

Federal Practice Roundup

Four decisions from the Eastern District

By James M. Wicks

This month we review four decisions rendered by the Judges and Magistrate Judges of the Eastern District of New York, Alfonse D'Amato Courthouse. First, we consider a decision by the Hon. Joseph F. Bianco, granting defendant's motions to dismiss and dismissing the civil rights complaint against the N.Y.S. Department of Taxation and Finance. Next, we consider a decision by the Hon. Joanna Seybert, adopting in its entirety, the Report and Recommendation of the Hon. William D. Wall, granting judgment to plaintiffs based upon a default. We then review a decision by the Hon. Denis R. Hurley, also granting a motion for a default and striking defendant's counterclaims. Finally, we review a Report and Recommendation of the Hon. Gary R. Brown, recommending dismissal of the complaint, but offering plaintiff the opportunity to file an amended complaint.

In *Temple v. N.Y.S. Dep't of Taxation & Finance*, 11-CV-0759 (JFB) (ETB) (E.D.N.Y. Feb. 15, 2012), the defendants moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiff's claims under 42 U.S.C. § 1983 and for a declaratory judgment. Plaintiff sued the N.Y.S. Department of Taxation for withdrawing funds from his bank account to satisfy past due child support, claiming the levy was invalid. The defendants moved to dismiss, arguing, (1) Eleventh Amendment immunity, (2) plaintiff lacked standing, (3) *Rooker-Feldman* doctrine, (4) failure to state a claim, and (5) plaintiff had adequate post-deprivation remedies.

The court concluded that the Department of Taxation was entitled to immunity under the Eleventh Amendment, which bars federal claims against the states. Furthermore, since the complaint against the individual was in his official capacity, he too was entitled to immunity. The court also

considered whether, applying the four prongs of the *Rooker-Feldman* doctrine, the suit was jurisdictionally barred. This doctrine – which holds that the U.S. District Courts lack subject matter jurisdiction to review final judgments of a state court in judicial proceedings – applied to this case, according to Judge Bianco. The court also granted the motion to dismiss for failure to state a claim, without granting leave to replead. Although ordinarily the court would

be inclined to afford a party, particularly pro se, leave to replead, Judge Bianco concluded that under the circumstances presented, "it is abundantly clear that no amendments can cure these (and other) defects in this case."

In *Sheet Metal Workers' Nat'l Pension Fund v. Nifenecker*, 11-CV-1239(JS) (WDW) (E.D.N.Y. Feb. 17, 2012), plaintiff pension fund brought an action seeking delinquent contributions allegedly owed under a collective bargaining agreement. Plaintiffs moved for a default judgment and, on the Report and Recommendation of Magistrate Judge William D. Wall, Judge Joanna Seybert adopted the Report in its entirety, concluding that it was "thorough, well-reasoned, and free of clear error."

In his Report, Magistrate Judge Wall easily disposed with entry of default on liability, since no answer was ever filed.

Turning to the damages, the court was guided by the rule that a default constitutes an admission of everything in the complaint, except as to damages. The movant for a default must nevertheless prove that the damages naturally flowed from the injuries pleaded. The court determined that an evidentiary hearing was not required, since defen-



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dant did not contest the evidence of damages submitted by plaintiff.

After reviewing the submissions, Magistrate Judge Wall found first that the individual defendant was an "ERISA fiduciary" individually liable under ERISA. Next, the court considered the proof submitted on the delinquent amounts, liquidated damages, interest and attorneys' fees, and awarded the full amounts sought.

In *Next Proteins, Inc. v. Distinct Beverages, Inc.*, 09-CV-4534 (DRH) (ETB) (E.D.N.Y. Feb. 1, 2012), District Judge Hurley was faced with an unusual motion for a default and to strike the counterclaims asserted by the corporate defendants. The action arose out of defendants' alleged patent infringement through defendants' manufacture and sale of a protein drink known as "Protegy." Early on, all four defendants, then represented by counsel, filed a timely answer and asserted counterclaims for tortious interference and declaratory judgment. Since then, counsel for defendants has withdrawn from representation on application as granted by the court. After counsel withdrew, the court had afforded the corporate defendants numerous deadlines and extensions to obtain new counsel. They never did secure new counsel.

Plaintiff thereafter moved for a default judgment against the corporations under Fed. R. Civ. P. 55 for failure to appear by counsel. Finding that over seven months elapsed without counsel for defendants appearing, the court granted plaintiff's motion for a default against the corporate defendants. Since the court granted the default, the motion to strike the answer and counterclaims of the corporate defendants

was also granted.

In the last case we review, *Parrino v. SunGard Availability Servs. LP*, 11-CV-3315 (JFB) (GRB) (E.D.N.Y. Feb. 16, 2012), Magistrate Judge Gary R. Brown considered defendant's motion to dismiss a defamation action on referral from District Judge Bianco. Specifically, plaintiff, appearing pro se, alleged that his former employer, SunGard Availability Services LP ("SunGard"), defamed and damaged his reputation by providing plaintiff's personnel file to third parties in response to a trial subpoena served on SunGard. The trial subpoena was served by a defendant in an unrelated action brought by plaintiff. The personnel file contained, among other items, an allegedly negative performance report.

In reviewing the complaint, Magistrate Judge Brown concluded that since plaintiff failed to allege specifically the defamatory words, the defamation claim was defective. In addition, since SunGard acted in compliance with a lawfully issued subpoena, there is an absolute privilege conferred upon the publication of the personnel file. The court also found that the "common interest privilege" applies, namely, that communications between a supervisor and co-workers mad in connection with performance reviews, are subject to a qualified privilege. The only issue that remained unanswered by SunGard, however, was plaintiff's claim that the performance review report was "falsely created." As such, Magistrate Judge Brown recommended dismissal of the complaint, with leave to replead.

Note: James M. Wicks is a partner at Farrell Fritz, P.C. concentrating in business and commercial litigation. He is a frequent contributor to the firm's New York Commercial Division Case Compendium blog. Mr. Wicks has an AV Preeminent Martindale-Hubbell Peer Review Rating.