. On the third attempt, Plaintiffs affixed the summons and complaint to the door of Perusini's residence. Perusini argued that Plaintiffs failed to satisfy the due diligence standard under CPLR 308(4) because Plaintiffs were obligated to attempt to serve him at his place of business in addition to his residence. CPLR 308(1) and CPLR 308(2) mandate that service be attempted by personal delivery to

the individual being served or by delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode." Under CPLR 308(4), affix and mail service may only be used where service under CPLR 308(1) or CPLRE 308(2) "cannot be made with due diligence." Applying recent Second Department precedent, Justice Ecker held that personal jurisdiction was not obtained over Perusini because Plaintiffs had knowledge of Perusini's place of work and did not attempt to serve process upon him at that location. However, in the interest of justice, Justice Ecker gave Plaintiffs an additional thirty days to serve Perusini if they so choose. In its motion, Defendant Hudson argued that service of process upon it was ineffective because Plaintiff, by serving Hudson's receptionist, did not serve a person authorized to accept service of process. Justice Ecker held that a question of fact existed as to whether service upon the receptionist was proper because she told the process server that she had authority to accept service on behalf of Hudson. Therefore, Judge Ecker ordered a traverse hearing as to whether the receptionist had the requisite authority or, in the alternative, whether it was reasonable for the process server to believe the receptionist when she claimed to have authority.