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Western District Case Notes

■ **Kevin Hogan And Sean McPhee** SPECIAL TO THE DAILY RECORD

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STANDING

In *Heeter v. James*, 24-cv-623-JLS-HKS (Nov. 8, 2024), plaintiffs—three individuals and an organization—sought to enjoin the New York State Attorney General, the Superintendent of the New York State Police, and the District Attorneys of four New York counties from enforcing various provisions of the New York Penal Law and General Business Law that restrict the purchase and sale of body armor, contending that enforcement of the statutes deprive residents of New York of their individual rights under the Second and Fourteenth Amendments to the United States Constitution. While certain defendants filed answers, the Attorney General and the Erie County District Attorney moved to dismiss on the grounds that the organizational plaintiff lacks standing, and that they were improperly named as defendants in the action. After analyzing the legal landscape underlying the concept of organizational standing, the Court determined that it need not resolve the issue at this juncture because there was no dispute that the individual plaintiffs *do* have standing. The Court then rejected the alternative arguments advanced by the Attorney General and Erie County District Attorney—*i.e.* that they are improper parties because plaintiffs supposedly cannot link their alleged injuries to any conduct by them—finding that plaintiffs demonstrated an injury-in-fact by alleging an intention to engage in a course of conduct arguably protected by the Second Amendment but proscribed by New York law, and a threat of future enforcement by the Attorney General, who is responsible for enforcing New York's restrictions on the sale of body armor, and the Erie County District Attorney, who is the prosecutorial officer with the responsibility to conduct all prosecutions for crimes and offenses cognizable by the courts of the county in which he serves, which includes the provisions of the New York Penal Law that plaintiffs are challenging. Finally, because neither the Attorney General nor the Erie County District Attorney have disavowed enforcement of the challenged laws, the Court presumed that they will enforce those laws, rendering them appropriate defendants in the action. As a result, their motions to dismiss were denied.


Kevin Hogan

SUBSTITUTING PARTIES

In *Freedom Mortgage Corp. v. Vacanti*, 23-cv-156-EAW (Dec. 30, 2024), plaintiff commenced an action to foreclose a mortgage and one of the defendants passed away three days after she was served with the summons and complaint. Plaintiff then moved to substitute that defendant but failed to cite any authority in support of its motion resulting in a summary denial. Thereafter, plaintiff moved yet again to substitute the deceased defendant and for the appointment of a guardian *ad litem*. In doing so, plaintiff cited to the procedural rules for substitution in state court but nowhere did it mention Fed. R. Civ. P. 25, which authorized the Court to substitute a proper party in the event a party dies and the claim is not extinguished, so long as the motion is made within 90 days of a statement noting the death. Otherwise, the action "must be dismissed." Noting first that "Plaintiff and its counsel appear to misapprehend the court in which this action was commenced," the Court then observed that, under New York law, a mortgage foreclosure claim survives the death of a fee owner, but it was unclear whether the 90 day deadline for filing a motion to substitute had already expired. Moreover, the "proper party" referred to in Fed. R. Civ. P. 25 must be either a distributee of an estate or a person lawfully designated by state authority to represent the deceased's estate, and here plaintiff submitted no proof establishing that a proper party exists for purposes of substitution. Accordingly, the motion was denied without prejudice, but plaintiff was cautioned that any subsequent motion to substitute must appropriately address all relevant issues with citation to relevant legal authority or it may be denied with prejudice, because "[t]he undersigned neither has the time nor the desire to perform legal research for Plaintiff and its counsel."


Sean McPhee

COPYRIGHT LAW

In *Williams et al. v. D'Youville University et al.*, 21-cv-1001-JLS (Oct. 23, 2024), plaintiffs, certain former full time faculty members employed by defendant, alleged copyright infringement by defendant for its continued use of a curriculum and associated materials relating to a master's in education program that plaintiffs had prepared during their employment but which defendant continued to use following their termination. The Court granted defendant's motion to dismiss, holding that plaintiffs did not plausibly allege that defendant's use of the copyrighted material exceeded the scope of the license granted to it by the collective bargaining agreement that plaintiff's union had negotiated and that was in effect when they prepared the curriculum and other materials. The CBA expressly provided that defendant would retain a permanent license to any and all of the syllabi created by the professors to use for pedagogical purposes associated with teaching. The CBA provided further that, for purposes of the agreement, a syllabus included the course description, objectives and other matters that, according to the Court, encompassed the works at issue in the lawsuit.

