

Western District Case Notes

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Temporary Restraining Order

In *Bravado International Group Merchandising Services, Inc. v. John Does, et al.*, No. 20-cv-113-LJV (Feb. 3, 2020), plaintiff, the exclusive licensee for merchandise for the band KISS, filed a complaint alleging unnamed bootleggers will infringe KISS's trademarks and violate the Lanham Act at a future concert in Buffalo, and filed a motion seeking a temporary restraining order ("TRO") to prevent the sale of counterfeit merchandise and a seizure order to authorize federal and local authorities to seize infringing merchandise. The Court denied the motion for the TRO without prejudice to renewing the motion and submitted proof of bootlegging on this tour. In support of its request for the ex parte TRO and seizure order, plaintiff repeatedly referred to past tours by KISS and other performers. Predictions that similar bootlegging activity would occur on this tour, however, were not sufficient, because the applicable legal standard requires plaintiff to present "specific information" to support its claim that the bootleggers' activities on this tour will irreparably harm plaintiff in the absence of the TRO. In the Court's view, plaintiff's general descriptions of past bootlegging activities were not sufficient to clearly demonstrate with specific facts that plaintiff would be irreparably harmed, as is required by both the Lanham Act and Fed. R. Civ. P. 65. The Court offered suggestions for such "specific facts," including photographs depicting bootlegging activities or instances of failed attempts to identify the bootleggers, but in both instances from earlier on this tour.

Diversity Jurisdiction and Fraudulent Joinder

In *Portville Truck and Auto Repair, Inc. v. Mac Trucks, Inc. et al.*, No. 19-cv-1045-EAW (Jan. 27, 2020), plaintiff commenced a state court lawsuit against a truck manufacturer and a local dealership alleging violation of New York Vehicle and Traffic Law § 463 (2)(d)(1) and claims of tortious interference with contract and business relations. After the truck manufacturer removed the action, plaintiff moved to remand, and the defendants separately moved to dismiss the complaint. On the remand motion, the truck manufacturer argued



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that the Court had subject matter jurisdiction because (a) it was reasonably probable the amount in controversy exceeded \$75,000, and (b) there was diversity of citizenship between it and plaintiff. Although the dealership, like plaintiff, also was incorporated in New York, the truck manufacturer argued that the dealership had been fraudulently joined. Noting that the truck manufacturer had a "heavy burden" to "clearly and convincingly" prove that the dealership had "no real connection with the controversy," the Court stated that the applicable standard was not whether plaintiff pleaded a claim of relief against the dealership, but rather whether there is any possibility that a right to relief against the dealership exists in state court. After liberally construing the complaint under Pennsylvania law, the Court held that it could not say there was no possibility based on the pleadings that plaintiff could state a cause of action against the dealership in state court. Because the Court was required to resolve ambiguities in favor of remand, it concluded complete diversity of citizenship was lacking, federal subject matter jurisdiction was absent, and the lawsuit should be remanded back to state court.

Preliminary Injunction and Bond Requirement

In *Rochester Drug Co-operative, Inc. v. Hiscox Ins. Co., Inc.*, No. 20-cv-06025-EAW (Feb. 25, 2020) — an insurance coverage action — plaintiff sought an injunction restraining defendant from dishonoring its right to advancement of current and future defense costs in connection with three lawsuits scheduled to go to trial in New York State Supreme Court. After observing that plaintiff is required to establish: (i) likelihood of irreparable harm absent preliminary relief; (ii) likelihood

of success on the merits; and (iii) that a balance of the equities tips in its favor, the Court found that plaintiff met its burden and was entitled to the requested relief. As for irreparable harm, that element is satisfied where, as here, the movant cannot afford to pay legal fees in the underlying litigation without insurance coverage (and its counsel will withdraw absent payment), and a significant proceeding like a trial is imminent. Next, the balance of the equities tipped decidedly in plaintiff's favor because failure to receive defense costs could seriously jeopardize plaintiff's ability to meaningfully participate in the upcoming trials, while defendant's risk was limited to potential monetary harm. The Court then found that there were at least sufficiently serious questions going to the merits of the dispute because it is the defendant's burden to prove the applicability of an exclusion to coverage, and there are ambiguities in the policy. Finally, although the Second Circuit has recognized that Fed. R. Civ. P. 65 gives a district court discretion to decide whether security is required, the Court found that a bond was required in this instance because, if a determination is ultimately made that plaintiff is not entitled to coverage, it would almost certainly be unable to repay defendant for the defense costs advanced. As a result, the Court conditioned the entry of an injunction on the posting of a bond in the amount of \$500,000.

