New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.law.com/ny
VOLUME 227—NO. 108 THURSDAY, JUNE 6, 2002

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY MICHAEL C. SILBERBERG AND EDWARD M. SPIRO

Recent Cases: Attorney Disqualification, 'Rooker-Feldman'

Among the decisions handed down in March and April in the United States District Court for the Southern District of New York were decisions by Judge William H. Pauley III and Judge Whitman Knapp on issues of attorney disqualification.

Judge Victor Marrero filed a decision dismissing federal claims, including under the Americans with Disabilities Act, applying the Rooker-Feldman doctrine and holding that the claims were barred by a prior state court judgment, and Magistrate Judge Frank Maas granted a stay pending appeal without requiring a full supersedeas bond. In other cases, Judge Laura Taylor Swain sanctioned plaintiff and her attorney because their lawsuit was both frivolous and motivated by improper purpose, and Judge Lawrence M. McKenna remanded an action to state court rejecting the assertion that non-diverse parties had been fraudulently joined.

Disqualification

In December 2001, we reported on a decision by Judge Casey in Crudele v. New York City Police Department, et al., 2001 WL 1033539 (Sept. 7, 2001), discussing the considerable obstacles a small law firm will encounter in adequately screening attorneys from cases which would otherwise require the firm's disqualification. This past month, Judge Pauley filed a decision in Mitchell v. Metropolitan Life Ins. Co., Inc.,[1] which emphasizes that law firms in the present environment of increased mobility of both associates and partners must anticipate and be sensitive to this issue.


Michael C. Silberberg *Edward M. Spiro*

In Mitchell, Judge Pauley granted defendant MetLife's motion to disqualify a law firm representing plaintiffs in that employment discrimination class action, because an attorney at that law firm had previously represented MetLife while employed at another firm. He accepted.

MetLife's contention that the attorney, who had billed thousands of hours on more than 50 matters for MetLife before joining the plaintiffs' firm, had become intimately familiar with confidential MetLife policies and information. Judge Pauley reasoned that while the matters on which she had represented MetLife were not directly related to the discrimination claims at issue in the present litigation, the knowledge she gained during that representation, under the cloak of the attorney-client privilege, was substantially related to material issues in dispute in that case.

Judge Pauley went on to hold that the attorney's personal conflict of interest tainted her entire firm under DR 5-105(D), rejecting the argument that she had been effectively screened from the attorneys representing the plaintiffs. He noted that in general, the Second Circuit has been skeptical of screening as a remedy for conflicts of interest, and that such procedures have been accepted only in the limited circumstances where the conflicted attorney does not possess information likely to be material to the current litigation and has no contact with those conducting the litigation. Judge Pauley observed that this latter requirement typically can be met only in a large firm setting, citing cases where screening was found effective in large firms, see In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270 (S.D.N.Y. 1994)(Conner, J.)(400-lawyer firm); Solow v. W.R. Grace & Co., 610 N.Y.S.2d 128 (1994)(350-lawyer firm) and those where it was not sufficient when attempted by smaller firms. See, e.g., Decora Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132 (S.D.N.Y. 1995)(Koeltl, J.)(44 lawyers); Yaretsky v. Blum, 525 F. Supp. 24 (S.D.N.Y. 1981)(Motley, J.).

In this case, the conflicted attorney was working in the 12-lawyer New York office of a 54-lawyer firm. Two of the plaintiffs' attorneys also worked in the New York office,

Michael C. Silberberg *and* **Edward M. Spiro** *are principals of Morvillo, Abramowitz, Grand, Iason & Silberberg PC, concentrating in commercial litigation. Mr. Silberberg is the author of* Civil Practice in the Southern District of New York, *2d Ed. (West Group 2001).* **Judith L. Mogul** *assisted in the preparation of this article.*

and one of them worked directly with the conflicted attorney on other matters. Judge Pauley found that the attorney's proximity to the plaintiffs' lawyers presented a "continuing danger that [she might] inadvertently transmit information gained through her prior representation of MetLife." He found that the efficacy of the proposed screening procedures was further undercut by the fact that they were not formally implemented until two months after the attorney had joined the firm.

Judge Knapp denied disqualification in the second case, Russell-Stanley Holdings, Inc. v. Buonanno.[2] The underlying dispute between the parties concerned a purchase agreement under which the plaintiff had acquired the defendant's company. Defendant was represented in the litigation by the same law firm that had represented him and his company in connection with the sale. The firm had also rendered legal advice to the company after its acquisition by the plaintiff, although at all times plaintiff had maintained separate legal representation. Plaintiff sought to disqualify the law firm, asserting that by virtue of its representation of the company after it became plaintiff's subsidiary, the firm was privy to confidential information directly related to the subject matter of the case.

