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EASTERN DISTRICT ROUNDUP

Expert Analysis

# Recent Decisions Deny Motion To Dismiss, Shkreli Compassionate Release and Relief to Debtor

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This column reports on several significant representative decisions handed down recently in the U.S. District Court for the Eastern District of New York. Judge Dora L. Irizarry declined to dismiss labor law claims against a school offering career services training. Judge Kiyo A. Matsumoto denied a second motion by defendant Martin Shkreli for compassionate release from prison. And Judge Joan M. Azrack, affirming bankruptcy court orders, denied relief to the debtor and imposed a filing injunction in light of her vexatious pleadings.

**Motion To Dismiss Labor Claims Denied**

In *Heras v. Metropolitan Learning Institute*, 19 CV 2694 (EDNY, Jan. 7, 2021), Judge Irizarry denied a motion to dismiss federal and state labor law claims brought against a New York City school.

Plaintiff Sandra Heras recruited students for the Metropolitan Learning Institute (MLI), which offers career training courses to high school graduates in Brooklyn and Queens. She alleged that, though she frequently worked more than 40 hours a week, MLI did not accurately record her time or pay her overtime or "spread-of-hours" compensation, in violation of the Fair Labor Standards Act, 29 U.S.C. §201, et seq. (FLSA), and §190 et seq. of the New York Labor Law. MLI brought a motion to dismiss under Fed. R. Civ. 12(b)(6), or for summary judgment under Rule 12(d).

Irizarry declined to entertain the motion for summary judgment. Although both sides submitted materials outside the pleadings, there had been no discovery and "the parties' submissions do not contain all facts relevant to a disposition." Slip op. 7.

The motion to dismiss was denied. While FLSA excepts "outside sales[people]" from its overtime requirement (29 U.S.C. §213(a)(1)), application of that exception could not be determined on the face of the amended complaint. Plaintiff alleged that she performed sales services away from the employer's business that would fall within the exception and also performed other services that would not, and "the Amended Complaint contains no breakdown of the time spent on these varying duties or details about which tasks, if any, were performed at MLI's campuses." Slip op. 9. Plaintiff's allegations that she "virtually always" and "regularly" worked more than 40 hours per week without lunch break and never received overtime were sufficiently detailed to state an overtime claim. Slip Op. 10.

Irizarry rejected MLI's argument that plaintiff failed to plead that she was not given a proper wage notice at the time she was hired, as required by NYLL §195(1). Plaintiff's allegation

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that she was never given a wage notice in her native language necessarily included the time of hiring. Slip op. 10-11. MLI's reliance on an August 2018 pay stub to show that plaintiff was paid $14 per hour as of August 2018, and therefore was not covered by the NYLL's spread of hours provisions, also failed. (The NYLL's spread of hours provisions require that minimum wage workers receive overtime when their workday exceeds 10 hours measured from beginning to end, including time off for meals plus intervals off duty.) The paystub was properly considered because it was "integral" to the complaint. But the applicable minimum wage was raised to $15 an hour in December 2018. Thus, "Plaintiff was paid less than the minimum wage between January 2019 and April 2019, relying on the wage stated on the paystub," and sufficiently pleaded a spread of hours claim for at least that period. Slip op. 13.

**First Step Act**

In *United States v. Shkreli,* 15 CR 637 (EDNY, Jan. 16, 2021), Judge Matsumoto, denying Martin Shkreli's second motion for "compassionate release" or a sentence reduction under the First Step Act, 18 U.S.C. §3582(c)(1)(A), found that the changed circumstances cited by Shkreli still do not show "extraordinary and compelling reasons" to grant relief.

In 2017 Shkreli was convicted after a jury trial on two counts of securities fraud and one count of conspiracy to commit securities fraud. The court sentenced him to 84 months' imprisonment on the substantive counts and 60 months on the conspiracy count, all to run concurrently, plus three years of supervised release, a fine of $75,000 and $388,000 in restitution. In April 2020 he brought his first motion for compassionate release, citing the risks posed by the COVID-19 pandemic in prison. Given his relatively young age and the then absence of COVID cases at his prison facility, FCI Allenwood Low, he failed to show that any medical condition placed him at increased risk for major complications from the virus.

In the instant motion, filed in December 2020, he asserts that a rise in COVID cases at FCI Allenwood Low (a) presents greater health risks and (b) makes it more difficult, because of restrictive prison policies, to communicate with the attorneys representing him in a civil case brought by the Federal Trade Commission (FTC).

