WESTERN NEW YORK
THE DAILY RECORD
Part of the BRIDGETOWER MEDIA network ■ DECEMBER 26, 2024

Western District Case Notes

■ Kevin Hogan And Sean McPhee SPECIAL TO THE DAILY RECORD

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REMOVAL AND FRAUDULENT JOINDER

In *Woolf v. Precision Technologies LLC*, 23-cv-1023-EAW (Sept. 18, 2024), plaintiffs filed a complaint in New York State Supreme Court asserting causes of action against two defendants based on negligence and strict products liability, seeking damages for personal injuries. One of the defendants removed the action contending that diversity jurisdiction existed, and plaintiffs moved to remand based on the "forum defendant rule," since the co-defendant is a citizen of New York. The removing defendant did not dispute that its co-defendant is a citizen of New York, but instead argued that the co-defendant was fraudulently joined, so its citizenship should not be considered in determining the right to remove. In making this argument, the removing defendant contended that the co-defendant was merely a "pass-through distributor" of the product at issue and should, therefore, be disregarded as a nominal party. Noting first that a defendant seeking removal bears a heavy burden of proving fraudulent joinder by clear and convincing evidence, and that all factual and legal issues must be resolved in favor of the plaintiff, the Court then observed that fraudulent joinder can be established in one of two ways: (1) by showing fraud in the plaintiff's pleadings; or (2) by demonstrating that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court.

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The Court then found that, by merely disputing the nature of the co-defendant's involvement in the distribution of the product at issue, the removing defendant failed to establish that its co-defendant was fraudulently joined in order to defeat diversity. Rather, as the Court observed, there was no dispute that the co-defendant had at least some connection to the controversy, as evidenced by the fact that the removing defendant asserted a cross-claim against the co-defendant for contribution and/or indemnification prior to removing the action to federal court. Ultimately, because the removing defendant failed to show by clear and convincing evidence that the co-defendant was fraudulently joined for the purpose of defeating diversity jurisdiction, the Court held that it lacked subject matter jurisdiction in light of the forum defendant rule and granted plaintiffs' motion to remand.

INTERPLEADER

In *Raymond James & Associates, Inc. v Ellison, et al.*, 23-CV-6497-EAW (Aug. 29, 2024), an interpleader action brought pursuant to 28 U.S.C. §1335 concerned two individual retirement accounts maintained by plaintiff that were the subject of state court disputes between alleged beneficiaries of the accounts following the creator's death. At the time of the action, the combined value of the two accounts was approximately $493,000.00. Plaintiff moved for an interpleader deposit, to be secured by a bond in the amount of $1,000.00, in which Plaintiff would continue to hold the accounts pending resolution of the competing claims but immediately receive a full and final discharge from any liability with respect to the accounts. Pursuant to 28 U.S.C. §1335(a), a federal District Court has original jurisdiction over an interpleader action if i) the value of the money or property in dispute is at least $500, ii) two or more adverse claimants are of diverse citizenship, and iii) the plaintiff has deposited the money or property into the registry of the court or has given bond payable to the court in such amount as the court deems proper. Thus, without a deposit or a bond, the court does not have subject matter jurisdiction and has no authority to hear the dispute. Here, plaintiff sought to use a nominal bond while it continued to hold the assets in controversy in its investment accounts. Although the Court

has discretion to determine the appropriate amount of an interpleader bond, here the Court was not persuaded that a nominal bond satisfied the purposes of the deposit requirement under §1335(a). The Court also rejected defendants' request that the funds currently in the investment accounts instead be deposited with a third party investment agency, because such a third party deposit did not satisfy the jurisdictional requirements of §1335(a) either. In the Court's view, the interpleader statute is clear — to invoke subject matter jurisdiction, a plaintiff must either deposit the funds into the registry of the court or post an *appropriate* bond. The Court thus denied plaintiff's motion but allowed it to submit a renewed motion for interpleader deposit accompanied by sufficient detail why any proposed bond was adequate to satisfy the purposes of the deposit requirement.

