



**Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
July 2017**

This article continues Yankwitt LLP's quarterly review of decisions from the Federal District Court and State Supreme Court in White Plains, New York. This article reviews decisions from the second quarter of 2017.

Judge Briccetti Denies Employer's Motion to Compel Arbitration

In *Nadeau v. Equity Residential Properties Mgmt. Corp.*, No. 16 CV 7986 (VB), 2017 WL 1842686 (S.D.N.Y. May 5, 2017), **Judge Vincent L. Briccetti** denied defendant Equity Residential Properties Management Corporation's motion to compel plaintiff Janice Nadeau to arbitrate her labor law claims against Defendant. Plaintiff was a customer support assistant for Defendant's property management company. She signed an arbitration agreement prior to commencing employment in which she agreed that employment-related disputes would be resolved before the American Arbitration Association. Plaintiff claims that throughout the course of employment, she was required, without compensation, to read and respond to text messages while off-the-clock, and was texted by her supervisor to attend a mandatory company event after-hours, also without pay. In response to the demand she attend this after-hours event, Plaintiff texted back her supervisor using vulgar language to express her displeasure, and received a disciplinary "write up." Plaintiff then filed an arbitration demand with the AAA. The arbitration was subsequently closed, however, because Defendant continuously refused to pay its share of the arbitration fees. Plaintiff accordingly filed a putative class-action suit, claiming violations of various federal and state labor laws. Defendant moved to compel arbitration and stay the litigation pursuant to the arbitration agreement. Plaintiff argued, *inter alia*, that Defendant could not invoke its rights to arbitration because its refusal to arbitrate constituted a material breach of the arbitration agreement. The Court agreed and denied Defendant's motion noting that employers could not insist on arbitration agreements, refuse to engage in the arbitration process and then move to dismiss litigation filed by frustrated employees. The Court further rejected Defendant's arguments that Plaintiff's arbitration demand was technically deficient and that Plaintiff sought recourse for non-arbitrable issues.

Judge Karas Denies Motion to Remand Following Removal to Federal Court

In *Rugiero-Serrano v. Makita USA, Inc.*, No. 16-CV-5391 (KMK), 2017 WL 2297019 (S.D.N.Y. May 25, 2017), **Judge Kenneth M. Karas** denied Plaintiffs' motion to remand their personal injury action back to state court. Plaintiffs Manuel Rugiero-Serrano and his wife, Hilda Suarez, sued defendant Makita USA, Inc., alleging severe injuries to Rugiero-Serrano's left arm after the safety guard failed on a circular saw designed, manufactured, and distributed by Defendant. During pre-suit settlement communications, Plaintiffs proffered medical and other reports and demanded at least \$1 million in damages. Per New York state procedure, however, when Plaintiffs initiated suit, the complaint did not specify a damages amount. Accordingly, Defendant served a demand for an *ad damnum* simultaneously with its answer. Plaintiffs responded nearly nine months later that they claimed damages of \$4.5 million. A few days after receiving the *ad damnum*, Defendant removed the action to federal court on diversity grounds. Thereafter, Plaintiffs moved to remand, claiming that the removal was untimely because Defendant was aware the alleged damages exceeded \$75,000 well-before the *ad damnum* was served and so more than thirty-days elapsed between the time Defendant knew the jurisdictional threshold was met and the date it filed the notice of removal. The Court disagreed, noting the Second Circuit favors a bright line rule in the removal context. Thus, the settlement papers and medical records sent to Defendant prior to suit being commenced were insufficient to constitute an "other paper" for the purposes of starting the removal clock. Rather, Defendant's thirty-day removal window was triggered by the *ad damnum*, because it was the first paper served in the litigation that explicitly set forth the amount in controversy. Accordingly, Defendant's removal was timely and Plaintiffs' motion was denied.

Judge Román Vacates Default Judgment Against Third-Party Defendant Under Excusable Neglect Standard

In *White Plains Hous. Auth. v. Getty Properties Corp.*, No. 13 CIV. 6282 (NSR), 2017 WL 1498041 (S.D.N.Y. Apr. 25, 2017), **Judge Nelson S. Román** granted third-party defendant Marianina Oil Corp.'s motion to vacate the default judgment entered against it under Federal Rule of Civil Procedure 60(b). Plaintiff White Plains Housing Authority initially sued a local Getty gas station in 2013, alleging the station had contaminated the parking lot below a housing development with hazardous materials. Both Plaintiff and Getty sued Marianina, alleging that its gas station was the cause of the environmental contamination. Marianina did not respond to either complaint and a default judgment was entered against it in December 2015. More than nine-months after the default judgment was entered, Marianina moved to vacate, claiming (a) its default was not willful because its insurance company failed to appear in or defend the litigation after repeatedly assuring Marianina that the claim was being handled, and (b) it had valid meritorious defenses due to extensive prior

remediation and absence of new spillage. While noting that Marianina's conduct was not laudatory and that it could have done more to determine whether its insurance company was actually defending the litigation, the Court agreed that the conduct did not rise to the level of willfulness required in the Second Circuit to deny a motion to vacate. Accordingly, and despite the potential that Plaintiff would be prejudiced by vacatur beyond a simply delay in the resolution of the action, the Court vacated the default judgment in accordance with the Second Circuit's strong preference for resolution of cases on the merits.

