New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.law.com/ny
VOLUME 228—NO. 26 THURSDAY, AUGUST 8, 2002

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Private Civil RICO Plaintiffs May Seek Injunctive Relief

Among the decisions handed down in May and June in the United States District Court for the Southern District of New York were a decision by Judge Jed S. Rakoff holding that private civil RICO plaintiffs may seek injunctive relief and two decisions by Judge Lewis A. Kaplan addressing the question of when an injury caused by an out-of-state defendant will be considered an injury within New York for purposes of long-arm jurisdiction.

In other cases, Judge John F. Keenan imposed sanctions against a party for pre-litigation destruction of documents and Judge Shira A. Scheindlin again rejected claims that she should recuse herself based on her stock holdings in companies involved in the class action litigation pending before her. Finally, Judge Whitman Knapp held that there was a mandatory one-year limitations period for commencing an action for summary confirmation of an arbitration award under 9 USC §9.

Injunctive Relief

Among the issues the Supreme Court is expected to decide next term is whether the RICO statute authorizes injunctive remedies for private civil plaintiffs. The court recently granted certiorari in Scheidler v. Nat'l Org. for Women, Inc., 122 SCt 1604 (2002) to resolve a split created by the Seventh Circuit's decision in that case, 267 F3d 687 (7th Cir. 2001), holding that injunctive relief was available, and the Ninth Circuit's holding in Religious Technology Center v. Wollersheim, 796 F2d 1076 (9th Cir. 1986) that the statute did not authorize injunctive relief for private plaintiffs. After noting that he would gladly avoid deciding this question on which the Second Circuit had not definitively ruled, Judge Rakoff found that the question was squarely presented in Motorola Credit Corp., et ano. v. Uzan, et al.,[1] and that he was compelled to address it. He concluded that private civil RICO plaintiffs are entitled to seek injunctive relief. Rather than relying on the statutory language, as had the court in Scheidler, or the legislative history upon which the Wollersheim decision was based, Judge Rakoff looked primarily to traditional principles of equity which he found supported a federal court's right to grant equity relief. He reasoned that "[i]t would be extraordinary indeed if Congress, in enacting a statute that … was to be 'liberally construed to effectuate its remedial purposes,' intended, without expressly so stating, to deprive the district courts of [] this classic remedial power in private civil actions brought under the act." (internal citations omitted). He concluded that because the statute did not expressly deny equitable relief in civil actions, the normal presumption favoring a court's retention of its powers should prevail.


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Judge Rakoff then determined that plaintiffs were entitled to the particular injunctive relief they sought, which included attachment of defendants' properties and the deposit in the court's registry of stock which had been pledged as collateral for loans at issue in the litigation. He found that plaintiffs had established a substantial likelihood of success in proving that the defendants were part of a RICO enterprise that had fraudulently induced the plaintiffs to make and forgo repayment of enormous loans while improperly diverting the loan proceeds and diluting the value of plaintiffs' collateral.

Judge Rakoff went on to reject the defendants' argument, predicated on Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 US 308 (1999) that the court lacked authority to issue an injunction preventing disposition of assets pending adjudication of plaintiffs' damages claims. He noted that Grupo Mexicano involved an unsecured creditor seeking to

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restrain the general assets of a debtor, while in this case, the plaintiffs were secured creditors seeking to preserve assets in which they had an acknowledged equitable interest. Thus, Grupo Mexicano, which expressly recognized that equitable remedies were available to creditors with an equitable interest in the property at issue, posed no bar to the injunctive relief sought.

Personal Jurisdiction

Judge Kaplan issued a pair of decisions in Davis v. Masunaga Group, Inc., et al.[2] addressing the requirements of §302(a) of New York's long-arm jurisdiction statute. Plaintiff sought damages arising from a series of harassing phone calls placed to him by the CEO of the corporate defendant. The corporate defendant was a California corporation with no connection to New York and the individual defendant was a California resident. All the telephone calls originated in California. The asserted basis for jurisdiction was §302(a)(3) of the CPLR, which provides in pertinent part that a court may exercise personal jurisdiction over any non-domiciliary who in person or through an agent "commits a tortious act without the state causing injury to person or property within the state. …, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state. …" He did not consider whether jurisdiction might be available under subsection (3)(ii), which authorizes jurisdiction over an out-of-state defendant who causes injury within New York who "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Judge Kaplan ultimately dismissed the action against defendants, on the grounds that while they had engaged in a persistent course of conduct (through the CEO's numerous telephone calls) they had not done so within New York State as required by subsection (i). He made this determination only after engaging in a lengthy analysis of when out-of-state actions can cause injury within the state. Although he subsequently vacated the decision containing that analysis on other grounds, his discussion of the "situs of injury" requirement provides a welcome clarification of this often confusing area of the law.