Quoting from Allegaert v. Perot, 565 F. 2d 246 (2d Cir. 1977), Judge Knapp stressed that a threshold requirement for disqualification is that the "attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client." Here, the law firm's representation of the acquired company was directed and paid for by the defendant pursuant to an indemnification clause in the purchase agreement. As such, Judge Knapp found that the plaintiff could not reasonably have thought that any attorney-client information regarding the company would have been withheld from the defendant. Citing Kempner v. Oppenheimer & Co., 662 F. Supp. 1271 (S.D.N.Y. 1987), (Kram, J.) he denied disqualification, noting that in contrast to the typical disqualification situation, here it was the client, and not the attorney, who had changed sides.

Judge Marrero dismissed the complaint in Harris v. New York State Dept. of Health,[3] on the grounds that the plaintiff's claims, challenging the state's revocation of his medical license, were barred by the Rooker-Feldman doctrine precluding appellate review of state court decisions in the lower federal courts.

The New York State Board for Professional Medical Conduct (BPMC) revoked plaintiff's medical license based in part on its finding that plaintiff had made false statements in various submissions to hospitals at which he practiced. Those findings followed a hearing at which plaintiff had asserted that he suffered from a learning disability and attention deficit disorder which caused him to misunderstand the forms on which he had provided false information. The BPMC rejected that explanation as "implausible." After an Administrative Review Board upheld the BPMC's determination, plaintiff commenced an Article 78 proceeding, seeking judicial review in New York State court. In ruling against him, the Appellate Division found "unavailing" plaintiff's argument that his false statements could be attributed to and excused by his learning disabilities, noting that the "administrative finder of fact is 'free to reject [a] plaintiff's explanations' or excuses." Plaintiff did not appeal the state court decision unanimously upholding the revocation of his license. Instead, he commenced an action in federal court claiming that the State's failure to acknowledge and accommodate his learning disabilities violated the Americans with Disabilities Act and the Rehabilitation Act, deprived him due process of law, and denied him federal rights protected under 42 U.S.C. § 1983.

"'Rooker-Feldman': '[T]he forum for appellate review of state decisions [on] federal law is the Supreme Court.'"

Judge Marrero dismissed those claims in a lengthy decision exploring the relationship between the Rooker-Feldman doctrine and res judicata and collateral estoppel. He noted that Rooker-Feldman, named for Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia v. Feldman, 460 U.S. 462 (1983), stands for the proposition that "the exclusive forum for appellate review of state court decisions construing federal law is the Supreme Court," and is jurisdictional in nature. He concluded that plaintiff's complaint was barred by Rooker-Feldman, reasoning that the remedies sought by plaintiff (including restoration of his license) went to the crux of the state court judgment and amounted to a request for appellate review of that decision. He further noted that because plaintiff's argument based on his disability was considered and rejected by the administrative finders of fact in decisions upheld by the state court, plaintiff's contention that the state violated federal disabilities laws implicated "the essence of the issue adjudicated by the state court," and was thus inextricably intertwined with the merits of that proceeding. Finally, Judge Marrero held that because plaintiff's federal claims were necessarily decided by the state court, he was precluded from relitigating them in federal court under both Rooker-Feldman and the doctrines of res judicata and collateral estoppel.

Pending Appeal

In response to post-trial motions following a jury verdict in excess of $1.6 million in Palazzetti Import/Export, Inc. v. Morson, et ano.,[4] Judge Maas granted the defendants a stay pending appeal pursuant to Fed. R. Civ. P. 62(d). Although that Rule provides for the posting of a supersedeas bond, Judge Maas noted that the court may grant a stay without requiring a bond, or conditioned on only a partial bond, upon a showing of "specific reasons why the court should 'depart from the usual requirement of a full security supersedeas bond to suspend the operation of an unconditional money judgment.'" Id.,

quoting Teachers Ins. & Annuity Ass'n, No. 87 Civ. 1259,1991 WL 254573 (S.D.N.Y. Nov. 21, 1991)(Wood, J.)(internal quotations omitted).

Here, Judge Maas found that the defendants had made an adequate showing that enforcement of the judgment might force them into bankruptcy and that their bank was unwilling to issue a letter of credit necessary to obtain a bond. He concluded that "the only way to maintain the status quo would be to dispense with the requirement that the judgment be fully bonded." The plaintiff, however, had presented evidence suggesting that the defendants might be secreting assets, which Judge Maas acknowledged would "raise[] the spectre that a stay … might render [its] recovery, if any, a Pyrrhic victory." Accordingly, to afford the plaintiff a reasonable degree of protection, he granted the stay pending appeal conditioned on defendants' posting a 20 percent bond, and their agreement to make no transfers except in the ordinary course of business and to place their profits in an escrow account to be applied toward the judgment if affirmed. Judge Maas further ordered that the defendants permit the plaintiff to audit the defendants' books and records and that the defendants cooperate fully with the plaintiff's efforts to undertake asset discovery.