FOIA AND VAUGHN INDICES

In *Robert F. Kennedy Human Rights, et al. v. United States Immigration and Customs Enforcement*, 22-CV-929-LJV-HKS (Aug. 28, 2024), a Freedom of Information Act ("FOIA") action, the Court entered an order requiring defendant to produce a disclosure plan, monthly updates reporting the number of pages produced, and a so-called *Vaughn* index listing documents withheld or redacted pursuant to a specified FOIA exemption. Based on a decision from the D.C. Circuit, a *Vaughn* index or affidavit is the means by which an agency specifically describes any withheld or redacted documents and justifies why the responsive records are exempt from disclosure under FOIA. The *Vaughn* index should provide enough detail to permit the requesting party to contest the failure to produce the record in an adversarial fashion, or a reviewing court to engage in a de novo review of the withheld information. In FOIA cases involving a large volume of responsive documents, such as was involved here, the producing agency also is permitted to use representative sampling in its *Vaughn* index, rather than itemizing every withheld record, to test the agency's FOIA exemption claims. Otherwise, to require a *Vaughn* index to itemize every withheld record would unnecessarily burden the limitations of time and resources that constrain agencies, courts and FOIA requestors alike. As a result, in an order addressing the completeness of defendant's FOIA responses, including its *Vaughn* index, the Court held that defendant was permitted to rely on a representative sampling of every 25th page of the withheld or redacted documents. The Court reasoned that allowing the proposed representative sampling of 4 percent should bring this matter to an earlier resolution while still affording plaintiff the relief it sought.

PRIVILEGE LOG REQUIREMENTS

In *Homeland Ins. Co. of Delaware v. Indep. Health Ass'n, Inc.*, 22-cv-462-WMS-HKS (Sept. 26, 2024), an insurer sought a declaratory judgment that it had no obligation to defend and indemnify its insureds in a federal *qui tam* action and related arbitration. During discovery, a dispute arose and plaintiff moved to compel defendants to respond to certain interrogatories and document requests. The Court granted that motion and, in doing so, specifically noted that if the defendants assert the attorney-client privilege in response, they are required by the Federal and Local Rules of Civil Procedure to prepare and produce a privilege log. Thereafter, defendants responded to plaintiff's discovery demands and provided a privilege log identifying certain materials that were withheld based on the common-interest, work-product, and attorney-client privileges. Plaintiff objected to the sufficiency of the privilege log, contending the log failed to comply with the applicable rules, and that it could not meaningfully evaluate defendants' assertion of privilege. Counsel for the parties then met and conferred but they were unable to reach an agreement, so plaintiff moved to compel challenging the sufficiency of defendants' privilege log. In evaluating the motion, the Court first observed that Local Rule of Civil Procedure 26(d)(1)(B)(i) requires a party withholding allegedly privileged documents to identify: the type of document; the general subject matter of the document; the date of the document; and "such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees and recipients to each other." The Court then noted that, while categorical privilege logs are presumptively proper where a party asserts the same privilege for multiple documents, the use of categorical privilege logs does not obviate a party's obligation to provide sufficient detail, and may not be vague or generic. Ultimately, the Court found that the privilege log ran afoul of the requirements because, among other things, the descriptions of the subject matter of the withheld documents were vague and generic, and because the log did not identify the titles or roles of the individuals involved in the communications. As a result, defendants were directed to revise their privilege log so as to break the communications into separate categories that: (1) are described with specific detail as to their subject matter so as to support the claimed privilege; (2) span no more than one year

per category; (3) identify the titles and roles of the individuals involved in the communications; and (4) state the specific privilege asserted for the communications within each category. Defendants were also specifically warned that "should their revised log entries not meet the above standards, the Court may exercise its discretion to require a document-by-document log of those communications" rather than utilizing a categorical log.

