

Western District Case NOTES

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REMOVAL

In *Simon v. Ningbo Liqi Electrical Appliances Co., et al.*, No. 19-cv-6386-FPG (Oct. 15, 2019), a products liability wrongful death action commenced in state court, one defendant removed the case based on diversity jurisdiction even though the complaint lacked an explicit statement of the amount of damages sought. Plaintiff moved to remand the case, acknowledged that the amount in controversy exceeded \$75,000, but contended that the removing defendant failed to include the written consent of all other defendants as required by 28 U.S. §1446(b)(2)(A). In response, the removing defendant filed the required written consent and an amended notice of removal, both within 30 days of the motion to remand, but more than 30 days after service of the complaint. The Court denied the motion to remand, finding that the 30-day removal clock had not begun to run until the remand motion provided the first explicit statement of the amount of damages sought. The Court emphasized that, “the moment the case becomes removable and the moment the 30-day clock begins to run are not two sides of the same coin,” and thus a defendant might remove immediately following the filing of a complaint even though the complaint does not explicitly convey the removability of the case at that time.

STANDING

In *Kearns v. Cuomo, et al.*, No. 19-cv-902-EAW (Nov. 8, 2019), plaintiff, a



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County Clerk, challenged the New York State Driver's License and Privacy Act (the “Green Light Law”), contending it was preempted by federal immigration law. Defendants moved to dismiss on various grounds including that plaintiff lacked standing because he had not plausibly alleged that implementation of the Green Light Law would actually cause him a personal and tangible harm. Plaintiff argued, in opposition, that he had alleged injury to his office sufficient to confer standing in his official capacity, and that he faced a credible threat of prosecution or removal from office, establishing standing in an individual capacity. The Court disagreed, and granted the motion to dismiss. With respect to the individual capacity claims, the Court noted that plaintiff was challenging the Green Light Law, but feared criminal prosecution under a different statute, unlike the case law on which he relied. Plaintiff also could only speculate as to why he would be criminally prosecuted should he comply with the Green Light Law. Moreover, the Court noted that plaintiff, as the County Clerk, was unlikely to actually engage in the sort of work at the county offices that would subject him

to potential criminal liability. Thus, plaintiffs’ theory of standing in his individual capacity relied on a “highly attenuated chain of possibilities” and did not satisfy the requirement that the threatened injury must be “certainly impending.” According to the Court, while plaintiff might disagree with the new law, that disagreement did not entitle him, even as an elected official, to seek the intervention of the Court. The Court also found that standing was lacking with respect to plaintiff’s claims in his official capacity as County Clerk, in part because the Court had already found that plaintiff did not plausibly allege credible threats that he would be criminally prosecuted or removed from office. The Court also found that plaintiff had not explained what harm would come to the office merely from having the clerk replaced, which already happens on a regular basis through elections, resignations, and retirements.

MOTION TO SEAL

In *Saraceni v. M&T Bank Corp.*, No. 19-cv-01152-LJV (Nov. 6, 2019), an action alleging claims under ERISA, plaintiff moved for a preliminary injunction and defendant immediately sought to seal one of the exhibits to the motion. Defendant then cross-moved for a preliminary injunction and sought to seal three of the exhibits to its cross-motion. Plaintiff agreed that one of the exhibits should be sealed, but opposed sealing the others. Noting first that “a strong presumption of public access attaches to evidence introduced at trial or in connection with summary judgment,” the Court then observed that the presumption of public access “is generally somewhat lower” when

the material is submitted in other procedural contexts, such as discovery disputes or motions in limine. In the case of the latter, while the Court must still articulate “specific and substantial reasons for sealing such materials, the reasons usually need not be as compelling as those required to seal summary judgment filings.” Thus, because the exhibits at issue were submitted in connection with motions for preliminary injunctions, the more relaxed standard applied. Nonetheless, Court conducted an individualized review of each document and determined that two documents should be sealed because they contained confidential information that could cause defendant competitive harm. And, while the other two documents may be proprietary in nature, they did not contain confidential information and could not be sealed.

