



Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
May 2014

*This article is the second in a quarterly series reviewing decisions from the Federal District Court and State Supreme Court (Commercial Part) judges located in White Plains.
This article reviews decisions from the first quarter of 2014.*

Plaintiff's Age Discrimination Claim Sufficiently Pleaded by Reference to Document Attached to Complaint

In *Ndremizara v. Swiss Re Am. Holding Corp.*, 2014 WL 941951 (S.D.N.Y. Mar. 11, 2014), Judge **Kenneth M. Karas** found that a *pro se* plaintiff, asserting a claim under the Age Discrimination in Employment Act, had sufficiently pleaded Defendant was aware of his age by attaching to his Amended Complaint his resume that included information from which Defendant could infer his age. Nonetheless, the Court granted Defendant's motion to dismiss without prejudice because Plaintiff had not alleged the position for which he applied was filled by a younger applicant.

Plaintiff alleged Defendant failed to hire him for a position as an actuarial analyst because of his age. Plaintiff's application for a position with Defendant did not include his age or date of birth. It did, however, describe Plaintiff as a "[s]easoned statistical analyst," "mature," and a "[m]idcareer professional" and indicated that he obtained a master's degree in 1993. Plaintiff, however, did not specifically allege that Defendant was aware of his age, and Defendant moved to dismiss based on that failure.

In rejecting Defendant's arguments, the Court found Defendant could have reasonably inferred Plaintiff's age from his resume. Therefore, the Court held Plaintiff had adequately pleaded a claim under the ADEA. In so holding, the Court recognized that the resume was not irrefutable evidence of Plaintiff's age, but merely provided sufficient support so as to warrant denial of a Rule 12(b)(6) motion.

Nonetheless, the Court dismissed the Amended Complaint without prejudice because Plaintiff had failed to allege sufficiently that a younger applicant was hired. Although Plaintiff had included allegations to that effect, the Court found such allegations "conclusory" and "naked." The Court thus granted Defendant's motion to dismiss without prejudice.

Court Grants Default Against Defendant Whose Corporate Representative Repeatedly Failed to Appear at Deposition

In *Vorcom Internet Servs. Inc. v. L&H Eng'g & Design LLC*, 2014 WL 116130 (S.D.N.Y. Jan. 13, 2014), Magistrate Judge **Lisa M. Smith** recommended that the District Court enter multiple sanctions, including default, against defendant LG Engineering & Design, Inc. and its officer, who was its Rule 30(b)(6) deponent, for failing to appear at his deposition.

Judge Smith noted that the deponent had repeatedly failed to appear for his deposition in derogation of multiple court

orders, and that LG and the deponent had even failed to respond to the motion for sanctions. Accordingly, Judge Smith recommended that the District Court award attorneys' fees incurred by Plaintiff in seeking to take the deposition, preclude any testimony by the deponent at trial, and enter a default judgment against LG. These recommendations were adopted by Judge **Vincent L. Briccetti** as the order of the Court.

Court Lacked Jurisdiction to Hear Claims by Plaintiffs Subject to Foreclosure Orders

In *Anctil v. Ally Fin., Inc.*, 2014 WL 516686 (S.D.N.Y. Feb. 10, 2014), Judge **Cathy Seibel** dismissed Plaintiffs' claims that orders of foreclosure obtained by the defendant banks were obtained by fraud, finding that the Court was barred from hearing such claims under the Rooker-Feldman doctrine.

Plaintiffs were former owners of residential property in New York, Maryland and Massachusetts who alleged Defendants had "engaged in a massive racketeering scheme designed to mislead mortgagors, the public, and various government entities in order to illegally foreclose on homes." Plaintiffs alleged that the MERS system was used to conceal transfers of Plaintiffs' mortgages among various companies.

The Court held that the Rooker-Feldman doctrine prevented it from exercising subject matter jurisdiction over Plaintiffs' claims, as that doctrine bars a federal district court from reviewing judgments of state courts and from reversing the orders of foreclosure. Where, as in this case, a plaintiff seeks review of a state court judgment and the suit is, in essence, an appeal of the state court judgment, the federal court lacks jurisdiction.

The Court also rejected Plaintiffs' invitation to find an exception to the Rooker-Feldman doctrine when the underlying state court judgment is allegedly based on fraud by a party. The Court noted that the Second Circuit had not decided whether there is such an exception to the Rooker-Feldman doctrine, but observed that the other Circuit Courts are split on such an exception. The Court concluded that recognizing such an exception would undermine the purpose of the Rooker-Feldman doctrine because state courts have mechanisms to reverse judgments based upon fraud.