Rule 11 Sanctions

In a decision filed in Lipen v. National Union Fire Ins. Co., et al.,[5] Judge Swain imposed sanctions pursuant to Rule 11 on the plaintiff and her attorney for presenting frivolous claims and conducting that litigation for an improper purpose. Plaintiff's original employment suit was brought in state court, and was dismissed as a sanction for conduct that included the plaintiff and her attorney taking and photocopying privileged documents belonging to the defendants. She then initiated two federal court actions alleging similar claims as well as a claim that the defendants had conspired to entrap plaintiff and her attorney into taking the privileged documents. Both of those cases were also dismissed. The action before Judge Swain was the fourth suit arising out of the plaintiff's disputes with defendants.

Judge Swain dismissed that action on multiple grounds, including that it was barred by the Rooker-Feldman doctrine, collateral estoppel and res judicata. She also sanctioned plaintiff and her attorney $1,000 each pursuant to Rule 11. She held that both the plaintiff and her attorney should be sanctioned under Rule 11(b)(1) because the complaint and accompanying papers were filed for the improper purpose of harassing defendants and causing unnecessary delay. Judge Swain found that plaintiff was on notice that her claims were precluded by virtue of the decisions dismissing her prior claims, and that an apparent motive for commencing this action was to disrupt and delay state disciplinary proceedings against plaintiff's attorney. She concluded that sanctions were also appropriate against plaintiff's attorney under Rule 11(b)(2) for presenting papers to the court that were legally unsupported. Quoting from Pentagen Technologies Int'l Ltd. v. United States, 172 F. Supp. 2d 464 (S.D.N.Y. 2001)(Sprizzo, J.), she concluded that in pursuing those claims, and seeking to "contravene the explicit findings of prior litigation without any meritorious arguments to extend the law, [the attorney] went far beyond the standard of objective reasonableness" and sanctions were therefore warranted.

In a decision filed in Arseneault v. Congoleum Corp., et al.,[6] Judge McKenna remanded that asbestos products liability action to state court. He rejected the removing defendants' arguments that the court had diversity jurisdiction because the two non-diverse defendants were fraudulently joined. Under Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459 (2d Cir. 1998), a defendant may show fraudulent joinder by clear and convincing evidence that either (1) there was outright fraud in the pleadings, or (2) "that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." Because the Second Circuit permits reference to matters outside the pleadings in considering jurisdictional issues, Judge McKenna held that reference to deposition testimony would be appropriate, bearing in mind that the burden of proof remained at all times with the defendants.

The defendants sought to establish that there was no factual basis for plaintiff's claims against the two non-diverse defendant asbestos companies through the absence of deposition testimony showing that plaintiff had ever worked at a site where asbestos from those two companies was present. Noting that the strength of plaintiff's case was not the relevant inquiry, Judge McKenna concluded that the defendants had not met their burden of showing fraudulent joinder by clear and convincing evidence. Specifically, he found that it was undisputed that the two non-diverse defendants were responsible for asbestos at work sites in the area in which the plaintiff had worked and that the absence of testimony placing him at one of those sites did not demonstrate that he was unaffected by those products. Judge McKenna adhered to his decision to remand on a subsequent motion for reconsideration,[7] noting that he shared the doubt, expressed by the court in Vasura v. ACandS, 84 F. Supp. 2d 531 (S.D.N.Y. 2000)(Haight, J.) "that a remand motion should be granted on the basis of what a state court plaintiff did not testify to in depositions."

(1) No. 01 Civ. 2112, 2002 WL 441194 (March 21, 2002).

(2) No. 01 Civ. 8218 (April 23, 2002).

(3) No. 01 Civ. 3343, 2002 WL 726659 (April 24, 2002).

(4) No. 98 Civ. 722, 2002 WL 562654 (April 16, 2002).

(5) No. 00 Civ. 3457, 2002 WL 475110 (March 28, 2002).

(6) No. 01 Civ. 10657, 2002 WL 472256 (March 26, 2002).

(7) No. 01 Civ. 10657, 2002 WL 531006 (April 8, 2002).

This article is reprinted with permission from the June 6, 2002 edition of the NEW YORK LAW JOURNAL. © 2002 NLP IP Company. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-11-02-0029