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

### Judge Halpern Denies City of Mount Vernon's Motion to Dismiss Plaintiff Firefighter's Procedural Due Process Claim Arising from His Unpaid Suspension

In *Salahuddin v. City of Mount Vernon, New York*, No. 20-CV-07021 (PMH), 2022 WL 564002 (S.D.N.Y. Feb. 24, 2022), the plaintiff, Deputy Chief of the City with the Mount Vernon Fire Department, filed suit against the defendant City of Mount Vernon (City) pursuant to 42 U.S.C. § 1983, after he was suspended without pay for approximately three-and-a-half months pending an investigation. The plaintiff alleged that at the conclusion of the investigation, he faced no disciplinary charges and was immediately reinstated to his position. The plaintiff claimed the City violated his procedural due process rights under the Fourteenth Amendment to the United States Constitution by failing to provide him with written disciplinary charges, a pre- or post-deprivation hearing, or any finding adjudging him guilty of any misconduct. He sought reimbursement for, among other things, his lost base salary, overtime, longevity pay, retirement account contributions and credited service time for the period of his suspension. The City moved to dismiss the complaint for failure to state a claim, and Judge Philip M. Halpern denied the motion.

In analyzing the City's motion, Judge Halpern considered whether the plaintiff had adequately alleged: 1) the existence of a property or liberty interest of which he was deprived; and 2) that such deprivation was done without due process. Regarding the first issue, the City did not dispute that the plaintiff held a constitutionally protected property interest in his position as a tenured public employee, but it argued that there was no state or federal law requiring that government employees be paid 100 percent of their wages every pay period and therefore, the plaintiff's suspension without pay was not a deprivation. Judge Halpern rejected this argument and found that because the plaintiff held a property interest in his job, a suspension – which can result in a deprivation of that interest – cannot be imposed without due process.

With respect to the second issue, Judge Halpern disagreed with the City that the plaintiff's failure to bring an Article 78 proceeding challenging his suspension precluded a procedural due process claim. In doing so, Judge Halpern explained that the availability of an Article 78 proceeding precludes a procedural due process claim premised on the failure to provide a post-deprivation remedy, but it does not necessarily preclude a due process claim premised on the failure to provide a pre-deprivation hearing, where an employee has the right to one.

To determine if the plaintiff was entitled to a pre-deprivation hearing, the court explained that the law recognizes a distinction between claims based on established state procedures and those based on "random and unauthorized" acts, with pre-deprivation hearings typically required with the former but not the latter. Judge Halpern found that the plaintiff had adequately

alleged that his suspension was effectuated through the City Charter and Rules and Regulations, and as a result, the court could not find that the plaintiff's suspension was "random and unauthorized." Because the plaintiff had alleged that his suspension resulted from established state procedures, he had adequately alleged his right to a pre-deprivation hearing, and his failure to bring an Article 78 proceeding did not preclude his procedural due process claim.

Ultimately, Judge Halpern concluded that the plaintiff had adequately alleged a violation of his procedural due process rights based on the City's alleged failure to provide him with both pre-and post-deprivation process, and therefore denied the defendant's motion to dismiss in its entirety.

**Judge Briccetti Finds Plaintiff Plausibly Alleged that Defendant's Marketing of its Eggs as "Free-Range" is Materially Misleading to Consumers**

In *Mogull v. Pete & Gerry's Organics, LLC,* 2022 WL 602971 (S.D.N.Y. 2022), the plaintiff consumer filed a putative class action against the defendant, Pete & Gerry's Organics, LLC, ("Nellie's" or "the defendant") for alleged deceptive business practices in violation of New York General Business Law §§ 349 and 350, fraud and breach of express warranty, based on Nellie's alleged materially misleading labeling and marketing of its eggs as "free-range." The plaintiff asserted that, despite Nellie's claim that its hens were "free-range," they were crammed into overcrowded sheds with limited access to the outdoors. The plaintiff alleged that had she been aware of Nellie's husbandry practices, she would not have purchased nor paid a premium for its eggs. The defendant moved to dismiss the complaint for failure to state a claim, and Judge Vincent Briccetti denied the motion in its entirety.

