

## FEDERAL PRACTICE UPDATE

## Four Decisions From the Eastern District

By James M. Wicks

This month we review four decisions rendered by the Judges of the Eastern District of New York, Alfonso D'Amato Courthouse. First we consider a decision by the Hon. Joseph F. Bianco dismissing a complaint alleging violations of the Americans with Disabilities Act without prejudice. Next, we consider a decision by the Hon. Leonard D. Wexler to dismiss claims conditioned upon the plaintiff filing these same claims as counterclaims in a related Pennsylvania action. We then review a decision by the Hon. Denis R. Hurley dismissing a motion for jury demand. Finally, we review another decision by the Hon. Leonard D. Wexler adopting a Report and Recommendation granting a motion to add a party and fraud claim, and denying a motion to add an alter ego liability claim.

In *Wendell v. New York*, 06-CV-4941 (E.D.N.Y. May 4, 2007), the District Court considered plaintiff's claim that a New York State statute regarding special license plates for disabled persons violates her rights under the Americans with Disabilities Act ("ADA"). Wendell obtained handicapped license plates from the DMV for one car, but was subsequently denied another set for a second car. Under New York Vehicle and Traffic Law § 404-a, a severely disabled person is only permitted one set of identification plates for a motor vehicle. Wendell asserted that the statute was facially invalid because it denied her the benefit of using public highways and other motor vehicle facilities, in violation of the ADA. Plaintiff's claim failed because § 404-a, on its face, does not limit a disabled driver's ability to use public roadways or own multiple vehicles. Furthermore, under New York Vehicle and Traffic Law § 1203-a, a disabled driver may obtain a handicap "hang-tag" in a vehicle without special plates.

Nevertheless, defendant's motion to dismiss the complaint was granted without prejudice. At oral argument, plaintiff's counsel stated that disabled drivers lose out on certain benefits when they are denied multiple special plates, including exemptions from New York City traffic tickets and priority by tow-truck operators assisting vehicles on public roadways. These alleged disparities were not enunciated in the complaint; only a facial challenge to § 404-a was presented. Defendants argued that permitting plaintiff's amendment would be futile, first because the named defendants bear no liability for any alleged actions of New York City police officers, and second because benefits conferred by third-parties cannot form the basis of an ADA claim against the State. The Court was unable to resolve this futility issue, however, until plaintiff stated what benefits were denied and by whom. Therefore, plaintiff's complaint was dismissed without prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, allowing thirty days to amend the complaint.

In *Puffin Company, LLC v. Kvitka*, CV-06-3579 (E.D.N.Y. April 19, 2007), plaintiff brought an action against defendants asserting claims for breach of the covenant of good faith and fair dealing, interference with business relations, fraud, indemnification, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Defendants moved to dismiss the complaint, or, in the alternative, to

transfer the action to the United States District Court for the Middle District of Pennsylvania.

Defendants asserted that plaintiff's complaint arose from the same transaction or occurrence that produced claims asserted by defendants Nikki Kvitka and Nikel Enterprises, Inc. against the plaintiff in the Middle District of Pennsylvania (the "Pennsylvania Action") approximately two months prior to this case (the "New York Action"). (Defendants removed the action to the District Court.) As a result, defendants contended that plaintiff's claims in the New York Action were unasserted compulsory counterclaims in the Pennsylvania Action according to Rule 13(a) of the Federal Rules of Civil Procedure. Because plaintiff failed to assert its compulsory counterclaims, the New York Action should be dismissed absent a showing of a balance of convenience or special circumstances.

The District Court agreed with the defendants that plaintiff's claims in the New York Action were compulsory counterclaims in the Pennsylvania Action because there was a sufficient "logical relationship" between defendants' claims in the Pennsylvania Action and plaintiff's claims in the New York Action, and the essential facts were sufficiently "logically connected" that judicial economy and fairness considerations dictated the issues be resolved in one action. See *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). Furthermore, the claims in both cases arose from the same contractual relationship between plaintiff and defendant and events related to its termination.

When this determination is made, the Court has the opportunity to stay or dismiss the action depending upon a showing of a balance of convenience or special circumstances giving priority to one action. Common factors include: (1) the convenience of the witnesses; (2) the location of the relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on a totality of the circumstances. See *J. Lyons & Co. v. Republic of Tea, Inc.*, 892 F.Supp. 486, 492 (S.D.N.Y. 1995). Weighing these factors, the Court concluded that there was no justification to grant priority to the New York Action. Factors 1 through 5 and 7 did not significantly favor one action over the other. Factor 6 did not favor one action because the relative means of the parties was not presented in the record. While factor 8 held substantial weight, it was offset by factor 9 because the interests of trial efficiency and justice weighed toward combining the actions in the forum where the first action was filed.

Given the connections between both actions' allegations, the Court concluded combining the actions in one forum would significantly promote the interests of justice and judicial economy. Therefore, the Court granted the defendants' motion to dismiss the New York Action with the condition that plaintiff was permitted to file its claims as counterclaims in the Pennsylvania Action.

In *Shambreskis v. Bridgeport and Port Jefferson Steamboat Company*, 02-CV-2692 (E.D.N.Y. May 16, 2007), defendant's

motion to strike plaintiff's jury demand was granted. Plaintiff, represented by counsel at the time the action commenced, did not state in either the summons or complaint a jury demand. The civil cover sheet, however, did indicate that a jury was demanded. This civil cover sheet was not served with the summons or complaint on the defendant. Similarly, the answer did not contain a jury demand. During the preparation of the pre-trial order, plaintiff, in its input to the pre-trial order, demanded a jury and subsequently filed the appropriate motion.