CONSTRUCTIVE NOTICE AND EXPERT WITNESSES

In *Yahya v. United States*, 21-cv-375-CCR (Nov. 25, 2024)—a lawsuit alleging negligence under the Federal Tort Claims Act for a slip and fall accident that occurred at defendant's post office—defendant moved for summary judgment contending that plaintiff's expert meteorologist's report to establish the weather conditions at the time of the accident was fundamentally flawed and speculative, and that plaintiff failed to proffer evidence establishing that it had constructive notice of the allegedly slippery conditions. Plaintiff's expert relied in part on data from the local airport's weather station located more than eight miles from the post office. The Court declined to find that the expert witness's report was inadmissible for purposes of summary judgment because a determination of how long any ice or snow was present at the post office was a question for the jury to decide and only a jury was permitted to weigh that evidence and assess the expert witness's credibility. Concerning defendant's alleged constructive notice of the slippery conditions, the Court noted that the federal burden of proof on a motion for summary judgment differs from the corresponding standard under New York law in a slip and fall action. Whereas in New York, where the defendant has the initial burden to make a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it, under the federal standard, the defendant need not submit affirmative evidence to show that it lacked notice but instead may properly discharge its burden by pointing out an absence of evidence that it had notice. Defendant here argued plaintiff failed to proffer any admissible evidence of constructive notice. The Court noted, however, that under New York law a Court will impute constructive notice to a party if it failed to conduct reasonable inspections of and a reasonable inspection would have revealed the defective condition. Here, plaintiff's testimony coupled with the proffered expert report and a lack of evidence of a pre-fall inspection were collectively sufficient to create a genuine issue of material fact regarding defendant's constructive notice, thus warranting denial of its motion for summary judgment.

CLASS CERTIFICATION

In *Miami Products & Chemical Co. v. Olin Corp.*, 19-cv-385-EAW-MJR (Dec. 16, 2024)—a putative class action in which plaintiffs alleged that defendants entered into a conspiracy to artificially reduce or eliminate competition for pricing of caustic soda sold to purchasers in the United States—plaintiffs moved for class certification under Fed. R. Civ. P. 23 and defendants opposed, arguing that the matter is not suitable for class certification. Noting first the initial preconditions to class certification found in Fed. R. Civ. P. 23(a)—*i.e.* numerosity, commonality, typicality, and that the representative parties will adequately address the interests of the proposed class—the Court observed that, even if all of those requirements are met, the Court must then determine whether one of the scenarios set forth in Fed. R. Civ. P. 23(b)(1)-(3) is satisfied. Here, plaintiffs sought certification under subsection (b)(3), which requires that common questions of law or fact predominate over questions affecting only individual class members, and that class treatment is superior to other methods of adjudicating the controversy. The Court then determined that plaintiffs did not meet their burden to show, through the submission of evidentiary proof and not mere allegations, that their proposed class should be certified. Specifically, the Court found that the diversity and complexity of the contracts between defendants and their customers were fatal to Rule 23(b)(3)'s predominance requirement, and that the evidence plaintiffs proffered in support of class certification failed to address the economic realities of the caustic soda market. Instead, plaintiffs' theory relied entirely on assumption and conjecture, which is insufficient because Rule 23(b) requires reliable evidence that a common method of proof exists to prove impact on a class-wide basis. And without such common evidence, the need to present evidence that varies from member to member to establish antitrust injury inevitably makes individual questions more prevalent or important than common ones, rendering class certification inappropriate.

