WESTERN NEW YORK
THE DAILY RECORD
Part of the BRIDGETOWER MEDIA network
DEC. 22, 2022

Western District Case Notes

■ Special to The Daily Record **KEVIN M. HOGAN and SEAN C. MCPHEE**

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


Kevin M. Hogan


Sean C. McPhee

Venue

In *Bausch & Lomb, Inc. v. Zea Vision LLC*, 20-cv-06452-FPG (Aug. 31, 2022) — an action for alleged patent infringement — defendant moved to dismiss for improper venue or, in the alternative, to transfer venue to Eastern District of Missouri, the location of its principal place of business. In response, plaintiff acknowledged that venue in the Western District of New York is improper, but argued that the action should be transferred rather than dismissed, and that the District of Delaware is a more appropriate venue than the Eastern District of Missouri. Noting that plaintiffs' claim could be heard in either of the requested venues, the primary question before the Court was whether the relevant factors supported a transfer to Missouri or Delaware. To answer the question, the Court evaluated the multi-factor test under 28 U.S.C. § 1404, observing first that, while a plaintiff's choice of forum ordinarily should not be disturbed, where the first choice of venue is improper, a plaintiff's second choice of venue should not be accorded much weight. Next, the Court determined that convenience of the witnesses — which is generally considered the most important factor — weighed in favor of defendant because much of the alleged misconduct and witnesses allegedly involved would be in Missouri, where the vast majority of defendant's operations are conducted. For the same reason, much of the evidence relevant to the parties' dispute would also be located in Missouri, so the Court found that factor also weighed in favor of defendant. Regarding convenience of the parties, the Court assigned little weight to that factor, finding that plaintiffs and defendant would each be inconvenienced by the other's requested forum. Finally, because plaintiffs' financial means likely exceed those of defendant, the Court found that factor also favored defendant. Ultimately, because no factors weighed in favor of plaintiffs' requested forum, but some factors favored defendant, the balance supported a transfer of the action to defendant's preferred forum in the Eastern District of Missouri.

Motion to Dismiss Claim for Breach of Alleged Oral Contract

In Van Bortel v. Ford Motor Co., 21-cv-06739-DGL (Aug. 10, 2022), plaintiffs alleged they entered into an oral agreement with defendant concerning the purchase of a car dealership. When the dealership was sold to another entity, plaintiffs filed suit in New York State Supreme Court. Defendant timely removed the action based on diversity of citizenship and then moved to dismiss. Remarking that the "first and most obvious element" of a claim for breach of contract "is the existence of a contract," the Court outlined the elements that are required to form a valid contract under New York law — "there must be an offer, acceptance, consideration, mutual assent and intent to be bound." The Court then found, "[o]n that score, the complaint fails in several respects." Specifically, "glaringly absent from the complaint" was any allegation regarding sufficient consideration to support the alleged oral contract. And the fact that plaintiffs had entered into a non-disclosure agreement with defendant concerning a potential sale of the dealership did not constitute adequate consideration to support the alleged oral agreement, because plaintiffs' acceptance of the terms of that non-disclosure agreement did not require them to part with anything "of real value." The Court noted that "[t]he problems with this claim do not end there" because it was "evident" from the allegations of the complaint no "meeting of the minds took place." It was also "not surprising" to the Court "that the complaint fails to allege another element of a contract claim, performance by plaintiffs," because "the alleged agreement did not impose any obligations on plaintiffs." Finally, the Court disregarded defendant's statute of frauds defense, explaining that, because "there never was any contract between the parties, matters concerning the statute of frauds are immaterial to this claim," and then dismissed the breach of contract claim as "facially meritless."

