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# Westchester County Roundup: July 2020

### *Judge Román Grants Defendant's Motion to Dismiss Amended Complaint in Gender Discrimination and Retaliation Case*

In *Lora v. Centralized Management Service, Inc.*, No. 18-cv-4253, 2020 WL 3173025 (S.D.N.Y. June 12, 2020), the plaintiff, a former executive administrative assistant, brought a gender discrimination and retaliation action against five entities she claimed were her former employers under Title VII, the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). The defendants moved to dismiss on the ground they did not qualify as employers under the relevant federal or state statutes. Judge Nelson Román granted the motion with leave for the plaintiff to file an amended complaint.

The core issue on the motion to dismiss was whether the defendants were "employers," which under Title VII would require each to have at least 15 employees. Further, to state a claim under Title VII, a plaintiff must allege facts that plausibly demonstrate the employer is covered by the statute. Finding the plaintiff's amended complaint failed to provide any details as to the number of each defendant's employees, the court held the plaintiff failed to state a claim under Title VII and dismissed her amended complaint without prejudice.

On the NYSHRL and NYCHRL claims, four of the defendants argued they were not the plaintiff's employer under state law because they did not "control" the plaintiff in the "performance of her work." The plaintiff did not dispute that the defendants were not her direct employers, but argued they collectively should be considered a single employer for statutory purposes because they shared a common business address. Once again, Judge Román found the amended complaint devoid of facts to plausibly support the plaintiff's claim. He also held the common address allegation was insufficient standing alone. Accordingly, Judge Román also dismissed those claims without prejudice.

### *Judge Seibel Denies Defendant's Motion to Stay Pending Appeal in Vote Dilution Case*

In *Nat'l Assoc. for the Advancement of Colored People, Spring Valley Branch v. East Ramapo Central School District*, No. 17-CV-8943, 2020 WL 2836327 (S.D.N.Y. June 1, 2020), the plaintiffs filed a complaint alleging the defendant's voting system denied Black and Latino voters an equal opportunity to participate in the political process and were seeking to enjoin future elections under that system. After a bench trial, Judge Cathy Seibel found in the plaintiffs' favor and enjoined the election scheduled for June 9, 2020, ordering the defendant to propose a remedial plan within 30 days. In response, the defendant filed an emergency motion to stay the court's decision pending the defendant's appeal of that ruling. Judge Cathy Seibel denied the defendant's stay motion in its entirety.

Judge Seibel set forth four factors to be considered on a motion to stay pending appeal: (1) the applicant must make a strong showing that they are likely to succeed on the merits; (2) the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the other interested parties; and (4) public interest. In analyzing the defendant's likelihood of success on the merits, Judge Seibel rejected the defendant's claim that the injunction was unlawful because it would cause voter confusion. Unlike other voter dilution injunctions, which directed remedies such as changed ballot wording, the court held that the injunction was straightforward and would not likely cause confusion because it simply put a hard stop to the election.

Turning to the irreparable harm prong, the court rejected the defendant's claim that it should not have to devote resources to producing a redistricting proposal. Judge Seibel noted the defendant had already retained a demographer and a political scientist and had been aware for some time that it might be required to produce a redistricting proposal. At the same time, the court held permitting the existing districting to remain in place would cause irreparable injury to the plaintiffs. The court was not persuaded by the defendant's argument that a special election could be held following the appeal, pointing to another voting dilution case where four years passed between the plaintiffs' victory and implementation of a legal election system.

Finally, Judge Seibel rejected the defendant's argument that the 30-day timeframe to issue their proposal was against the public interest in light of the COVID-19 pandemic. To the contrary, the court agreed with the plaintiffs that the public interest supports protecting the franchise of minority voters and remedying a Voting Rights Act violation is a compelling state interest.

Having found that all factors weighed against the defendant, Judge Seibel denied the emergency motion to stay the order and decision pending appeal.

### *Judge Briccetti Grants Defendant's Motion to Dismiss for Lack of Personal Jurisdiction in Negligence Case*

In *Luctama v. Knickerbocker*, 19 CV 8717, 2020 WL 1503563 (S.D.N.Y. Mar. 30, 2020), the plaintiffs filed a personal injury lawsuit in New York that arose out of a car accident in Connecticut. The defendant, a Connecticut resident, moved to dismiss the complaint for lack of personal jurisdiction and failure to state a claim. Judge Vincent Briccetti granted the motion to dismiss based on lack of personal jurisdiction and further denied the plaintiffs' request to transfer venue to the District of Connecticut because the claims were time-barred under Connecticut law.

On the threshold jurisdiction question, Judge Briccetti rejected all of the plaintiffs' arguments as meritless and borderline frivolous. First, the plaintiffs' issuance of the summons and subsequent service of initiating documents on the defendant at his residence in Connecticut did not vest a New York court with personal jurisdiction as a matter of law because a plaintiff's unilateral activity of service cannot support a finding of personal jurisdiction over a defendant. Second, the fact that the defendant retained a New York attorney to represent him did not constitute transacting business in New York under New York's long-arm statute. To satisfy that prong of the statute, the business within the forum state must be substantially related to the cause of action, and the act of retaining an attorney does not qualify. Finally, Judge Briccetti rejected the plaintiffs' frivolous contention that because the defendant had attached an affidavit to his opposition papers, the defendant had implicitly asked the court to convert the motion to dismiss into a motion for summary judgment, thereby waiving his right to make a jurisdictional challenge.

