

# FEDERAL PRACTICE UPDATE

By James M. Wicks\*

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 denied a motion to dismiss a securities fraud case. Next, we consider a decision by the Honorable Sandra Feuerstein dismissing Section 1983 claims against a village. Finally, we review a decision by the Honorable Leonard D. Wexler, granting plaintiffs' motion to remand the matter to state court under 28 U.S.C.S. § 1447(c).

In *S.E.C. v. Apolant*, 04-CV-04199 (ADS)(ETB) (E.D.N.Y. Jan. 31, 2006), Judge Spatt vacated defendant's default in answering, but denied defendant's motion to dismiss the amended complaint. The S.E.C. originally brought this securities fraud action against four individuals, including defendant Stephen Apolant, seeking an injunction, disgorgement of unlawful profits and civil penalties for their violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5.

S.E.C.'s amended complaint alleged that Apolant aided or abetted a fraudulent scheme to manipulate the price of the stock of Spectrum Brands, by posting information on their website and writing press releases that misidentified the corporate address and the corporate officers, and did not mention

that the company was run by convicted felons. Spectrum Brands marketed a product called "DeGERMinator," devised to exploit fears of bio-terrorism following the September 11, 2001 attacks.

Defendant moved to dismiss the Complaint. In response, the S.E.C. filed an amended complaint. Defendant did not answer the amended complaint, but instead filed a reply brief, arguing that the amended complaint failed to cure any defects raised by his original motion to dismiss. Although this technically placed him in default for failing to properly respond to plaintiff's amended complaint, Judge Spatt vacated the default because defendant timely filed a reply to the motion and had continued to expeditiously defend the action.

The court found that the amended complaint sufficiently alleged the elements of an aiding and abetting violation. Accordingly, defendant's motion to dismiss the amended complaint was denied.

In *Muzio v. Inc. Vill. Of Bayville*, CV-99-8605 (SJF) (E.D.N.Y. Jan. 3, 2006), District Judge Feuerstein granted defendants' motion to the extent of dismissing the Section 1983, defamation and punitive damages claims in their entirety as against the Village. Plaintiffs John and Theresa Muzio commenced this civil rights action against defendants Incorporated Village of



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Bayville and various officials of the Village alleging violations of 42 U.S.C. §§ 1983, 1985 and 1986, and state law claims for negligence, malicious prosecution, abuse of process, and false arrest after the Village issued ordinance violations and a trial was commenced in connection with plaintiff's unlawful maintenance of a "large container" or stockade in front of their property. Defendants moved to

FRCP 37 for dismissal of the complaint for plaintiffs' failure to comply with discovery orders or, in the alternative, pursuant to FRCP 56 for summary judgment.

Judge Feuerstein dismissed plaintiffs' Section 1983, conspiracy and selective enforcement claims as against the Village and the individual defendants in their official capacities. Moreover, Feuerstein held that plaintiffs' allegations failed to state a valid claim for defamation under New York law and therefore dismissed the claims in their entirety. Finally, punitive damages are not recoverable in a Section 1983 action against a municipality; the Court accordingly dismissed plaintiffs' claims for punitive damages against the Village.

As to defendants' motion under FRCP 37, the Court held that the drastic remedy of dismissal was not appropriate under the circumstances, and therefore denied that part of defendants' motion.

In *Novick v. Bankers Life Ins. Co. of N.Y.*, CV-05-3085 (E.D.N.Y. Jan. 9, 2006), District Judge Wexler granted plaintiffs' motion to remand the matter to state court under 28 U.S.C.S. § 1447(c). Plaintiffs originally filed the action in Nassau County Supreme Court against defendants, an insurance company, a financial services company and agent, and an accounting firm. The insurance company removed the matter to federal court, asserting that the claims fell within the Employee Retirement Income Security Act ("ERISA"). Plaintiffs then moved to remand to state court.

The Court agreed with the plaintiffs that remand was appropriate because not all of the defendants filed timely written consents to join in the removal within the 30-day period provided by 28 U.S.C.S. § 1446(b). Although the removing defendant indicated to the Court that the two other defendants had verbally consented to the notice of removal, one of the other defendants never filed a written consent within the 30-day period. The fact that the third defendant indicated consent through affidavits after the 30-day period had run was not sufficient to satisfy the express statutory requirement of consent. Therefore, the Court granted plaintiffs' motion to remand the matter to state court.

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