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Westchester County Roundup: Third Quarter 2020

Judge Briccetti Grants Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction in Clean Water Act Citizen-Suit Case

In *Kovach v. United States*, No. 19-cv-7065, 2020 WL 4003366 (S.D.N.Y. Jul. 15, 2020), the plaintiff, a former New York Air National Guardsman, brought a Clean Water Act citizen suit against, *inter alia*, Major General Paul A. Weaver Jr., the United States Air Force, and the New York Air National Guard. The plaintiff claimed he suffered ongoing health problems due to "[Perfluorooctane Sulfonate (PFOS)] ingestion from the base water supply" as a result of an alleged intentional dumping incident at a military base on which he was stationed in the summer of 1990. The defendants moved to dismiss for lack of subject matter jurisdiction and specifically argued that the plaintiff's injuries were not redressable. Judge Vincent Briccetti granted the motion without leave for the plaintiff to file an amended complaint, as the court determined the amendment would be futile.

The core issue on the motion to dismiss was whether the plaintiff had standing to bring a claim for damages under the Clean Water Act for his losses caused by the defendants' actions. To satisfy Article III's standing requirements, a plaintiff must allege 1) an "injury in fact," 2) a causal connection between the injury and defendant's actions, and 3) likelihood that the court will even be able to redress plaintiff's injury. Here, the decision hinged on the "redressability" prong of subject matter jurisdiction.

In his complaint, the plaintiff sought personal damages of $25,000 per day from the date of incident for total damages in excess of $264,350,000. The defendants argued that the citizen suit provision of the Clean Water Act requires any penalties be paid directly to the U.S. Department of the Treasury, not the private plaintiff, and thus, the plaintiff's claim failed on standing grounds. The plaintiff acknowledged that requirement but argued the court could direct the government to pay the plaintiff a portion of the damages. Judge Briccetti rejected the plaintiff's argument as contrary to the clear language of the statute and recent case law precluding individual recovery thereunder. Further, Judge Briccetti denied leave to amend, holding the amended pleading would be futile due to the lack of subject matter jurisdiction.

Judge Seibel Grants Defendant's Motion for Summary Judgment in Failure to Promote Case

In *Brophy v. Chao*, No. 17-CV-9527, 2020 WL 4040742 (S.D.N.Y. Jul. 16, 2020), the plaintiff, who was in a protected age class, applied and interviewed for a promotion at the Federal Aviation Administration, which he did not get, but for which he felt more qualified than two younger candidates, one of whom accepted the job. The plaintiff filed a complaint against the Department of Transportation (DOT) under Title VII and the ADEA for failure to promote, alleging the defendant's application and interview process were subjective and illegitimate, and that the defendant's justification for not hiring the plaintiff was pretext for discrimination. The DOT moved for summary judgment, alleging the plaintiff was not hired for the position based on the

legitimate, nondiscriminatory reason that the other candidates performed better during their interviews. Judge Cathy Seibel granted the motion, finding the defendant's proffered reasons for not hiring the plaintiff were legitimate and nondiscriminatory, and the plaintiff failed to prove those reasons were pretextual.

Judge Seibel began by noting the plaintiff's claim was governed by the three-stage burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): 1) whether the plaintiff demonstrated a *prima facie* case of discrimination, 2) whether the defendant proffered legitimate, nondiscrimination reasons for the non-hire and 3) whether the plaintiff demonstrated those reasons were pretext for discrimination. The court focused on the second two steps, assuming for purposes of the motion that the plaintiff, who was older than the hired candidate, had made out a *prima facie* case.

In regards to the second step, the court rejected the plaintiff's arguments that the interviewer's questions were "subjective, unarticulated and subject to manipulation," noting the hiring coordinator had prepared detailed questions, outlined a scoring system, and clearly articulated that the plaintiff simply did not perform as well as the other two candidates during the interview.

Next, Judge Seibel rejected the plaintiff's arguments that the defendant's justification was pretext for discrimination. Among other things, the court found the fact that the plaintiff had more degrees and longer work experience than the other candidates, while sometimes indicative of pretext, was not dispositive here, where 1) there was no degree requirement for the position, 2) the plaintiff did not perform well during the interview process, and 3) the plaintiff had not established his qualifications were "plainly superior" to those of the other candidates.

Having found that all factors weighed against the plaintiff, Judge Seibel granted the defendant's motion for summary judgment and dismissed the case.

Judge Karas Grants Defendant's Motion to Dismiss State Tort Law Case Brought Under Maritime Jurisdiction

In *Ghiazza v. Anchorage Marina, Inc.*, No. 19-cv-2792, 2020 WL 4340746 (S.D.N.Y. Jul. 27, 2020), the plaintiff filed state law tort claims against the defendants for fraud by concealment, breach of fiduciary duty, and unjust windfall, in connection with the alleged improper title transfer and unlawful possession of a boat, the "Lucky Four." The plaintiff sought a declaratory judgment clearing the title of the Lucky Four and releasing the boat to the plaintiff free of encumbrances. As all parties were citizens of New York, and only state law claims were asserted, the plaintiff based his complaint on federal admiralty and maritime jurisdiction, alleging that the Lucky Four was registered with and therefore under the jurisdiction of the United States Coast Guard. The defendants moved to dismiss the complaint for lack of jurisdiction, and Judge Kenneth Karas granted the motion.