Relying on the Second Circuit decision in Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F3d 779 (2d Cir. 1999), Judge Kaplan noted that situs of the injury for purposes of §302(a)(3) is determined by neither defendant's location when he committed the tort, nor from where the economic or other final consequences of the tort are felt, but instead based upon where the "original event" that caused the injury occurred. He observed that in most personal injury cases, the plaintiff and defendant will be in the same location when the injury occurs, making obvious the location of the injury. He went on to explain the analysis required when the defendant and plaintiff are in separate jurisdictions when the injury occurs, using an illustration provided in the New York Practice Commentaries, C302:11, 7B McKinney's Consolidated Laws of New York 155 (2001). Where an out-of-state defendant manufactures a defective product which causes injury to a plaintiff in New York, the situs of the injury will be in New York. But if the plaintiff was injured by that product while visiting Connecticut, and suffered pain and lost income upon her return to New York, the situs of her injury is not New York, for purposes of long arm jurisdiction.

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In fixing the situs of the injury from defendant's telephone calls in this case, Judge Kaplan drew from cases holding that New York is the situs of an injury for an out-of-state misrepresentation transmitted into New York. He noted that in Hargrave v. Oki Nursery, Inc., 636 F2d 897 (2d Cir. 1980)., the injury occurred in New York because the "immediate and direct injury" caused by the misrepresentation stemmed from the lost money paid by the plaintiffs in New York. Judge Kaplan reasoned that because the alleged purpose of the harassing phone calls was to hurt plaintiff, they had similarly caused immediate and direct injury within New York.

Spoliation

In a decision filed in Rutgerswerke AG, et ano. v. Abex Corp., et al.,[3] Judge Keenan sanctioned the plaintiffs for having destroyed witness affidavits two years prior to instituting that lawsuit. One of the issues in dispute in that litigation was whether landfills located on the grounds of a factory had been used following an inspection conducted in 1984. During discovery, defendants obtained unexecuted affidavits of two plant employees stating that the landfill usage had stopped by 1982 (before the inspection). Notwithstanding the statements in the unsigned affidavits, plaintiffs elicited deposition testimony from one of the employees that the landfill was still in use in 1986. Defendants sought to preclude introduction of that testimony based on the admission by an employee of one of the plaintiffs that during 1992, in connection with pre-litigation negotiations, he had obtained affidavits from the two employees, and then deliberately destroyed them after consulting with counsel.

Judge Keenan granted the motion for preclusion as a sanction for the plaintiffs' spoliation of evidence. Citing Indemnity Ins. Co. of North America v. Liebert Corp., No. 96 Civ. 6675, 1998 WL 363834 (SDNY June 29, 1998)(Chin, J.), he observed that even where litigation has not commenced, the duty to preserve evidence arises when a party is on notice that litigation is likely and that duty requires preservation of evidence

which the party knows, or should know, will be relevant to the action. He found that the plaintiffs in this case were aware the litigation was likely because the affidavits in question were obtained after their attorneys advised them that they should collect information concerning when the landfills were used to assist in resolving the disputes between the parties. Noting that the unsigned affidavits provided inferential evidence that the destroyed affidavits might have been harmful to plaintiffs' case, he further held that defendants were significantly prejudiced by their inability to use the destroyed affidavits as admissions regarding the use of the landfill and to impeach the witnesses based on their contradictory deposition testimony. Based upon the deliberate destruction of the affidavits, and the "Plaintiffs' overall bad behavior in their pursuit of indemnification," Judge Keenan precluded the plaintiffs from introducing testimony from the two employees which contradicted the statements in the unsigned affidavits.

