Jul 2021 | Articles Blog: The Westchester Litigator

Westchester Quarterly Roundup: Notable Decisions of the Westchester County Federal and State Courts

Judge Román Grants Third-Party Defendants' Motion to Dismiss in its Entirety

In *Blackhawk Development, LLC v. Krusinski Co.*, 19-CV-5590 (NRS), 2021 WL 1225917 (S.D.N.Y. Mar. 31, 2021), the plaintiff, Blackhawk Development, LLC, brought suit against the defendant, Krusinski Construction Company (Krusinski), alleging breach of contract, breach of warranty, and negligence in its construction of a distribution center in Orange County, New York. Krusinski then filed a third-party complaint against, *inter alia*, CBRE, Inc., Blackhawk's construction agent, and McKesson Corporation, Blackhawk's parent company. Krusinski alleged common law indemnification, contribution, and negligence against McKesson, and common law indemnification, contribution, breach of implied warranty, and negligence against CBRE. The third-party defendants then filed a motion to dismiss.

The court first held the third-party complaint did not state a plausible indemnification claim against the third-party defendants because the plaintiff failed to allege specific facts showing it delegated exclusive responsibility for the duties giving rise to the loss.

Second, the court dismissed the negligence claim against McKesson because a parent company cannot be held liable for the tort of its subsidiary unless it is shown that the parent company exercised complete control and dominion, facts not found in the complaint. In addition, the court held that in order to impose tort liability on third-party defendants, there must be allegations of a duty separate and apart from any contractual obligations, which Krusinski failed to do.

Third, the court found the CPLR 1401 contribution claim also failed because it was duplicative of the parties' contractual obligations. Finally, the court dismissed Krusinski's breach of implied warranty claim against CBRE because no goods exchanged hands, only agent services, for which there is no cause of action for breach of warranty. As none of Krusinski's claims passed muster, the court granted the third-party defendants' motion to dismiss in its entirety.

Judge Seibel Grants Defendants' Motion to Dismiss Action Alleging Negligence Against the WHO

In *Richard O'Kling et al., v. The World Health Organization*, No. 20-CV-3214 (CS), 2021 WL 1254293 (S.D.N.Y. Apr. 5, 2021), the plaintiffs, residents of Westchester County, filed suit against the World Health Organization (WHO), alleging it was negligent in its response to the COVID-19 pandemic. The WHO moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), claiming it had absolute immunity from suit in the United States courts. Judge Cathy Seibel agreed and granted the motion.

After considering whether the WHO was immune pursuant to its own constitution and noting that at least one court has concluded its constitution does not qualify for immunity under United States law, the court turned to whether the WHO had independent immunity pursuant to the International Organization Immunities Act (IOIA), which grants immunity to organizations that demonstrate foreign sovereignty. The plaintiffs conceded the IOIA applied to the WHO but argued that the non-commercial tort exception to immunity applied under 28 U.S.C. § 1605(a)(5). Since that exception is read narrowly and applies only when the entire tort occurs within the territorial jurisdiction of the U.S., the court found it did not apply here: Much of the WHO's work was done outside the U.S. and its use of U.S.-based media platforms could not account for an "entire tort" being committed in the country.

Finally, the court held the WHO retained its immunity because its decisions regarding the pandemic involved discretionary policy judgments and such decisions are protected under the IOIA. Accordingly, the court dismissed the plaintiffs' second amended complaint with prejudice.

Judge Karas Grants Defendants' Partial Motion to Dismiss Employment Discrimination Action

In *Johnson v. Rockland County Boces, et al.*, No. 21-CV-3375 (KMK), 2021 WL 1791501 (S.D.N.Y. May 5, 2021), the plaintiff, *pro se*, brought suit against Rockland BOCES and the school's principal and chief operating officer, alleging employment discrimination based on race and marital status under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 1981 and the New York State Human Rights Law (NYSHRL).

As the case was brought in *forma pauperis*, the court undertook an initial review of the complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) to determine whether it was frivolous or malicious, failed to state a claim on which relief may be granted, or sought monetary relief from a defendant who is immune from such relief. Based on the analysis, Judge Kenneth Karas dismissed certain claims against the individual defendants including the Title VII claim, the 42 U.S.C. § 1981 claim (without prejudice) and the NYSHRL claim.

The court then addressed service of the complaint by the plaintiff pro se. The court granted in forma pauperis status, which enabled the plaintiff to rely on the court and the U.S. Marshals Service to effect service. The court also extended the plaintiff's time to effect service until 90 days after the summons was issued, recognizing that the court's pre-service review of the complaint prevented the plaintiff from serving within 90 days of filing as ordinarily required under Federal Rule of Civil Procedure 4(m).