Judge Seibel Grants Summary Judgment in Slip-and-Fall Case

In *Dranoff v. Sam's E., Inc.*, No. 16-CV-6482 (CS), 2017 WL 1437207 (S.D.N.Y. Apr. 20, 2017), **Judge Cathy Seibel** granted summary judgment in favor of the defendant store owner in a personal injury action arising out of Plaintiff's alleged slip and fall in water near a flower display at a "Sam's Club" in Middletown, NY. In its motion, Defendant argued that there was no evidence that it either created a dangerous condition or had constructive notice of any alleged condition. Critically, because the action was removed to federal court after originally being filed in Orange County Supreme Court, the Court concluded that federal, rather than state, law applied in determining the burden of proof on this motion. Accordingly, the absence of evidence in support of Plaintiff's negligence claim at the summary judgment stage, "redounds to the detriment of the Plaintiff detriment, not the Defendant." Applying that principle, the Court found that there was no evidence whatsoever that Defendant, as opposed to a patron or some other source, caused water to end up on the floor where Plaintiff fell. Judge Seibel further found that Defendant did not have constructive notice of the allegedly wet condition. Although Plaintiff claimed security footage showed an employee walking by the alleged spill shortly before the fall, the Court found it impossible to make this determination, and noted there was no evidence that an employee noticed water on the floor even if the employee had passed by the area. In sum, Plaintiff's failure to proffer evidence to support her negligence claim warranted summary judgment in Defendant's favor and dismissal of the action.

Justice Ecker Partially Grants Landlord's Motion for Summary Judgment

In *Splash, LLC v. Shullman Family Ltd. P'ship*, 51 N.Y.S.3d 852 (West. Cty. Sup. Ct. 2017), **Justice Lawrence H. Ecker** granted partial summary judgment in favor of the Defendants, landlord and its current tenant, but declined to impose sanctions against Plaintiff. Plaintiff, a carwash operator, formerly leased space from the defendant landlord. When the parties were unable to renegotiate their lease, Plaintiff signed a new lease for space down the road from the original location, which was contingent upon Plaintiff obtaining various zoning variances and permits. Plaintiff then sued Defendants alleging they interfered with Plaintiff's zoning board applications by funding local residents' challenges against the zoning, tortiously interfered with

current and prospective business relations in connection with the new lease, breached the implied covenant of good faith and fair dealing with respect to the old lease by preventing Plaintiff from vacating the premises at the lease's expiration, negligently and intentionally damaged Plaintiff's property, and failed to return Plaintiff's security deposit. Plaintiff alleged its zoning approvals were significantly delayed by Defendants' tortious actions and fraudulent misrepresentations, and that Defendants' dilatory tactics were intended to poach Splash's customers by opening a competing carwash in the same location well before Splash could reopen. Further, Splash claimed Defendants intentionally or negligently damaged its roof during a site inspection, which caused water to leak into the premises and damage much of its property. Both Defendants moved for summary judgment on all causes of action, and the subsequent tenant moved for sanctions. With respect to the tortious interference claims in connection with Plaintiff's new lease, the Court granted summary judgment because Plaintiff did not demonstrate that the new lease was ever breached or that Defendant engaged in any unlawful conduct. The Court also granted summary judgment on the good faith and fair dealing claim, holding that that the town board determinations were made *prior* to the old lease's expiration and Plaintiff elected to holdover at the premises. Thus, Defendants' conduct did not prevent Plaintiff from vacating the premises. Justice Ecker denied summary judgment on the intentional and negligent property damage claims, however, holding that triable issues of facts existed on both those affirmative claims and Defendants' counterclaims for a setoff. Finally, the Court denied summary judgment with respect to the security deposit, which Defendants claim escheated to New York years ago, because that relatively nominal sum was inextricably intertwined with the property damage and holdover claims.

***Yankwitt LLP** is an elite trial and litigation firm located in White Plains, New York. Our New York lawyers are prominent members of the Westchester and New York City bars, who utilize their broad experience and expertise to produce exceptional outcomes for our clients. All of our New York partners and senior lawyers are former federal law clerks or prosecutors, or both.*

Contact us at (914) 686-1500
www.yankwitt.com