Statute of Limitations and Plausibility Requirement

In *Whiteside v. Hover-Davis, Inc.*, No. 19-cv-06026-CJS (Feb. 28, 2020), plaintiff sued his former employer, alleging violations of the Fair Labor Standards Act ("FLSA"), the Americans with Disabilities Act ("ADA"), and certain New York state laws. Defendant moved to dismiss, contending that the FLSA claim was time-barred, and that plaintiff's allegations of discriminatory intent concerning the ADA were merely conclusory. Regarding the former, the Court found that it was evident from the face of the complaint that the FLSA claim was time-barred unless the pleading plausibly alleged willful conduct sufficient to extend the statute of limitations from two years to three. The Court then found that plaintiff's bare allegation that defendant acted with "reckless disregard" as to whether its conduct was prohibited under the FLSA was conclusory and not entitled

to a presumption of truth. As such, because the FLSA claim was filed beyond the two-year limitation without any plausible allegation that defendant acted willfully, it was dismissed. Similarly, plaintiff's claim under the ADA was dismissed as insufficiently pled because, although the standard at the pleading stage is low, plaintiff failed to plausibly plead at least minimal support for his proposition that defendant's conduct was motivated by discriminatory intent. Finally, with plaintiff's federal claims dismissed, the Court declined to exercise supplemental jurisdiction over his state law claims, and those were dismissed without prejudice.

Choice of Law for Release of Liability

In *Witkowski v. Niagara Jet Adventures, LLC*, 16-cv-00856-LJV-JJM (Jan. 30, 2020), a personal injury action alleging negligent and reckless conduct in connection with a jet boat excursion, defendant moved for summary judgment based on a "Release and Waiver of Liability, Assumption of Risk and Indemnity" that plaintiff signed prior to boarding the boat. The Magistrate Judge recommended that defendant's motion should be granted in part and denied in part, and both sides objected. Noting first that the Magistrate Judge's recommendation was subject to a de novo review, the Court then undertook the review and adopted the recommendation. In doing so, the Court

rejected plaintiff's suggestion that New York state law — rather than federal maritime law — applied to the release, observing that state law would only apply where: (i) no applicable admiralty rule exists; (ii) local and state interests predominate; and (iii) the uniformity principle underlying federal maritime law is not crucial. The Court determined that the test was not met in light of the conflict between federal admiralty law and New York law, the latter of which completely precludes negligence waivers for recreational activities in derogation of the common law. Because enforcement of the release was not against federal public policy, it was valid, requiring dismissal of plaintiff's negligence claim. Finally, the Court found that a reasonable factfinder could conclude that defendant's conduct was reckless, and that claim was referred back to the Magistrate Judge for further proceedings.

Default Judgement

In *Joe Hand Promotions, Inc. v. Boyd et al.*, No. 19-cv-6254-FPG (Jan. 30, 2020), plaintiff sought enhanced statutory damages under the Copyright Act, alleging defendants unlawfully received and exhibited a pay-per-view boxing match at their restaurant. After defendants failed to appear, the Clerk of the Court filed an entry of judgment, and plaintiff moved for a default judgment. Evaluating whether plaintiff's allegations, taken as true, estab-

lished defendants' liability, the Court concluded that plaintiff adequately stated a claim for violation of the Copyright Act. Although plaintiff sought the maximum statutory damages, the Court concluded statutory damages in the amount equal to what plaintiff normally would charge this venue for broadcasting this event were warranted. Finding that defendants' conduct was willful and for the purpose of private financial gain, the Court then enhanced those damages by trebling the award. The Court awarded to plaintiff its attorney's fees, having concluded they were reasonable, but reduced the requested costs, holding that auditing (or investigator) fees were not permitted and that private service of process fees in excess of the rate established for service through the U.S. Marshals Service were excessive. The Court also denied prejudgment interest because the statutory damages had been enhanced to punish defendants' willful conduct rather than to compensate plaintiff for a loss.

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