A timely jury demand is made by serving on the other party a written demand after the commencement of the action and no later than ten days after the service of the last pleading directed at such issue. Fed.R.Civ.P. 38. Plaintiff argued that the civil cover sheet containing the jury demand was sufficient to satisfy this rule. The Court disagreed, citing a Second Circuit case stating a *timely served* civil cover sheet can constitute a proper jury trial demand. See *Favor v. Coughlin*, 877 F.2d 219 (2d Cir. 1989). Nevertheless, the Court still considered whether to allow the plaintiff's jury demand pursuant to Federal Rules of Civil Procedure 39(b) or 6(b). Under Rule 39(b), a district court may grant a late jury request. Because the inadvertence to timely file a demand was attributable to plaintiff's counsel at the time, the Court considered three criteria under a 39(b) application: (1) whether the issue in the case is one traditionally triable by jury; (2) whether the parties were operating on the assumption that the trial would be a bench trial; and (3) whether the party opposing the jury demand would be unduly prejudiced if the court permitted a jury trial. See *Cassone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 390 (2d Cir. 1983). Ultimately, the Court held that the third factor significantly tipped the scale in favor of the defendant because the defendant had engaged in four and one half years of litigation planning based on the understanding that the case would be heard as a bench trial. Plaintiff did not articulate any prejudice he would suffer if the matter was tried by the Court, nor was the Court able to foresee any injury.

Under Rule 6(b), a Court may permit an untimely act overlooked as the result of excusable neglect. Following the guidance of the *Raymond* Court, the District Court considered the prejudice to the opposing party, the reason for the delay, its duration, and whether the movant acted in good faith. *Raymond v. IBM Corp.*, 148 F.3d 63 (2d Cir. 1998). While the plaintiff in this case acted in good faith, the Court ultimately decided to deny plaintiff an extension given the considerable delay in serving the jury demand and the extensive prejudice suffered by the defendant as a result of the delay.

In the last case we review, *Ross Products Division Abbott Laboratories, Inc. v. Saper*, CV-06-3264 (E.D.N.Y. April 26, 2007), the District Court adopted a Report and Recommendation from the assigned Magistrate Judge, Michael L. Orenstein, stating that the plaintiff's motion to add Goodfellow, Inc. as a party defendant be granted, that plaintiff's application for leave to add a fraud claim against defendant Saper and Goodfellow, Inc. be granted in part and denied in part, and that plaintiff's motion to amend the complaint to add a claim of alter ego liability against Saper be denied.

Plaintiff originally alleged breach of contract and unjust enrichment against Saper

over a nutritional supplement sale contract. It was only from defendant's answer and initial disclosure pursuant to Federal Rule of Civil Procedure

26(a)(1) that plaintiff learned that Saper was acting as a representative of Goodfellow, Inc. and not as Raymond Saper. Plaintiff then made a timely motion to grant leave to serve and file an amended summons and complaint. Defendants opposed the motion, arguing that plaintiff unduly delayed in its submission, since plaintiff allegedly knew of Goodfellow, Inc., and the allegations were vague, failing to state a claim.

Leave to file an amended complaint is freely given when justice so requires. Fed. R. Civ. P. 15(a). Only when there is a showing of undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility should leave to amend be denied. *Foman v. Davis*, 371 U.S. 178 (1962). The Court found that the addition of Goodfellow, Inc. did not show undue prejudice, delay or bad faith. Instead, the claims involving the additional defendant were related closely to the issues already in the pleadings, arose from the same facts and circumstances, and clarify and/or correct formalities involved in the matter.

The Court also found that plaintiff's motion to add a claim for fraud sufficiently complied with Federal Rule of Civil Procedure Rule 9(b)'s requirement of particularity. Regardless, plaintiff's amendments were limited by the Court. A plaintiff cannot maintain a claim for fraud when the only fraud charged relates to a breach of contract, or where the claim is duplicative or inextricably related to a breach of contract claim. *Dooley v. Metropolitan Jewish Health Sys.*, 2003 WL 22171876 (E.D.N.Y. July 30, 2003). Because the first three claims in plaintiff's complaint corresponded to the proposed fraud claim and sought the same amount of damages, the motion was denied. To the extent that plaintiff's proposed fraud claim was based on misrepresentations that plaintiff claimed Saper and Goodfellow, Inc. made with knowledge of their falsity and with specific intent to mislead the plaintiff into entering the contract, the Court granted plaintiff's motion.

Lastly, the Court denied the plaintiff's motion to add a claim of fraud under the alter ego theory and doctrine of piercing the corporate veil. A party must show complete domination of the corporation related to the transaction of interest and that such domination was used to commit a fraud or wrong against the plaintiff which caused injury. *Matter of Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807 (1993). Here, the plaintiff's allegations did not establish that Saper's domination of Goodfellow, Inc. was the means by which a wrong was done to the plaintiff. Accordingly, the Court denied plaintiff's motion.

*Note: The author is a member of Farrell Fritz, P.C., and a member of the firm's Commercial Litigation Practice group. The author expresses his gratitude to Jennifer C. White, a Summer Associate at Farrell Fritz, for her assistance in the preparation of this article.*



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