On the threshold jurisdiction question, Judge Karas analyzed the plaintiff's claims under the Second Circuit's two-pronged test for admiralty jurisdiction: 1) the alleged tort must have occurred on or over navigable waters, and 2) the activity giving rise to the incident must have had a substantial relationship to traditional maritime activity. Judge Karas examined each of the plaintiff's state law claims and concluded that none of the challenged conduct "occurred on or over navigable waters." In particular, the Anchorage Marina defendants' storage of the Lucky Four was not considered a tort on or over water under Southern District and Second Circuit precedent. Furthermore, the defendants submitted affidavits stating the Lucky Four had not been in the water for years. Because the plaintiff could not satisfy the first prong of the maritime jurisdiction analysis, Judge Karas granted the defendants' motion to dismiss for lack of subject matter jurisdiction and dismissed the case with leave to amend.

Judge Román Grants Defendant's Motion to Dismiss in Takings Action Against Municipality

In *Post Office Square LLC v. Village of Spring Valley*, No. 18-CV-9687, 2020 WL 5125480 (S.D.N.Y. Aug. 31, 2020), the plaintiff and the Village of Spring Valley were parties to a real property development agreement. After the plaintiff encountered substantial difficulties in completing the project, the Village of Spring Valley took possession of the parcel under a reverter provision in the parties' contract. That reversion was subsequently upheld in state court litigation. The plaintiff then brought suit against the Village of Spring Valley, its board of trustees, and its mayor, alleging the reverter constituted an impermissible taking under the Fifth and Fourteenth Amendments and state law. The defendants moved to dismiss all claims, arguing, *inter alia*, that: a) the plaintiff was collaterally estopped from pursuing the federal litigation based on the state court's decision, and that b) the reverter was not an improper taking as a matter of law. Judge Nelson Román held that collateral estoppel did not preclude plaintiff's claims, but then granted the defendants' motion to dismiss on the merits of the takings claim.

With respect to the collateral estoppel argument, Justice Román noted that the state court action directed the reverter of the property pursuant to the contract, while in the federal action, the plaintiff sought monetary damages. Because the remedies sought in each suit were distinct, the court held collateral estoppel did not preclude the plaintiff from pursuing his claims in the federal litigation. Addressing the plaintiff's takings claim, the court focused on the fact that the reversion of the property was effected pursuant to the development agreement between the parties and not by a governmental taking directly. As Judge Román explained, the government itself "has not required [plaintiff] to give up or to submit to the physical occupation of the . . . land," rather that conduct was dictated by the terms of the contract. To hold otherwise, would "lead to the absurd result that neither state governments nor the federal government could ever hold a reversionary interest in real property . . . because the vesting of those interests would constitute a 'taking.'"

Accordingly, Judge Román concluded the plaintiff had not alleged a constitutional taking and dismissed the federal claims with prejudice. Judge Román then declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed the case, as original jurisdiction had been lost with the dismissal of the federal claims. Therefore, the motion to dismiss was granted, and the case dismissed.

Justice Lefkowitz Denies Plaintiff's Motion to Strike Defendant's Answer; Grants Plaintiff's Motion to Compel Parties' Depositions by Video Conference

In *Chase-Morris v. Tubby*, 2020 WL 4516920 (Sup. Ct., Westchester Cty. Aug. 3, 2020), the plaintiff moved to strike the defendants' answer due to their multiple delays of party depositions. In the alternative, the plaintiff moved to compel the parties' depositions by video given COVID-19 concerns. Justice Joan Lefkowitz granted the plaintiff's motion to compel the parties' deposition by video but denied the motion to strike the defendants' answer, holding the defendants' conduct in adjourning prior depositions was not willful and contumacious.

A preliminary conference stipulation and order directed all party depositions to take place by May 5, 2020. The defendants twice adjourned the plaintiff's deposition because of missing medical records and then sought to further delay depositions until the COVID-19 health emergency was over and in-person depositions could resume. The plaintiff filed a motion to strike the defendants' answer, arguing their deposition delays were willful and contumacious and warranted this ultimate sanction.

Justice Lefkowitz began by noting that CPLR 3126 permits the court to strike a pleading as a consequence of a party's failure to proceed with discovery. The court noted, however, that striking an answer is a drastic remedy to be applied only in response to "repeated non-compliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure." Here, the court found the defendants had a legitimate reason

to adjourn prior depositions – the delay in obtaining medical records – and so denied the motion to strike.

Turning to the plaintiff's motion to compel video deposition, the court examined numerous cases from other courts approving of the use of virtual depositions during the COVID-19 pandemic. In particular, Justice Lefkowitz noted that one of the principal arguments in favor of in-person depositions is assessing witness credibility, and during the pandemic, this assessment was *easier* by video because in-person appearances require the witness to wear a mask. Combined with overarching health concerns about in-person interactions, the court concluded in-person depositions would present undue hardship on the parties due to the pandemic, whereas virtual proceedings sufficiently protect the parties' interests in the "new normal."

Justice Lefkowitz, therefore, granted the plaintiff's motion to compel virtual depositions and ordered that all depositions in the action be held by video conference due to health risks posed by the COVID-19 pandemic.