Judge Scheindlin filed a decision in MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.,[4] denying defendant's motion that she recuse herself pursuant to 28 USC 455(a) and (b)(4) because of her ownership of stock in companies concerned with the litigation. The defendant had previously sought her recusal in related litigation arguing that because she owned stock in companies that were putative members of the plaintiff class she was therefore a party to the proceeding. She denied that earlier motion because she had divested herself of the stock in question and had waived any interest in the action. In re Initial Public Offering Secs. Litig., 174 FSupp 2d 70 (SDNY 2002). In April, the Court of Appeals upheld that determination, denying defendants' petition for mandamus. In re Certain Underwriter Defendants, No 01-3092, 2002 WL 483550 (2d Cir. April 1, 2002).

The motion in MDCM Holdings sought Judge Scheindlin's recusal based on her actual, as opposed to her former, ownership of stock in two putative members of the plaintiff class.

Judge Scheindlin held that she did not have an ownership interest in a party to the proceeding, which would require her recusal under §455(b)(4), because as putative members of the plaintiff class, the companies whose stock she owned did not qualify as "parties to the proceeding." Citing Tramonte v. Chrysler Corp., 136 F3d 1025 (5th Cir.1998) and New Orleans Pub. Serv. v. United Gas Pipe Line Co., 719 F2d 733 (5th Cir.1983), Judge Scheindlin noted that although the Second Circuit has not addressed this issue, every court that has considered whether putative class members are parties to a proceeding has held that they are not. She concluded that her interest in two companies that might or might not become parties to the litigation was "too speculative to trigger the recusal provisions of section 455(b)(4)."

Judge Scheindlin also raised sua sponte the question of whether her ownership of stock in two other corporations, which in turn owned stock in several of the defendants, required her recusal. She found that the key question was whether the companies in which she owned stock had effective control (such as at least 50 percent of the voting stock) over a party in the litigation. Because neither of the companies at issue exercised any control over any defendant, she held that her stock ownership did not require her recusal.

Judge Scheindlin's inquiry on this point was triggered by financial disclosure statements filed by the parties pursuant to Local Rule 1.9. She observed that Rule 1.9 only requires parties to disclose publicly owned parents, subsidiaries and affiliates, and not noncontrolling stock interests such as those included by the defendants in their disclosure statements. She admonished that in the future, parties should limit their disclosures to the required information in light of the court's limited resources and the large number of Rule 1.9 statements it must review each year.

Judge Knapp dismissed the petition to confirm an arbitration award in Photopaint Technologies, LLC v. Smartlens Corp., et ano.,[5] on the grounds that the petition, which was filed more than one year from the date of the arbitration award, was time-barred under 9 USC §9.

The arbitration decision was issued on May 26, 2000, but was not transmitted to the parties until Oct. 3, 2000. Exactly one year later, on Oct. 3, 2001, the petition to confirm the arbitration award was filed.

9 USC §9 provides in pertinent part that "at any time within one year after the award is made any party to the arbitration may apply to the court … for an order confirming the award. …" Judge Knapp held this provision imposes a mandatory one year statute of limitation on petitions for summary confirmation of arbitration awards. He acknowledged that the majority of federal courts to consider this question have given the statute a contrary interpretation, finding that use of the word may makes the statute permissive and that the one-year time period does not constitute a mandatory limitations period. He found that the word may relates solely to a party's decision to avail itself of the summary confirmation procedure authorized by the statute, but that the one-year time period is an absolute restriction on the time within which a party may do so. He further rejected the petitioner's argument that the limitations period should be measured from the date the decision was delivered to the parties, holding instead that it ran from the date on which the arbitrator signed the award.

(1) 202 F. Supp. 2d 239 (S.D.N.Y. 2002).

(2) 204 F. Supp. 2d 657 (S.D.N.Y. 2002), vacated by 204 F. Supp. 2d 665 (S.D.N.Y. 2002).

(3) No. 93 Civ. 2914, 2002 WL 1203836 (S.D.N.Y. June 4, 2002).

(4) Nos. 01 Civ. 9333 & 21 MC 92, 2002 WL 1013271 (S.D.N.Y. May 20, 2002).

(5) No. 01 Civ. 8877, 2002 WL 1331854 (S.D.N.Y. June 13, 2002).