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Westchester County Roundup: October 2019

Judge Román Grants in Part and Denies in Part Cross-Motions to Preclude Proposed Experts

In *Nemes v. Dick's Sporting Goods, Inc.,* No. 17—cv—1688, 2019 WL 3982212 (S.D.N.Y. Aug. 23, 2019), the plaintiffs, a husband and wife, brought products liability claims against defendants Dick's Sporting Goods, Inc. and Barnett Outdoors, LLC after Mrs. Nemes partially amputated her thumb while shooting a Barnett Lady Raptor FX crossbow. Judge Nelson Román granted in part and denied in part the parties' motions to preclude the testimony of their respective experts.

At the close of discovery, the parties stipulated to dismiss certain claims, leaving only the plaintiffs' claim that the Lady Raptor suffered from a design defect in that it lacked proper finger guards. The plaintiffs submitted expert testimony to prove their design defect theory while the defendants offered two experts to disprove causation. Judge Román first noted that under Daubert the district court is a gatekeeper that must decide whether experts are qualified under Federal Rule of Evidence 702; this determination includes ensuring that the expert is qualified by knowledge, skill, experience, training or education and that his or her testimony is based on sufficient facts, is the product of reliable methods, and that those methods are applied reliably to the facts of the case. Recounting the qualification of the plaintiffs' expert-including work as a professional engineer, certifications in various OSHA programs, and his current occupation as an associate with Robson Forensic, Inc.-Judge Román held that the expert's qualifications were sufficient. The Court then turned to the reliability of the plaintiffs' expert's testimony as to the elements of a design defect claim in New York, i.e., whether(1) the product posed a substantial likelihood of harm as designed, (2) it was feasible to design the product in a safe manner, and (3) the defective design was a substantial factor in causing plaintiff's injury. Judge Román determined that the plaintiffs' expert was able to testify to the first and third elements, but not the second. Although the expert claimed feasible alternatives to the Lady Raptor design existed, he did not specifically identify those alternatives or conduct any tests to prove that those supposed alternatives presented a feasible design. The Court then turned to the defendants' experts, finding that while they were both qualified, their testimony on causation was not reliably applied to the facts of the case. Neither expert examined the Lady Raptor, attempted to reconstruct the accident, or watched the video produced by the plaintiffs of Mrs. Nemes holding the Lady Raptor. Thus, the Court permitted the plaintiffs' expert to testify to substantial likelihood of harm and causation, while the defendants' experts could testify only to general design features of crossbows and general causes of crossbow injuries.

Judge Seibel Denies Parties' Cross-Motions for Summary Judgment on Breach of Contract Claims

In *Sasson v. Mann,* 15—CV—6601, 2019 WL 3532155 (S.D.N.Y. Aug. 2, 2019), the plaintiffs, Uri Sasson and Howard Mann, who co-owned several real estate companies in Rockland County with their now deceased father-in-law Philip Mann, filed suit against Mr. Mann's estate for breach of contract. Judge Cathy Seibel denied the parties' cross-motions for summary judgment on their

breach of contract claims arising out of the plaintiffs' alleged option to purchase an interest in a family-owned real estate company.

In 1997, the parties entered into an agreement to restructure the companies and provide for Mr. Mann's exit and transfer of his interest to plaintiffs. Mr. Mann agreed to make a specific bequest of his interest in the restructured company to the plaintiffs if certain conditions were fulfilled. The parties further agreed that if Mr. Mann failed to include the bequest in his will, the plaintiffs would have the option to purchase the interest for a nominal sum. Mr. Mann did not include the bequest in his will and the plaintiffs sought to exercise their options upon his death. The defendant, Howard Mann, as the estate's representative, rejected those attempts and the plaintiffs sued for breach of contract. Following discovery, the plaintiffs moved for summary judgment arguing that all conditions to the transfer were fulfilled, so the defendant breached the parties' agreement by refusing to accept the plaintiffs' tender of their option. In opposition, the defendant disputed that the conditions of the transfer were fulfilled, and further contended that his performance was excused under the contract because the plaintiffs materially breached certain obligations in the agreement relating to the restructuring of the real estate companies. In evaluating the motion, Judge Seibel first concluded there was no material issue of fact as to whether the conditions were fulfilled or the options properly exercised. Going further, however, the Court found there were factual disputes as to whether the plaintiffs had materially and substantially breached the agreement themselves by failing to restructure the real estate companies in accordance with that contract. While Judge Seibel expressed skepticism that the plaintiffs' alleged breach was "so substantial as to defeat that it defeats the object of the parties in making the contract," the Court declined to rule as a matter of law on the defendants' excuse of performance argument because the parties had not briefed whether the plaintiffs' alleged breaches were material. Judge Seibel also found issues of fact as to whether the agreement was divisible such that the plaintiffs' alleged breach would not excuse the defendant's performance. The Court held that the issue of divisibility is a matter of intent, which is a question for the jury unless the contract is clear on its face. Here, there was operative language which could be read to support both sides' positions and the agreement did not contain a severability clause. Because of those ambiguities, the Court held it could not determine whether the agreement was divisible at the summary judgment stage.

