FEDERAL PRACTICE UPDATE

By James M. Wicks

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This month we review three decisions rendered by the Judges of the Eastern District of New York, Alfonse D'Amato Courthouse. In the first decision, the Honorable Arthur D. Spatt confirms Magistrate Judge James Orenstein's Order denying an application to extend a discovery deadline. Next, we consider a decision by the Honorable James Orenstein denying in part, and granting in part, motions for summary judgment in a case involving goods damaged by fire at a storage facility. Finally, we review a decision by the Honorable Denis R. Hurley adopting the Report and Recommendation of Magistrate Judge James Orenstein where he recommended dismissal of a Section 1983 action.

In *Schwartz v Metropolitan Prop. & Cas. Inc. Co.*, 04-CV-4614 (ADS)(JO), E.D.N.Y. (Oct. 17, 2005), Magistrate Judge Orenstein entered a Scheduling Order requiring all parties to complete discovery in nine months. The Order also provided that "no request for an extension of the discovery deadline submitted less than 30 days before the scheduled close of discovery will be granted absent extraordinary circumstances." Three days before the discovery cut-off date, plaintiffs wrote to the Court requesting a 30-day extension of the cut-off date. The request was sent by fax and four days later, filed electronically.

Magistrate Judge Orenstein denied the request, on the grounds that the letter violated the Case Management and Scheduling Order (request was made less than 30 days), and the Court's Administrative Order 2004-08 (requiring requests to be filed electronically).

Plaintiffs filed objections with Judge Spatt, who found that (i) there was no dispute that the Court's Case Management and Scheduling Order was violated; (ii) no argument made that the Order was clearly erroneous or contrary to law (the applicable standard of review); and (iii) no showing of "extraordinary" circumstances were made. Accordingly, the objections were denied, and the Order confirmed.

In *Albani v Maffucci Storage Corp.*, No. CV 03-3897(JO) (E.D.N.Y. Sept. 23, 2005), Magistrate Judge James Orenstein considered cross-motions for summary judgment in an action brought against storage and moving corporations for damage suffered to plaintiffs' belongings during storage. Plaintiffs hired the Bekins Company and Maffucci Storage Corporation to move their belongings from New York City to a storage facility located in North Amityville, only to be delivered months later to Florida. During storage, the facility was damaged by fire, and plaintiffs' belongings were destroyed. Plaintiffs' sued both the storage and moving companies, and all parties moved and cross-moved for summary judgment.

As to the plaintiffs' motion, the Court found material issues of fact precluding summary judgment in their favor. Specifically, whether the defendants were grossly negligent by permitting or causing the fire to occur and whether the defendants failed to provide plaintiffs with an opportunity to insure their goods for a higher amount were ripe with factual issues. Turning to defendants' cross-motions, the Court held that as to the storage company, whether the plaintiffs were bound by the written liability limitation turned on disputed issues of material fact as to whether the documentary evidence fully reflected the parties' agreement. As to the transport company, the Court rejected plaintiffs' attempt to hold it liable on theories of agency, joint venture and violation of the Federal Carmack Amendment, 49 U.S.C. §14706 (regulating rights and responsibilities of interstate carriers). Accordingly, the Court granted Bekins' motion for summary judgment.

In *Deprola v Doe*, No. 04-CV-1379 (DRH) (JO) E.D.N.Y. (Oct. 7, 2005), Judge Hurley adopted the Report and Recommendation of Magistrate Judge James Orenstein and dismissed the action brought pursuant to 42 U.S.C. § 1983. Plaintiff commenced the action while incarcerated. During a telephone status conference, plaintiff advised the Court that he would be released from prison on March 30, 2005, and requested further correspondence be sent to his home address. Subsequently, a scheduling order was served on the plaintiff. Plaintiff did not appear for a status conference on July 8, 2005, at which time the Court directed that if the plaintiff remained out of contact and failed to attend the next scheduled conference, the Court would consider recommending dismissal of the case for failure to prosecute. Defendants thereafter served copies of the July 8, 2005 Scheduling Order on plaintiffs' last known addresses, receiving no response. On September 9, 2005, plaintiff again failed to appear for a status conference. Magistrate Judge Orenstein held that plaintiffs' "complete neglect" to pursue his claim would cause prejudice to defendants and needlessly burden the Court. The Court noted that defendants had been unable to contact plaintiff for 4 months and, therefore, dismissed plaintiff's claims, with prejudice, for failure to prosecute pursuant to Fed. R. Civ. p. 41(b).

Note: The author is a Member of Farrell Fritz, P.C., and a member of that firm's Commercial Litigation Practice Group.