First Amendment Right to Free Speech

In *Searle v. Red Creek Central School District*, 21-cv-6086-FPG (Aug. 18, 2022) — an action under the First and Fourteenth Amendments of the United States Constitution — plaintiff sued the school district and its superintendent where his two children were enrolled after receiving a notice directing that he not contact any faculty or staff or come on school grounds without written permission of the superintendent for the remainder of the school year. This restriction followed numerous emails from plaintiff replete with abusive and inappropriate language and requests to terminate school staff that had become increasingly strident to the point of being harassing in the view of defendants. Plaintiff contended that the notice was sent for the purpose of inhibiting and punishing him for his constitutionally protected right of free speech, without any rational basis, and solely to treat plaintiff differently than other similarly situated parents. The Court noted that, to state a claim for retaliation under the First Amendment, plaintiff must plausibly allege i) an interest protected by the First Amendment, ii) conduct by defendants motivated by the exercise of that right, and iii) that defendants effectively chilled the exercise of that right or caused some other concrete harm. The Court concluded that the complaint did not plausibly allege that his First Amendment right to free speech had been "chilled" because it contained no allegation that plaintiff had indeed changed his behavior after receiving the notice nor that he had requested access to the District facilities and was subsequently denied. For similar reasons his claim for selective enforcement under the Fourteenth Amendment also was futile, because plaintiff did not plausibly allege that the supposed differential treatment was based on an impermissible consideration (such as race or religion), and failed to identify any similarly situated individuals who supposedly were treated differently or how the District's conduct was irrational or motivated by animus. Accordingly, defendants' motion to dismiss was granted.

Employment Discrimination

In *Martin v. SS Columba-Brigid Catholic Church, et al.*, 21-cv-491-GWC (Aug. 11, 2022), plaintiff, a choir director at defendant's church, brought an action for employment discrimination alleging that she was wrongfully terminated on the basis of her race. The Court granted defendants' motions to dismiss the federal claims because they were barred by the so-called ministerial exception. The ministerial exception bars employment discrimination claims brought by ministers against religious groups that employ them, to ensure that the authority to select and control who will administer to the faithful — a matter strictly ecclesiastical — is the church's alone. An affirmative defense as opposed to a jurisdictional bar, the ministerial exception is not limited to the head of a religious congregation, and there is no rigid formula for deciding when an employee qualifies as a minister. On the basis of numerous facts alleged in the complaint, including that the pastor was plaintiff's supervisor and that she arranged music for mass, the Court concluded that plaintiff performed duties with a "significant religious dimension," and that her leadership of the choir formed an "integral part" of the Catholic tradition. Concluding that, if the Court attempted to resolve this dispute, it would impermissibly entangle itself with religious doctrine, the Court concluded that the ministerial exception barred plaintiff's federal employment discrimination claims.

Leave to Amend

In *Thomas v. Conagra Foods, Inc., et al.*, 20-cv-6239-EAW-MJP (Aug. 26, 2022) — an action for products liability — plaintiff alleged in her complaint she was injured from the combustion of a specific brand of cooking spray can. During discovery, plaintiff informed defendants that she had not preserved the subject can and that the product may have been labeled differently than alleged. During the deposition, plaintiff testified that she recalled that the cooking spray can was indeed labeled differently than alleged in the complaint and that she had not told anyone that the cooking spray can was branded as alleged in the complaint. Well after the deadline to do so had passed, plaintiff moved for leave to amend the complaint to allege the new brand, and the Court denied the motion. According to the Court, two rules guided its analysis of the untimely motion for leave to amend: Rule 15(a)(2) provides that, after the time for leave to amend as of right has expired, a party may amend its pleading only with the consent of its opponent or Court leave, which should freely be given; and, Rule 16(b)(4) provides that a "schedule may be modified only for good cause and with the Judge's consent." In applying these two rules, the Court noted that the standards Rule 16(b) must be met first and cannot be short circuited by an appeal to those of Rule 15(a). In denying the motion, the Court concluded that plaintiff possessed knowledge supporting the amended pleading prior to the expiration of the deadline and had ample opportunity either to investigate and determine the cooking spray can brand, to note the ambiguity, or to seek an extension of the deadline to amend. Plaintiff therefore had not been diligent, and the good cause for her delay in bringing the motion, as required by Rule 16(b), was lacking.

