

Western District Case NOTES

This article originally appeared in The Bulletin, the official publication of the Bar Association of Erie County. It is reprinted here with permission.

Standing and Subject Matter Jurisdiction

In *Orange Transportation Services, Inc. v. Volvo Group North America, LLC*, No. 19-cv-06289-FPG (Jan. 15, 2020), plaintiff sought damages for breach of warranty, fraud, and other purported violations of New York law in connection with defendant's sale of 24 semi-trucks that were allegedly defective. Defendant moved to dismiss, contending that 18 of the semi-trucks were not purchased by plaintiff, rendering it without standing to pursue claims related to those trucks. In response, plaintiff argued that it is affiliated with the purchasers of those 18 trucks, and that its affiliates assigned their rights to plaintiff to "simplify this litigation." The Court first observed that, in order to proceed with the claims, plaintiff must not only have constitutional standing, but the Court must also have statutory jurisdiction or subject matter jurisdiction would be lacking. The Court then noted that it "is black-letter law that one corporation cannot assert an affiliate's legal rights," and observed that plaintiff did not dispute that it did not purchase 18 of the semi-trucks at issue. Moreover, because the assignment argument was merely asserted in plaintiff's brief—without citation to any evidence—and also contradicted the allegations in its complaint, it was insufficient to establish standing. As a result, the claims concerning those 18 semi-trucks were dismissed, without prejudice. Finally, plaintiff was ordered to show cause why the remainder of the



By KEVIN M. HOGAN
Daily Record
Columnist



By SEAN C. MCPHEE
Daily Record
Columnist

complaint should not be dismissed, based on the Court's concerns that plaintiff had not shown that the parties were completely diverse.

Class Certification

In *Jackson v. Bank of America, N.A.*, 16-cv-00787-FGP-HBS (Dec. 30, 2019), plaintiffs filed a putative class action complaint alleging that defendant improperly and untimely processed their mortgage assistance applications so that it could charge them excessive loan delinquency fees. The Court subsequently dismissed all of plaintiffs' claims except for one relating to whether defendant

failed to use "reasonable diligence" in reviewing their loss mitigation application, as required by 12 C.F.R. § 1024.41(b)(1). Plaintiffs then moved for class certification and, after discussing each of the requirements found in Rule 23, the Court determined that several of the required elements were not satisfied, warranting denial of plaintiffs' motion. For example, because plaintiffs admitted that their expert would need to review an unknown number of loan documents and spreadsheets to determine whether defendant failed to use reasonable diligence for each class member, the "commonality" requirement was not met. For similar

reasons, the Court found that plaintiffs failed to establish the "predominance" requirement, which is designed to ensure that a class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. In other words, because determining which of the class members encountered defendant's alleged failure to exercise reasonable diligence would require a loan-by-loan inquiry in order to determine liability, class-wide issues did not predominate.

Injunctions

In *Havens et al., v James et al.*, No. 19-cv-6482-DGL (Jan. 24, 2020), plaintiffs sought a declaration that they and others associated with them could engage in conduct specifically prohibited by a 20-year-old injunction, from litigation plaintiffs were not involved in, that limited protest actions outside a reproductive health care services clinic by establishing a 15-foot buffer zone and prohibited sidewalk counseling activities within that zone (the "Prior Injunction"). Plaintiffs moved for a preliminary injunction enjoining defendants from enforcing the Prior Injunction, and defendants moved to dismiss the complaint for failure to state a claim. The Court granted the two motions to dismiss, finding that the complaint demonstrated that the sidewalk counseling engaged in by plaintiffs within the buffer zone violated the Prior Injunction, and that plaintiffs were acting in "active concert or participation" with the named parties that were enjoined by the Prior Injunction. The Court noted

that an injunction cannot lawfully enjoin the world-at-large, but rather can lawfully apply only to the parties named in the injunction, their officers, agents, servants, employees, and attorneys, and any other persons who receive notice of the injunction and act in concert or participate with the named parties or their agents. According to the Court, plaintiffs were indisputably coordinating their efforts to violate the Prior Injunction, and that concerted action and participation with the named parties in the Prior Injunction was evident from the allegations in plaintiffs' own complaint. The Court then found that, because plaintiffs failed to state a claim for relief, their motion for a preliminary injunction was moot. The Court went on, in any event, and ruled that plaintiffs had not shown the requisite irreparable harm necessary for such relief because, as the Second Circuit previously had found, the Prior Injunction was content-neutral, served to protect significant government interests, and still enabled individuals such as plaintiffs to effectively communicate their message.

Consolidation

In *Damico et al. v. Waste Management of New York, LLC*, No. 18-cv-6080-EAW-MJP (Dec. 14, 2019), plaintiff commenced a punitive class action against the operator of a landfill, claiming noxious odors were emitted onto plaintiff's property or causing damages. Defendant moved to consolidate the lawsuit with a second lawsuit also pending in the District that involved similar claims concerning the same landfill, but did not include a class action claim, and sought damages for odors emanating from a second landfill operated by Defendant, raised additional causes of action, and named an additional municipal Defendant. The Court denied the motion to consolidate, even though defendant sought to consolidate the two lawsuits only for purposes of discovery. The Court found that consolidation risked prejudicing plaintiffs in the second lawsuit due to the likelihood of significant delay caused by the class certification issue in the first lawsuit. The Court determined that consolidation was

not warranted because the factual and legal issues that were different predominated over those that were common. And, because of those differences, the Court found the two cases would likely diverge for discovery purposes, at least until class certification was decided, making consolidation — even if only for discovery purposes — not in the interest of judicial convenience.