Judge Briccetti Grants Defendant's Motion for Summary Judgment in Wrongful Death Case

In *Centi v. Fedigan*, 17 CV 325, 2019 WL 4392795 (S.D.N.Y. Sept. 12, 2019), Judge Vincent Briccetti granted defendant Gayle Fedigan's motion for summary judgment in a wrongful death case arising from a 2015 car accident involving the decedent driver Christine Centi, whose airbag failed to deploy. Ms. Centi's parents sued Mrs. Fedigan for wrongful death, alleging that Mrs. Fedigan had sold the car to Ms. Centi in 2013 and failed to warn her that the driver's side airbag was not functional. The court found that Mrs. Fedigan, in fact, did not sell the car to Ms. Centi and hence, did not owe a duty to Ms. Centi.

Mrs. Fedigan purchased the car at issue in 2007, and her husband drove it for several years. In 2010, it began to malfunction, and Mrs. Fedigan's husband brought the car to their mechanic, who informed them that the engine needed to be replaced. For nearly a year, the mechanic kept the car at his shop while searching for a replacement engine. Late in 2011, the Fedigans decided they no longer wanted the car and gave it to their mechanic for parts. Mrs. Fedigan signed the "seller" portion of title transfer documents, but neither she nor her husband dated the signature, and no one filled out the "buyer" portion of the title. Based on investigative work conducted during discovery, Mrs. Fedigan discovered that at some point, the mechanic sold the car and gave the title signed by Mrs. Fedigan to a third party, Philip Punch, without her knowledge. Mr. Punch, a used car dealer, advertised the car for sale, and in 2013, he and his wife, Michelle Punch, sold it to the Centis and provided the Centis with three documents- a bill of sale, the car's title, and a New York State Department of Taxation and Finance Form 802 ("DTF 802") - all of which

identified the "seller" as Mrs. Fedigan. Mrs. Fedigan testified, however, that the signatures on the bill of sale and DTF 802 were forgeries, and that the title had been signed by Mrs. Fedigan back in 2011 in connection with the Fedigans' transfer of the car to their mechanic. During depositions, Mr. Punch admitted to buying the car from the Fedigans' mechanic and to selling the car thereafter, and Mrs. Punch admitted that she had prepared the bill of sale and DTF 802 using Mrs. Fedigan's name, even though she did not know Mrs. Fedigan, but Mrs. Punch denied signing Mrs. Fedigan's name. On January 14, 2015, Ms. Centi was involved in a fatal head-on collision, in which the driver's side airbag failed to deploy. Her parents sued Mrs. Fedigan, claiming that Ms. Centi would have survived had the airbag deployed and that Mrs. Fedigan had a duty to warn Ms. Centi about the airbag problem. Following discovery, Mrs. Fedigan moved for summary judgment, arguing that the undisputed evidence shows that she was not the seller of the car to Ms. Centi and therefore that she owed no duty to Ms. Centi.

After examining all the evidence, Judge Briccetti agreed and granted the motion in its entirety. In holding that no reasonable juror could find Mrs. Fedigan had sold the car to Ms. Centi, the court pointed to the undisputed evidence that Mrs. Fedigan believed her mechanic would scrap the car, had no contact with the Punches or Ms. Centi, and was not aware of the mechanic's sale of the car to Mr. Punch or of the Punches' sale of the car to the Centis. The plaintiffs argued that Mrs. Fedigan owed a duty based on the presence of her signature on the car's title, but Judge Briccetti, drawing on New York precedent, found that vehicle ownership is based on intent, possession and control, rather than title, and none of these had been established as to Mrs. Fedigan. Absent any indication that Mrs. Fedigan had sold the car to Ms. Centi or had any knowledge of or involvement in the sale in any way, Mrs. Fedigan did not owe a duty to Ms. Centi and all claims against her were dismissed.

Judge Karas Grants Motion to Intervene and Stay Proceedings Pending Appeal in Contract Dispute

In *United States for use of Preferred Masonry Restoration, Inc. v. Int'l Fidelity Ins. Co.,* No. 17—CV-1358, 2019 WL 4126473 (S.D.N.Y. Aug. 30, 2019), Judge Kenneth Karas granted a motion to intervene and stay proceedings pending arbitration filed by the defendant International Fidelity Insurance Company ("IFIC") on behalf of itself and its principal, S.J. Thomas Co., Inc. ("SJTC").