MOTION FOR RECONSIDERATION

In *Freeland v. Findlay's Tall Timbers Dist. Center*, LLC, 22-cv-6415-FPG (Nov. 1, 2024)—a putative labor law class action lawsuit—the Court twice previously considered motions to dismiss. The Court first ruled there exists a private right of action for violations of New York Labor Law § 191(1)(a), which requires that manual workers be paid on

a weekly basis, and later ruled that allegedly inaccurate wage statements did not cause concrete harm sufficient to afford plaintiff standing to bring a claim under New York Labor Law § 195(3). Defendant moved to reconsider the first decision, plaintiff moved to reconsider the second decision, and the Court granted both motions based on intervening changes in law. Regarding defendant's motion, the Court earlier had relied on a First Department decision in holding that a private right of action existed for violations of Section 191. Since that decision, however, the Second Department had declined to follow the First Department and held that no private right of action existed for violations of Section 191. In a separate lawsuit, this Court had followed the Second Department's decision and held that the New York Court of Appeals was unlikely to determine that either an express or implied private right of action existed. The Court therefore granted that part of defendant's earlier motion to dismiss the claim for violations of Labor Law § 191. The Court also granted plaintiff's motion for reconsideration, this time based on an intervening decision from the Second Circuit, which held that defective wage statements that cause an employee to lose wages has a sufficiently concrete interest to establish standing for purposes of a Section 195 claim. For that reason, plaintiff's Labor Law § 195 claim was reinstated.

DEFAULT JUDGMENT

In *Freedom Mortgage Corp. v. Thomas*, 23-cv-6339-EAW (Nov. 4, 2024)—a residential mortgage foreclosure action—plaintiff moved for a default judgment, which was denied because plaintiff failed to establish that it complied with a New York state statute requiring lenders to serve borrowers with a particular notice containing at least five housing counseling agencies identified by the New York Department of Financial Services ("DFS") that offer assistance to homeowners facing foreclosure in the county where the real property is located. Thereafter, plaintiff made a successive motion for a default judgment contending that it complied with the statute because, while the notice it served listed only four housing counseling agencies physically located within the county where the real property is situated, the notice was sufficient because it contained the complete copy of the most recent listing of all housing counseling agencies in New York state available on the DFS's website. According to plaintiff, while several agencies on that list are located in neighboring counties, those agencies nonetheless serve the county where the real property at issue in the action is located and argued that, if its notice was deemed insufficient, a lender would never be able to foreclose a mortgage in that county since there are only four agencies that are physically located within that county. The Court rejected plaintiff's argument and denied the motion for a default judgment yet again, observing that plaintiff had misunderstood its burden to establish strict compliance with the statute. Indeed, while the list plaintiff relied upon *may* contain housing counseling agencies that serve the particular county where the mortgaged premises is located despite being located outside of that county, the Court is not obligated to "guess as to which agencies qualify." Accordingly, because plaintiff failed to establish strict compliance with the statute, denial of its renewed motion for a default judgment was required.

ATTORNEY'S FEES

In *Midwest Athletics and Sports Alliance LLC v. Xerox Corp.*, 19-cv-6036-EAW (Nov. 1, 2024) defendants sought an award of attorney's fees incurred after the close of fact discovery in a patent infringement litigation on grounds that this was an "exceptional case" pursuant to 35 U.S.C. § 285 or according to the inherent equitable power of the Court to award expert witness fees. In this very large case involving infringement and invalidity claims of 20 patents, 321 claims, 41 inventors and over 70 accused products and methods, plaintiff unsuccessfully sought leave to amend its complaint and supplement its Final Infringement Contentions, having proffered no legitimate reason for its delays in seeking to do so. Thereafter, plaintiff nevertheless included multiple theories that were the subject of its motion for leave to amend in its expert reports, which defendant successfully moved to strike before obtaining summary judgment in its favor and moving for an attorney's fees award. The Court noted that, under Section 285, an "exceptional" case is one that stands out from others with respect to the substantive strength of a party's litigating position or the unreasonable manner in which the case was litigated. Considering the totality of the circumstances, the Court determined that this case was exceptional because plaintiff disregarded the Court's Local Patent Rules and ignored the Court's prior rulings. While there is nothing inherently improper in bringing a large case, or even an unusually large case such as this one, the Court found it exceptional that plaintiff pursued infringement theories at the summary judgment stage that were not included in its Final Infringement Contention after plaintiffs was expressly denied leave to assert them in its amended complaint. On the other hand, the Court declined to award fees under its inherent authority, ruling that to do so should occur only where the rules or statutes do not otherwise reach the subject conduct that supposedly degraded the judicial system. Because the award of attorney's fees under Section 285 adequately reached the litigation misconduct by plaintiff, the exercise of the Court's inherent authority was not warranted here.

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