Judge Briccetti Grants Motion to Dismiss in a Pro Se and In Forma Pauperis Case

In *Leonard Pina-Rodriguez v. Gary Garbutt et al.*, No. 18-CV-5167 (VB) (S.D.N.Y. Jun. 21, 2021), the incarcerated plaintiff, proceeding pro se and in forma pauperis, brought an action pursuant to 42 U.S.C. § 1983, alleging the defendants violated his Eighth Amendment rights by being indifferent to his medical needs. The plaintiff claimed to have significant dental issues that worsened after he underwent an MRI scan in response to complaints of facial pain. In particular, the plaintiff alleged that the defendants were deliberately indifferent by "allowing [him] to be near the MRI magnet – with a mouth full of orthodontic braces." The defendants moved to dismiss the second amended complaint pursuant to Rule 12(b)(6) for failure to state a claim.

As the case was brought *pro se* and in *forma pauperis*, Judge Vincent Briccetti explained that while the court must "liberally construe" *pro se* litigants' claims and "interpret them to raise the strongest arguments that they suggest," conclusory statements will not suffice. (Internal quotation marks removed). To state a claim for constitutionally inadequate medical care,

the plaintiff must allege both objectively and subjectively deliberate indifference to his serious medical needs.

Regarding the claim for inadequate medical care, the court found that even if the plaintiff's allegations were sufficient to meet the objective prong, the plaintiff failed to satisfy the subjective one because he did not allege facts that demonstrated the defendants "knew of or disregarded a serious threat" to his health or safety related to his orthodontic braces and any adverse side effects. Significantly, Judge Briccetti noted that it is not enough to allege the medical professionals were negligent, rather, "medical malpractice does not rise to the level of a constitutional violation unless the malpractice involves culpable recklessness." Because the plaintiff failed to allege that any of the defendants evinced a "conscious disregard" for his health and safety, the court granted the defendants' motion to dismiss.

Judge Halpern Dismisses Plaintiff's Claims for Lack of Jurisdiction

In *Patricia Williams v. Specialized Loan Servicing, LLC et al.*, No. 20-CV-08208 (PMH), 2021 WL 2139401 (S.D.N.Y. May 26, 2021), Judge Philip Halpern dismissed the plaintiff's claims against Community Housing Innovations, Inc. (CHI), finding the court did not have either diversity or general question jurisdiction.

With respect to diversity jurisdiction, the court found it did not apply because the plaintiff was domiciled in New York and CHI's principal place of business was in White Plains, making it a citizen of the state of New York for diversity purposes.

Regarding federal question jurisdiction, the plaintiff's complaint did not contain a cause of action that arose under federal law, so it did not meet the requirements for consideration by the court. While the complaint did reference the Real Estate Settlement Procedures Act and the Truth in Lending Act, the plaintiff did not allege any facts that would support a claim for relief under those statutes. Accordingly, the court held there was no federal question jurisdiction and dismissed the complaint.

Westchester County Supreme Grants and Denies in Part Defendants' Motion to Dismiss in a Pierce the Corporate Veil Dispute

In *70 Jackson Street, LLC et al. v. Green Works Projects, Inc., et al.*, No. 57604/2020 (N.Y. Sup. Ct. West. Cty. May 28, 2021), Justice Gretchen Walsh granted in part and denied in part the defendants' motion to dismiss. The plaintiff owned the property at issue and hired Green Works, the defendant, to do construction on the property, but due to the COVID-19 pandemic, work on the property stopped. The plaintiff brought suit arising out of the failed project against Green Works, its purported successor, TPK Construction & Design, LLC, and Timothy Mahoney, the purported owner of the two entities. The defendants moved to dismiss most of the claims in the complaint on the grounds that: 1) the plaintiff failed to allege sufficient facts to pierce the corporate veil and hold Mahoney personally liable and 2) TPK could not be held liable on a successor liability theory for the alleged misconduct of Green Works.

With respect to the claim of piercing the corporate veil, the court dismissed the first and seventh causes of action asserted against Mahoney, finding that the plaintiffs failed to offer any facts and instead made conclusory arguments of domination control.

Regarding the claims against TPK, the court denied that portion of the defendants' motion to dismiss, finding that TPK could be liable based on a successor liability theory. The court explained that because successor liability is applicable to breach of contract actions and "de facto mergers" evidenced by the continuity of ownership, management, physical location, assets, etc., the claims against TPK precluded dismissal.