SJTC was the general contractor on a federally funded restoration project. IFIC, as SJTC's agent, posted a labor and material payment bond required for the project. Plaintiff Preferred Masonry Restoration, Inc. ("PMRI"), a masonry restoration contractor, was a subcontractor for SJTC on the project. PMRI brought suit alleging it completed substantial work on the project until SJTC barred it from further performance and that PMRI is owed money under the sub-contract. The case was initiated in February 2017, but was slow to get moving because of an unsuccessful mediation that the parties undertook pursuant to their contract, a delay in scheduling the initial conference, PMRI's principal experienced serious health issues and numerous pre-motion conferences took place before SJTC finally filed its motion intervene and stay in October 2018. Under Federal Rule of Civil Procedure 24(a)(2), an intervenor as of right must show: (1) that its motion was timely, (2) it has an interest in the action, (3) an unfavorable ruling may impair its interest, and (4) its interest is not otherwise protected. Judge Karas first focused on the timeliness requirement in light of the 18—-month lag between the complaint and the motion to intervene. The Court noted there are four factors to consider—(1) how long the applicant has had notice of the interest, (2) prejudice to existing parties from resulting delay, (3) prejudice to the applicant if the motion is denied, and (4) any unusual circumstances regarding timeliness-but the determination must still be evaluated under the totality of the circumstances. Judge Karas concluded that the motion was timely notwithstanding the delay because the amount of time that had passed was largely out of SJTC's control. Judge Karas went on to find there would be no prejudice to the existing parties if SJTC intervened because there had been no substantive proceedings to date and no significant discovery. On the other hand, there was the potential for significant prejudice

to SJTC, because it sought to bring several of its own claims against PMRI and could be subject to inconsistent rulings or estoppel issues. Regarding the other factors, Judge Karas held it was clear SJTC had a "concrete interest in the instant action that could be impaired were the application to intervene denied," Because SJTC (not IFIC) was the contracting party and might be required to indemnify IFIC. Finally, on the fourth factor, the Court determined that the retention of the same counsel by SJTC and IFIC did not guarantee that SJTC's interests were adequately protected if it did not intervene. Accordingly, Judge Karas granted the motion to intervene. He next turned to the motion to stay pending arbitration and addressed PMRI's argument that SJTC had waived its right to arbitrate because of (a) the delay in moving for a stay and (b) SJTC's filing and subsequent voluntary dismissal of a state court action against PMRI. As with the motion to intervene, Judge Karas found that, given the limited proceedings in the litigation to date, there was no prejudice to PMRI from staying the litigation. The Court concluded that given the strong federal preference for enforcing arbitration agreements, SJTC had not waived the right arbitrate and the litigation would be stayed pending arbitration.

Westchester Supreme Court Justice Ruderman Denies Petitioner's Application to Compel Pre-Suit Discovery

In *Estate of Gallagher by & through Gallagher v. Catholic Foreign Mission Soc'y of America, Inc*, 105 N.Y.S.3d 863 (N.Y. Sup. Ct. West. Cty. 2019), the petitioner brought suit on behalf of the estate of Howard Gallagher under the the newly enacted Child Victims Act, which extends the statute of limitations on certain criminal sex offenses against children. The petitioner alleged that a religious brother later priest, who is also deceased, sexually abused the decedent in the 1960s. Justice Terry Ruderman denied the petitioner's application to compel pre-suit discovery as unnecessary.

The petitioner sought pre-suit discovery pursuant to CPLR 3102(c) seeking, inter alia, the identity and contact information of other minors with whom the accused priest had contact and relevant documents in the defendant Catholic Foreign Mission Society of America's possession concerning the accused priest's misconduct. Of particular interest to the petitioner was deposing an alleged witness to the abuse. At the outset, Justice Ruderman stated that CPLR 3102 cannot be used to determine whether a prospective plaintiff has a cause of action worth pursuing, but only may be granted when the petitioner has demonstrated a meritorious cause of action; this is done through affidavits made by individuals with firsthand knowledge of the underlying facts. The Court noted that the petition for pre-action discovery was supported only by an affidavit from the petitioner's counsel, who had no firsthand knowledge of the facts. Even if proper support had been provided, the petitioner had sufficient information to frame a complaint, making pre-suit discovery unnecessary. To the extent the petitioner sought the names of other minors who had contact with the accused priest or co-workers and supervisors of the accused priest, those would be available through the ordinary course of discovery. Finally, turning to the deposition of the alleged witness, the Court noted there was no evidence that the alleged witness was alive, competent to testify, or had any direct knowledge of the alleged abuse. Accordingly, the Court denied the petitioner's application to compel pre-suit discovery in its entirety.