With respect to the plaintiff's claim under Sections 349 and 350, the defendant argued: 1) the challenged representations were true because its farming practices met "Certified Humane Free-Range" qualifications, and 2) alternatively, the challenged representations were non actionable puffery. Judge Briccetti was not persuaded by either argument.

First, Judge Briccetti held that the plaintiff had adequately alleged that "free-range" was materially misleading in this context – appearing as a standalone phrase on Nellie's packaging and not in conjunction with "Certified Humane." Second, the court agreed with the plaintiff that a reasonable consumer could construe the term "free-range" to be an affirmative claim about the egg's qualities and not "an exaggeration or overstatement" that could be considered mere puffery.

The court also denied the defendant's motion to dismiss the plaintiff's fraud claim for the aforementioned reasons, and because the plaintiff alleged that she paid more for Nellie's eggs because of the "free-range" claim, and that Nellie's 1) was aware of its farming practices, 2) was aware of how "free-range" impacts consumer choices, and 3) had gone to great lengths in its packaging to push the "free-range" narrative. While Judge Briccetti described the defendant's motion to dismiss the fraud claim a "close call," he denied it as he could "not conclude at this early stage" that the plaintiff had failed to adequately allege fraudulent intent.

Finally, Judge Briccetti also denied the defendant's motion to dismiss the plaintiff's breach of express warranty claim. First, because the plaintiff alleged that many of Nellie's hens were unable to go outside, the court was not persuaded by the defendant's argument that the plaintiff had not shown the eggs she purchased came from a hen without access to the outdoors. The court further rejected the argument that the plaintiff had failed to provide timely pre-suit notice as required by the UCC, since the plaintiff alleged that she served Nellie's with a demand letter shortly after learning of Nellie's alleged husbandry

practices.

Judge Briccetti denied the defendant motion to dismiss on all counts.

### Judge Seibel Dismisses Purported Consumer Class Action Challenging the Labeling of Dove Bars® As Deceptive and Misleading

In *Beers v. Mars Wrigley Confectionery US, LLC*, No. 21-CV-2 (CS), 2022 WL 493555 (S.D.N.Y. Feb. 17, 2022), the plaintiff, a consumer and representative of a purported class of similarly situated consumers, brought suit against the defendant, the manufacturer of Dove Bars®, alleging that the chocolate-coated ice cream bar manufacturer engaged in deceptive and misleading business practices in violation of New York General Business Law Sections 349 and 350. In particular, the plaintiff claimed that the reference to "Silky Smooth Dove Bar®, Vanilla Ice Cream with Milk Chocolate" on Dove Bars' labeling misleads consumers because it led him – and allegedly other consumers – to believe that Dove Bars' chocolate coating contains only milk chocolate, although it also contains certain vegetable oils. Following the plaintiff's filing of an amended complaint, the defendant moved to dismiss for failure to state a claim.

Judge Seibel began the analysis by noting that, in order for the plaintiff's Sections 349 and 350 claims to survive the defendant's motion, the plaintiff must "plausibly allege that a significant portion of the general consuming public . . . acting reasonably in the circumstances, could be misled" by Dove Bars' labeling.

Judge Seibel rejected each of the plaintiff's arguments raised in opposition to the motion and determined that the plaintiff failed to plausibly allege that the challenged label's reference to "with milk chocolate" and "silky smooth" would mislead reasonable consumers to believe that Dove Bars' chocolate coating is made solely of milk chocolate. First, Judge Seibel was persuaded by the fact that the label did not contain any qualifiers, such as "only" or "exclusively," that might indicate to a consumer that milk chocolate was the only ingredient in the chocolate coating. In addition, the court noted that because milk chocolate is "prominently featured" in the product, the "with milk chocolate" statement on the label was accurate and did not, as the plaintiff argued, suggest that Dove Bars contain more milk chocolate than they actually do. Judge Seibel also rejected the plaintiff's "bare bones" allegations about a supposed "consumer survey" that had been conducted on the topic of Dove Bars' labeling. The court found that the plaintiff failed to provide any context for the survey, such as the questions asked and methodology used, and moreover, the court explained, even if the survey results were accepted as true, Dove Bars' labeling could not be construed as misleading to consumers because the product did contain milk chocolate.