AIDING AND ABETTING FRAUD

In *Heinert v. Bank of America, N.A.*, No. 19-cv-06081-DGL (Oct. 18, 2019), a putative class action seeking damages for aiding and abetting fraud and/or breach of fiduciary duty, plaintiffs alleged that they were victims of a decade-long Ponzi scheme that was facilitated by the defendant banks. The banks then moved to dismiss, arguing that the complaint failed to state a claim upon which relief could be granted. Addressing the fraud claim first, the Court observed that, in order to plead a cause of action against a bank for aiding and abetting fraud committed by account-holders, the plaintiff must plausibly allege, among other things, the defendant bank’s actual knowledge of the fraud. In other words, constructive knowledge is not sufficient, nor is a lower standard such as recklessness or willful blindness. The Court then found that plaintiffs’ allegations did not plausibly allege that the defendant banks had actual knowledge of the individual defendants’ actions because a bank’s failure to identify warning signs of fraudulent activity—even where the warning signs form a “forest of red flags”—is insufficient to impute actual knowledge of ongoing fraud. Turning to the breach of fiduciary duty claim,

the Court noted that a bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation, and that a plaintiff must allege that the defendant had actual knowledge of the breach of fiduciary duty. Because there was no indication that the defendant banks had actual knowledge that the individual defendants were in breach of their own fiduciary obligations, this claim was also insufficiently stated. Finally, the Court held that, even if plaintiffs had sufficiently alleged actual knowledge for either of their aiding or abetting claims, they would still fail because there were no allegations that the defendant banks committed any affirmative acts, and “banks do not owe non-customers a duty to protect them from the intentional torts of their customers.” As a result, the motion was granted and the claims against the banks were dismissed.

WRONGFUL DEATH DAMAGES

In *Hollingsworth v. Roseland Wake Park, LLC*, 18-cv-06013-MAT-MJP (Nov. 29, 2019), plaintiff asserted claims for negligence, gross negligence, recklessness and strict products liability after his son was killed in a wake boarding accident. Defendants filed a joint motion for partial summary judgment, seeking dismissal of plaintiff’s loss of services claim, arguing that New York law does not allow recovery of damages for the sentimental and emotional impact of the lost services. Plaintiff opposed the motion, arguing that his loss of services claim sought pecuniary, as opposed to emotional, damages because the services that the decedent would have provided were more valuable than the same services provided by strangers. In granting the motion, the Court found that Plaintiff had conflated the concept of recovering the cost of replacement services and the valuation of emotional damages, which is not permitted under New York law. Stated differently, plaintiff could “not avoid the bar to seek emotional damages by merely labeling the damages he seeks as ‘pecuniary’ when substantively, they are of an emotional

or sentimental nature.” As a result, the loss of services claim was dismissed.

MOTION TO REGISTER A JUDGMENT

In *Xerox Corp. v. JCTB Inc., et al.*, No. 18-cv-6154-MAT (Nov. 14, 2019), an action for breach of contract, plaintiff was granted judgment as a matter of law and awarded compensatory damages and a declaratory judgment entitling it to retake possession of certain leased equipment. Upon entry of the judgment, defendants filed a notice of appeal. When plaintiff filed a motion to register the judgment in another district, defendants did not oppose but filed a motion to stay enforcement of the judgment pending their appeal. Plaintiff argued that defendants had not obtained a supersedeas bond and that an asset search revealed defendants’ only assets were located in the other district. The Court granted the motion to register the judgment and denied the stay motion. The Court determined that good cause existed to register the judgment in another district because defendants did not have sufficient property in this district to satisfy the judgment, but had substantial property in the other district. In denying the motion to stay pending appeal, the Court noted that defendants improperly relied on the four part test governing motions to stay injunctive or equitable relief when here they sought to delay enforcement of the money damages ruling. Instead, Rule 62(b) applied, but required that defendants post a supersedeas bond or equivalent security in order to obtain a stay of the judgment. Grounds to waive that bond or security did not exist. Defendants’ inability to pay the judgment was neither a basis for the stay, nor to waive the bond. And defendants failed to provide any acceptable alternative means of securing the judgment.

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