Judge Briccetti also denied the plaintiff's request to transfer venue to the District of Connecticut. The litigation arose out of a 2016 accident and was filed in 2019. While the action was timely under New York's three-year statute of limitations, Connecticut's statute of limitation for negligence claims is only two years. Because the plaintiffs had waited until the day before

the New York three-year statute of limitations ran to file suit, the shorter limitations period in Connecticut would make transfer futile. Judge Briccetti, therefore, refused to transfer the case and dismissed the action.

### *Judge Karas Grants in Part and Denies in Part Defendant's Motion to Dismiss in Action Against Private Energy Supplier*

In *Stanley v. Direct Energy Services, LLC*, No. 19-CV-3759, 2020 WL 3127894 (S.D.N.Y. June 12, 2020), the plaintiff brought an action against a private energy supplier, commonly known as an ESCO, alleging the defendant breached its promise to offer competitive utility rates when it changed its rate structure from fixed to variable and started charging rates substantially higher than market rates. The complaint asserted claims on behalf of the plaintiff and a proposed class of the defendant's customers for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violations of the New York General Business Law (GBL). The defendant moved to dismiss all claims. Judge Kenneth Karas granted the defendant's motion to dismiss the unjust enrichment claim and narrowed the scope of the GBL claims but denied the motion in all other respects. Below is an analysis of the breach of contract claim.

Addressing the plaintiff's breach of contract claim, the court examined two recent Second Circuit cases concerning ESCO contracts – *Richards v. Direct Energy Servs., LLC*, 915 F.3d 88 (2d Cir. 2019) and *Mirkin v. XOOM Energy LLC*, 931 F.3d 173 (2d Cir. 2019). In *Richards*, the Second Circuit affirmed the dismissal of a breach of contract claim based on contract language stating the defendant had discretion to set variable utility rates based on business and market conditions. A few months later in *XOOM*, the Second Circuit reversed the dismissal of a similar claim, holding the plaintiffs had plausibly alleged a breach of contract claim based on allegations that the rates materially deviated from the defendant's market supply costs.

Judge Karas held this case fell between *Richards* and *XOOM*: The defendant never promised its variable rate would be based on actual and estimated supply costs, nor did it state that the rate would be subject to the defendant's discretion. Instead, the contract stated only that the pricing for defendant's variable rate would be "market." Relying on *XOOM*, the court explicitly rejected the defendant's argument that local utility rates can never serve as a valid metric to measure the lawfulness of an ESCO contract. Instead, Judge Karas concluded that the plaintiff had plausibly alleged that the contract did not provide the defendant with unfettered price-setting discretion and the defendant's high prices potentially breached its contractual obligation to provide "market" pricing. As a result, the court denied the motion to dismiss the breach of contract claims.

### *Justice Rice Grants Plaintiff's Motion to Compel Production; Denies Plaintiff's Motions to Strike the Answer and for Sanctions in Breach of Contract Case*

In *Irizarry v. Hudson Medical Services, P.C.*, 67 Misc.3d 1225(A), 2020 WL 3023387 (Sup. Ct., Westchester Cty. May 18, 2020), the plaintiff moved to compel the defendants to produce documents, to strike and dismiss the defendants' answer and counterclaim with prejudice due to their willful failure to disclose information and produce documents, and to require the defendants to pay the plaintiff's costs for making the motion. Justice Jared Rice granted the plaintiff's motion to compel production but denied the other parts of the motion.

During discovery, the plaintiff propounded 26 document requests. The defendants refused to produce documents in response to half, prompting the plaintiff's motion to compel and for sanctions. In opposition to the motion, the defendants argued that (1) they could not produce documents in response to two of the requests based on HIPAA, which precluded them from disclosing patient information under the Department of Health and Human Services' privacy rule, and (2) the remaining requests were overbroad and/or sought irrelevant information.

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Justice Rice began by noting that CPLR 3101(a) provides for broad disclosure of all information "material and necessary" to the prosecution or defense of an action. Turning to the defendants' privacy objections, the court agreed the defendants were a "covered entity" under HIPAA and so generally prohibited from disclosing protected health information without valid authorization. The court continued, however, that covered entities are permitted to disclose such information in response to discovery requests if there are assurances that the third party has made reasonable efforts to secure a qualified protective order from the court. Justice Rice criticized the defendants for simply objecting to the requests and failing to seek a protective stipulation with the plaintiff and directed the defendants to produce the documents in compliance with HIPAA and the privacy rule. The court further rejected the defendants' arguments concerning all but one of the plaintiff's other requests and granted the plaintiff's motion to compel responses pursuant to CPLR 3124.

At the same time, the court denied the plaintiff's motion for sanctions pursuant to CPLR 3126. Justice Rice refused to find the defendants' failure to disclose documents requested was willful or in bad faith. For the same reason, he denied that portion of the plaintiff's motion requesting the defendants pay the plaintiff her motion costs.