Overall, the plaintiff failed to satisfy his burden of plausibly alleging that "with Milk Chocolate" is materially misleading to consumers where, as here, the product was made with milk chocolate. Judge Siebel granted the defendant's motion in its entirety and dismissed the case without affording the plaintiff, who had already, yet unsuccessfully, amended his complaint once, an opportunity to amend a second time.

**Judge Román Transfers Copyright Case to Mississippi After Finding the "First-to-File" Rule Applicable**

In *Fit & Fun Playscapes, LLC v. Sensory Path, Inc.*, No. 19 CIV. 11697 (NSR), 2022 WL 118257 (S.D.N.Y. Jan. 12, 2022), Fit & Fun Playscapes (FAF) brought an action in the Southern District of New York (the NY Action), asserting claims against Sensory Path, Inc. (SPI) and several individual defendants (together, the SPI Defendants) for copyright infringement related to graphic designs of stencils and decals used to reduce sensory stimulation and promote movement in schoolchildren. The SPI Defendants moved to dismiss or transfer the NY Action to the Northern District of Mississippi on the basis that there was a duplicative litigation (the MS Action) already pending there.

SPI filed the MS Action against FAF and its founder one day after receiving a cease-and-desist letter from FAF, in which SPI was accused of infringing on FAF's copyright for its graphic designs and decals. In the MS Action, SPI sought, among other things, a declaration of non-infringement of FAF's copyright and asserted claims alleging unfair competition. Months later, FAF filed the NY Action against SPI, alleging copyright infringement.

In considering the SPI Defendants' motion to dismiss or transfer the NY Action, Judge Nelson Román analyzed the applicability of the "first-to-file" rule, which acts as a presumption in favor of the first filed complaint.

While Judge Román recognized there to be a split in authority as to whether the court of the first or subsequent action should decide whether the "first-to-file" rule applies, he ruled, recognizing the resources already expended by the Mississippi court, that he would make the determination in this case. The question of whether the "first-to-file" rule applied, Judge Román explained, requires careful consideration of whether the two actions are duplicative in that they have "substantial overlap" in the form of "identical or substantially similar parties and claims." On this issue, the court concluded that the NY Action and the MS Action substantially overlapped, even though the claims asserted were not identical because "all claims in both actions . . . involve the same work or product—namely, the stencils and decals the parties' sell as their own in competing against each other, [and] . . . the issue at the core of both actions is whether the parties created their own products independently from one another." In fact, Judge Román found that FAF should have asserted the copyright infringement claim that it asserted in the NY Action as a compulsory counterclaim in the MS Action. Accordingly, the court found that SPI Defendants had established that the "first-to-file" presumption was applicable to the case.

Next, Judge Román considered whether FAF had established the applicability of an exception to the "first-to-file" rule – i.e., whether FAF had overcome the presumption that the NY Action should be dismissed and/or transferred to MS. In finding that FAF had failed to establish that an exception applied, Judge Román first rejected its argument that the MS Action was an improper anticipatory action. Because FAF's cease-and-desist letter did not threaten an imminent lawsuit, Judge Román ruled that the improper anticipatory action exception to the "first-to-file" rule was inapplicable.
Judge Román also rejected FAF's argument that SPI had engaged in improper "forum shopping" by filing unrelated and irrelevant claims in Mississippi to gain the "home court advantage." In holding that the "forum shopping" exception was also inapplicable, Judge Román noted that if SPI's claims in the MS Action were irrelevant and meritless, as FAF argued, the Mississippi court would have dismissed them, but it did not.

Lastly, Judge Román considered and rejected FAF's argument that the "balance of convenience" required that the NY Action proceed. The court weighed each of the relevant factors, including the location of the parties, witnesses, documents, and

operative facts, and concluded that, on balance, they favored transfer of the NY Action to Mississippi for consolidation with the MS Action.

Judge Román granted the SPI Defendants' motion and transferred the NY Action to the Northern District of Mississippi.