Discovery Extensions

In *Gentner v. Navient Solutions, Inc.*, 20-cv-747-LJV-JJM (Aug. 12, 2022) — an action brought under the Telephone Consumer Protection Act of 1991 — the Court provides another reminder that a party seeking an extension of a discovery deadline under Rule 16 must proceed with diligence and establish good cause, and those requirements will be strictly enforced by the Court. Here, less than one week be-

fore the discovery deadline, defendant moved to stay the proceedings to await a looming decision from a pending United States Supreme Court appeal. In a text order setting a briefing schedule for the stay motion, the Court noted that, "[u]nless ordered otherwise, the deadlines of the [CMO] ... remain in effect." With defendant's consent, plaintiff then moved, on the final day for discovery under the CMO, to extend the fact discovery deadline, and argued that, when she earlier had granted defendant a 30-day extension to respond to her discovery requests, she relied on defendant to request a corresponding extension of the CMO deadlines. The Court concluded that plaintiff had proceeded at her own risk, her reliance did not merit sufficient good cause, and she also had not been diligent because she failed to bring her motion to extend the discovery deadline herself until the last minute. Noting that, "if the courts do not take seriously their own scheduling orders who will?", the Court denied the motion.

Judgment on the Pleadings

In *Carter v. Ciox Health, LLC*, 14-cv-06275-FGP-MWP (Aug. 18, 2022) — a putative class action asserting claims: (i) that defendants overcharged patients for copies of medical records in violation of New York Public Health Law ("PHL") § 18; (ii) for deceptive acts or practices prohibited under New York General Business Law ("GBL") § 349; and (iii) for unjust enrichment — defendants made a joint motion to dismiss, which was granted in part and denied in part. Defendants then answered and the parties engaged in limited discovery and settlement discussions. Defendants later moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), arguing that a recent decision from the New York Court of Appeals holding that there is no private right of action for violations of PHL § 18 was fatal to plaintiffs' claims. In response, plaintiffs conceded to judgment on the pleadings on their claim under PHL § 18, but argued that their other claims remained viable independent of their PHL § 18 claim. The Court disagreed, finding that plaintiffs' theory under GBL § 349 was "dependent on PHL § 18 and does not exist independently." Thus, while plaintiffs "may feel taken advantage of ... that does not mean they were, or that they have pled that they were, materially deceived." The same was true regarding plaintiffs' unjust enrichment claim, with the Court observing: "try as they might to make it something different, Plaintiffs' Amended Complaint and [unjust enrichment] claim boil down to Defendants making a profit ... [a]nd that cannot serve as the basis of an unjust enrichment claim." Accordingly, the Court granted defendants' motion for judgment on the pleadings and dismissed the complaint.

Tortious Interference with Contractual Relations

In *Mrs. U.S. Nat'l Pageant, Inc. v. Williams*, 18-cv-06587-MWP (Sept. 9, 2022), a producer of beauty pageants brought multiple claims against its former licensee and two pageant businesses that she operates. Defendants asserted counterclaims and, following the completion of discovery, the parties made competing motions for summary judgment. The Court resolved the motions with respect to all claims except defendants' counterclaim for tortious interference, and invited the parties to submit supplemental briefing because, while labeled in defendants' pleading as one for "tortious interference with business relationships," at oral argument, defendants' counsel contended that defendants were, in fact, asserting a counterclaim for tortious interference with contractual relationships. Noting that the difference "is significant, and not merely semantic, because the two types of claims are judged under different standards," the Court first addressed plaintiff's argument that there was insufficient evidence to raise a triable issue of fact that plaintiff had knowledge of the contractual relationships, let alone that it had induced their breach. In rejecting this argument, the Court found that a letter plaintiff's counsel sent to certain individuals who had contracted with defendants, which acknowledged their contracts and threatened suit against them, was sufficient evidence to give rise to a reasonable inference that plaintiff had knowledge of those contractual relationships. Turning next to plaintiff's argument that there was no evidence it acted with malice, but instead had simply relied on advice of counsel, the Court rejected this argument too, finding that the record evidence did not demonstrate the merits of this "advice-of-counsel" defense as a matter of law. In doing so, the Court noted that the assertion of this defense operates as an implied waiver of the attorney-client privilege, and warned plaintiff that unless it affirmatively disclaims reliance on the advice-of-counsel defense, it must disclose certain documents reflecting communications with its counsel. The Court then denied both motions as it relates to defendants' counterclaim for tortious interference with contractual relationships, and scheduled a status conference to set a trial date.

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.