Court Has Personal Jurisdiction Over Company That Sold Products Over Internet into New York

In *Two's Co., Inc. v. Hudson*, 2014 WL 903035 (S.D.N.Y. Mar. 6, 2014), **Judge Nelson S. Romàn** denied Defendant's motion to dismiss for lack of personal jurisdiction and held that personal jurisdiction existed over the owner of a company that conducted sales of products over the internet into New York.

In its Complaint, Plaintiff alleged that in 2002 it had obtained a trademark for the name "Two's Company, Inc." for its business selling giftware and home goods. Plaintiff further alleged that Defendant infringed its trademark by operating a company that sold embroidered and needlepointed products over the internet. From 2010 to 2012, Defendant had conducted eighteen sales over the internet to purchasers in New York, which constituted 0.4% of Defendant's total sales by dollars over that period.

Defendant, based in South Carolina, moved to dismiss for lack of personal jurisdiction on the ground that it lacked sufficient minimum contacts to warrant jurisdiction in New York. The Court held that although it lacked general jurisdiction over Defendant under the Fourteenth Amendment, it could exercise specific jurisdiction insofar as the products it sold in New York allegedly violated Plaintiff's trademark rights. Thus, the Court ruled, it was reasonable to hale Defendant into court in New York.

Reliance on Bad Actor's Input Can Demonstrate Meaningful Role in Termination

In *Wang v. Int'l Business Machines Corp.*, 2014 WL 896721 (S.D.N.Y. Mar. 4, 2014), **Judge Vincent L. Briccetti** denied Defendant's motion for reconsideration, which asserted that the Court had improperly applied *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), when denying Defendant's motion for summary judgment.

In his Complaint, Plaintiff alleged he was terminated from his position as a computer software engineer with Defendant because he was deaf. During discovery, Plaintiff adduced evidence that the decision maker had relied on the input of the alleged bad actor; the decision maker testified that the bad actor's feedback "did help to form [his overall opinion of [plaintiff's] performance and his skills" and the decision maker had relied on "feedback from [the bad actor]" In its motion for summary judgment and again on reconsideration, Defendant asserted that the bad actor had not played a "meaningful role" in the termination process because the bad actor had not acted within the "termination process."

Holcomb requires that a plaintiff show that the bad actor "played a meaningful role" in the decision to terminate him. In rejecting Defendant's argument, the Court held that a bad actor can play a meaningful role in a termination even when his position in the process is not formal, but rather only provides feedback within the process.

Holding that the jury in this case could find that the alleged bad actor had played a "meaningful role" in the decision maker's decision to terminate Plaintiff as part of a reduction in force, the Court denied Defendant's motion for reconsideration. The Court specifically noted that it did not make any determination that the alleged bad actor had actually played a meaningful role in the termination, only that a jury could so conclude.

Town Court's Inability to Host Kerry Kennedy Trial Warranted Transfer of Case to Westchester County Supreme Court

In *People v. Kerry Kennedy*, 43 Misc. 3d 1201(A) (N.Y. Town Ct. 2014), **Justice Alan D. Scheinkman**, in his position as the Administrative Judge for the Ninth Judicial District, granted defendant Kerry Kennedy's request to have her misdemeanor trial transferred from the Town Court of the Town of New Castle to New York Supreme Court, Westchester County.

On July 13, 2012, Defendant was arrested and issued a ticket for driving while impaired, a misdemeanor. Prior to trial, Defendant requested a conference with Justice Scheinkman to discuss an alternative location for the trial. Following the conference and subsequent informal briefing, Justice Scheinkman removed the case from the Town of New Castle and relocated it to the Supreme Court.

The Court emphasized that although the Town Court was an appropriate venue for the trial, in light of the layout and size of the Town's courtroom, it may not be the optimal location for the particular matter at issue. The Court recognized the increased media attention to the matter given Defendant's high public profile. In addition, the Court noted that the layout of the room was not conducive to a jury trial insofar as there was no jury box or jury deliberation room, and the jury sits right in front of the public gallery without any separation. Finally, the Court noted that it was difficult to sufficiently separate the jury from counsel to ensure the jury could not see the attorneys' notes and documents on counsels' tables. Finally, the Court found that even if the Town could alter the layout of the room, such rearranging would serve only to decrease the space available for the significant number of expected spectators.

In light of these facts, the Court held that justice would be properly and fairly administered by the transfer of the case to the Supreme Court for trial.

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