### Judge Karas Analyzes Subject Matter Jurisdiction, Standing and Federal Preemption in Connection with Motion to Dismiss

In *Barton v. Northeast Transport, Inc.*, No. 21-CV-326, 2022 WL 203593 (S.D.N.Y. Jan. 24, 2022), the plaintiffs, proceeding *pro se*, brought suit against the defendant transport companies, Northeast Transport, Inc. and Land-Air Express of New England, Ltd. (Land-Air), alleging that, due to the defendants' negligence, more than 4,000 bottles of soda that the plaintiffs produced for retail were destroyed in transport, leading to the collapse of the plaintiffs' small family business in Dutchess County, New York. Northeast Transport moved to dismiss the plaintiffs' complaint, which asserted claims of negligence, breach of contract and breach of the implied covenant of good faith and fair dealing, for lack of subject matter jurisdiction, lack of standing, federal preemption and to strike some of the categories of damages sought. In a thoughtful opinion that gave due consideration to the plaintiffs' *pro se* status, Judge Karas ultimately granted Northeast Transport's motion and dismissed the plaintiffs' complaint.

Judge Karas began with an analysis of whether the court had subject matter jurisdiction over the plaintiffs' claims. After finding that the complaint did not allege that any federal law or constitutional provision had been violated, the court held that federal question jurisdiction did not exist. Judge Karas then considered whether there was diversity jurisdiction, which requires that the amount in controversy exceed $75,000 and that all adverse parties be completely diverse in their citizenships. Because the plaintiffs and Northeast Transport were all citizens of New York and therefore not diverse, Judge Karas went on to consider whether jurisdiction could be "salvaged" by dropping the non-diverse Northeast Transport from the case. The court found that "given the centrality of Northeast Transport's role in the events giving rise to the action" and the plaintiffs' ability to re-file their claims to assert a violation of federal law, the case was a "rare example" of when "jurisdiction [was] beyond salvation."

Although Judge Karas dismissed the plaintiffs' claims for lack of subject matter jurisdiction, he also addressed Northeast Transport's alternative grounds for dismissal. While the court was "not without sympathy" for the plaintiffs' alleged personal injury, Judge Karas further found that the plaintiffs lacked standing to assert claims for alleged wrongs to their business, which has a separate legal existence. The court also held that the plaintiffs' state law claims were preempted by the Federal Aviation Administration Authorization Act (FAAAA), and that the plaintiffs' request for punitive and consequential damages would be denied.

Judge Karas dismissed the plaintiffs' claims against both Northeast Transport and Land-Air without prejudice, allowing the plaintiffs 30 days to amend the complaint and address the deficiencies identified in the court's decision. The plaintiffs did not amend, and the case was recently dismissed with prejudice for failure to prosecute.

### Justice Jamieson Grants Plaintiff's Motion for Summary Judgment After Defendant Fails to Submit a Response to Plaintiff's Statement of Material Facts

At issue in *Marco Vivanco et al. v. Ourem Iron Works, Inc.*, Index No. 69808/2018 (N.Y. Sup. Ct. Jan. 14, 2022), was the defendant Ourem Iron Works, Inc.'s (Ourem or defendant) counterclaims against its minority shareholder and the plaintiff, Marco Vivanco, for, among other things, breach of fiduciary duty, malfeasance, theft of corporate opportunity and diversion of Ourem's assets to the plaintiff's corporations. The plaintiff moved for summary judgment seeking dismissal of the defendant's

remaining counterclaims. Justice Linda S. Jamieson of the Westchester County Commercial Division granted the plaintiff's motion in its entirety on procedural grounds.

Justice Jamieson first found that the plaintiff had made a *prima facie* showing that the counterclaims should be dismissed and had supported his motion with a statement of material facts, as required by 22 NYCRR § 202.8-g. In opposition, the defendant had failed to submit any response to the plaintiff's statement of facts. Justice Jamieson pointed out that "[c]ertainly, the procedural requirements of Rule 202.8-g(b) are straightforward, as are the consequences of a party's failure to comply with the Rule." As a consequence of the defendant's failure to comply, Justice Jamieson deemed all of the plaintiff's assertions admitted, granted the plaintiff's motion for summary judgment and dismissed the defendant's counterclaims.

Justice Jamieson also went on to discuss the substantive reasons why each of the defendant's counterclaims claims failed, even putting aside the procedural defect in its opposition.