Discovery of Electronically Stored Information

In *Black Love Resists et al. v. City of Buffalo et al.*, No. 18-cv-00719-CCR (Dec. 19, 2019), a putative class action alleging that defendants violated the Constitution and discriminated against the class on the basis of their ethnicity by conducting vehicle checkpoints in areas of the City of Buffalo with a majority of Black and Latino residents, plaintiffs moved to compel defendants to produce, among other things, electronically stored information ("ESI") related to the traffic checkpoints. Defendants objected to the demand for ESI, contending that it is not reasonably accessible, and that plaintiffs have not shown good cause to require the production of metadata, as required by Local Civil Rule 26(e)(4). Regarding the former objection, the Court noted that, while a party is not required to produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost, at least some of the information plaintiffs sought apparently resided on defendants' active email systems, making it "presumably accessible." Moreover, because it is likely that the requested ESI will contain information that is probative, defendants' unspecified burden weighed in favor of compelling disclosure of the ESI. As for the metadata, however, because the Local Civil Rules create a presumption that "metadata ... need not be routinely produced" absent a showing of good cause by the requesting party, the Court found that plaintiffs were only entitled to disclosure of metadata documenting the date and time that various emails were sent and received, as well as the identities of the sender and all recipients (including any copied

and blind-copied recipients). Finally, the Court denied defendants' request for cost shifting because the requested ESI is likely to contain relevant information, and "the party responding to discovery requests [typically] bears all costs associated with production."

Security for Stay Pending Appeal

In *Seneca Nation of Indians v. State of N.Y.*, 19-cv-00735-WMS (Dec. 12, 2019), petitioner sought to stay enforcement of a monetary judgment confirming an arbitration award pending its appeal of the judgment. Noting first that a party who posts a full bond or "other security" is entitled to a stay from a monetary judgment as a matter of right, the Court then considered whether petitioner's proposed security—a restricted securities account that contains deposits in excess of the amount of the judgment—qualified under Fed. R. Civ. P. 62(b). In opposition, respondent primarily argued that the proffered account does not adequately secure the judgment because the governing agreements do not adequately restrict the transfer of funds out of the account, and may permit petitioner to initiate transfers for reasons other than to satisfy the judgment. The Court rejected this, and each of respondent's other arguments, concluding that the securities account constituted adequate "other security" under Fed. R. Civ. P. 62(b), so long as petitioner agreed not to make any withdrawals (even if permitted under the terms of the agreements underlying the securities account) as a condition of the stay.

Satisfaction of Judgment

In *Centerbar v. Esser James & Associates, LLC et al.*, No. 16-cv-896-LJV (Dec. 26, 2019), plaintiff filed a complaint alleging violations of the Fair Debt Collection Practices Act. Defendants failed to appear, the Clerk of the Court entered a default, and the Court entered a default judgment and awarded plaintiff damages of \$32,883.33. Plaintiff moved to compel one defendant to surrender an engagement ring in satisfaction of the judgment. Under Rule 69(a), the procedure to enforce a Writ of Execution must comply with state law. The Court grant-

ed the motion because, under New York Law, a money judgment may not be enforced against a wedding ring, but can be enforced against an engagement ring when the engagement ring does not also serve as a wedding band. Here, plaintiff's husband testified that plaintiff received her engagement ring before their wedding and separate from a wedding band that was exchanged at the ceremony. The Court thus held that the engagement ring was exempt under CPLR. § 5205(a)(6) and must be turned over to satisfy the money judgment.

Default Judgment

In *Grice v McMurdy*, No. 18-cv-6414-MAT (Jan. 8, 2020), plaintiff contracted to have defendant sell on consignment certain sports memorabilia. When plaintiff delivered the memorabilia but defendant failed to deliver payment or procure insurance as required under the contract,

plaintiff commenced a lawsuit for damages that did not specify a sum certain. Following entry by the clerk of default against the defendant, plaintiff moved for entry of default judgment for a sum certain, supported by an affidavit by an appraiser stating that the fair market value of the memorabilia was \$983,758. The Court denied the motion, without prejudice, because only claims for sum certain or a sum that can be made certain by computation may support a default judgment under Rule 55(b)(1). If the dollar amount of the defendant's liability is a matter of estimation, however, entry of a default judgment may only be entered by the Court after a factual evaluation. Here, it remained plaintiff's burden to demonstrate that the uncontroverted allegations, without more, established defendant's liability on each asserted cause of action, and the Court was still required to con-

sider the willfulness of the default, the existence of a meritorious defense, and the level of prejudice that the non-defaulting party might suffer. Here, plaintiff had not addressed any of those factors in his motion and, thus, failed to meet his burden demonstrating that he was entitled to judgment by default.

Kevin M. Hogan is the Managing Partner at Phillips Lytle LLP. He concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com or (716) 847-8331.

Sean C. McPhee is a partner with Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com or (716) 504-5749.