BANKRUPTCY

In *Official Committee of Equity Securities Holders v. Integrated Nano-Technologies, Inc.*, et al., 23-CV-6350-FPG, 23-CV-6351-FPG (Aug. 19, 2024), related appeals arose from a Chapter 11 bankruptcy in which the Bankruptcy Judge dismissed the case due to the debtor's failure to retain counsel and concluded that the committee of secured creditors must be automatically dissolved. Earlier in the proceeding, the Bankruptcy Judge had denied the debtor's motion to retain a certain law firm as counsel because that law firm had not disclosed numerous potential interests in the debtor, resulting in the law firm's disqualification. The Bankruptcy Court issued a new deadline for debtor to retain counsel, but the debtor again failed to do so, causing the trustee to move, pursuant to 11 U.S.C. §1112(b)(1), to convert the bankruptcy proceeding to one under Chapter 7 or to dismiss it altogether. The Bankruptcy Court concluded that dismissal, rather than conversion, was in the best interest of the creditors and the estate. On appeal, the District Court vacated the order dismissing the proceeding, and remanded for further proceeding. In the District Court's view, §1112(b)(1) presented the Bankruptcy Court with three alternatives: it could dismiss the case, convert the case to one under Chapter 7, or appoint a Chapter 11 trustee. Because the statute mandated the appointment of a Chapter 11 trustee and precluded dismissal or conversion when it was in the best interest of the creditors and the estate, a bankruptcy court had an independent obligation to consider appointment of the trustee. Thus, the Bankruptcy Court had abused its discretion when it failed to consider whether appointment of a Chapter 11 trustee was in the best interest of the creditors and estate, notwithstanding that defendant had not filed a motion seeking that relief. While Rule 2007.1(a) required such a motion to appoint a trustee under §1104(a), the District Court concluded that rule did not apply to the independent analysis required when considering a motion to dismiss, convert, or appoint under §1112(b)(1).

DISCOVERY STAYS PENDING SUMMARY JUDGMENT MOTIONS

In *Short v. City of Rochester*, 22-cv-6263-EAW-MJP (Aug. 30, 2024), defendant moved to stay discovery pending the determination of its motion for summary judgment, which sought dismissal of plaintiffs' entire complaint. Noting first that courts may stay discovery pending the outcome of a dispositive motion, the Court also observed that "the Federal Rules do not gift any defendant an automatic stay merely because the defendant files a dispositive motion." Instead, the Federal Rules entrust the Court with the discretion to determine if a stay is warranted. That discretion "should be exercised carefully and only after looking to the particular circumstances and posture of the case." Moreover, notwithstanding the Court's discretion, the moving party must first show good cause, and must then prevail on the factors that courts evaluate when determining whether to stay discovery pending the outcome of a dispositive motion—*i.e.* (1) the breadth of discovery sought; (2) any prejudice that would result; and (3) the strength of the motion. Applying the test, the Court found that defendant established good cause for a stay because if defendant's motion succeeds, whether partially or entirely, the parties could avoid substantial burden and the waste of precious resources. The Court then declined to consider the "strength of the motion" factor in depth, but found that it was satisfied, noting that defendant's summary judgment motion "may shape the number and nature of the claims going forward in a manner that could significantly impact the breadth of discovery." The Court also found that, absent a stay, defendant faced the prospect of electronic discovery, including sifting through thousands, if not tens or hundreds of thousands, of email from numerous custodians, so the "breadth" factor favored a stay. Finally, while observing that some prejudice to plaintiffs is inherent in any delay, such delay alone is insufficient to prevent a stay, otherwise stays of discovery would never be granted. And because defendant is a municipal entity that provides public services, compliance with discovery in the current posture of the case would result in a substantial diversion of public resources which may ultimately not be necessary. As a result, the Court granted defendant's motion and stayed discovery pending the determination of defendant's motion for summary judgment.

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