While "the overall situation at FCI Allenwood Low is worse today than it was in May of last year," slip op. 6, there have been no reported cases in Shkreli's housing unit. The Bureau of Prisons (BOP) has implemented an action plan, including the lockdowns that Shkreli complains have denied him adequate access to his attorneys. Ten days before the decision here, there were 56 infected inmates at FCI Allenwood Low. On the date of the decision, there were 29 active cases, out of a total of 895 inmates, suggesting a relatively low likelihood of infection. At 37 years old, Shkreli "would not be at a high risk to suffer severe consequences." Slip op. 7. He now alleges certain mental health conditions that "weaken his immune system." The record does not support that claim.

The FTC lawsuit is pending in the Southern District of New York before Judge Denise L. Cote. Regarding Shkreli's claim of inadequate access to counsel, since his incarceration he has had 14 calls with his attorneys in the FTC suit. FCI Allenwood Low has allowed in-person legal visits "since March 13, 2020, by request on a case-by-case basis (and for about three months in late 2020, without restrictions)," but counsel did not seek to meet with him during that time. Slip op. 9. The fact that he may need more frequent legal communications going forward does not show an "extraordinary and compelling reason" to release him early. Shkreli admitted in his reply brief that, after filing this motion, he had two calls and a two-hour video session with counsel.

If eventually Shkreli is unable to meet deadlines ordered in the FTC suit, he can seek relief again from Judge Cote, who denied his requested stay of discovery because he is represented by able counsel and has various methods for communicating with them—including legal mail, legal visits, unmonitored legal calls, plus emails and calls over the

BOP's TRULINCS and TRUFONE systems. Despite the impediments caused by COVID-19, his ability to participate in his defense is sufficient. Matsumoto encouraged the BOP to accommodate Shkreli's access to counsel "to the extent it can safely and fairly do so." Slip op 11.

As to the relevant sentencing factors under 18 U.S.C. §3553(a), nothing has changed since the court imposed sentence or denied the first motion for compassionate release. Slip op. 12.

**Bankruptcy Appeal**

In *Simon v. Bank of America, N.A.*, 19 CV 3498 (EDNY, Jan. 15, 2021), Judge Azrack affirmed Bankruptcy Court Orders denying relief from the automatic stay and imposing a filing injunction on the pro se plaintiff.

Plaintiff/debtor, along with two others, executed a note secured by a mortgage which was ultimately held by defendant Bank of America, N.A. (BANA). In April 2015, after the borrowers' default on the note, BANA commenced a foreclosure action in Supreme Court, Nassau County. The borrowers defaulted. The state court entered an order in BANA's favor in September 2016. The borrowers did not appeal. Instead, they filed a complaint in the Eastern District of New York alleging fraud, which was dismissed.

Plaintiff filed a bankruptcy petition in August 2017, making numerous discovery demands, and filed an adversary proceeding against BANA, among others, challenging BANA's standing as a secured creditor. The bankruptcy court dismissed the adversary proceeding.

BANA filed a motion for relief from the automatic stay to foreclose on the property, attaching documentation showing that the debtor/plaintiff had no equity in the property because the property had been appraised at $360,000, while the principal balance of the note and mortgage was $589,628.42. BANA also filed a motion for a filing injunction against plaintiff and her co-borrowers requiring them to seek leave from the court before filing any new pleadings, motions, discovery requests or actions challenging BANA's standing or the validity of its lien on the property or before filing another bankruptcy petition. Both motions were granted by the bankruptcy court.

Azrack concluded that BANA had shown that it was a party in interest with standing to move to lift the automatic stay because it had physical possession of the note and mortgage through assignment. The state court had already determined that BANA had standing to bring the foreclosure action. Thus, debtor's argument that BANA lacked standing was barred by the Rooker-Feldman doctrine and res judicata.

Azrack affirmed the bankruptcy court's order for relief from the automatic stay. There was cause for relief from the stay under 11 U.S.C. §362(d)(1) because borrowers had not made a mortgage payment since September 2014. Further, the stay was properly lifted under 11 U.S.C. §362(d)(2) because (a) the debtor did not have any equity in the property and (b) the property was not necessary for a successful reorganization. Here, debtor sought liquidation, not reorganization.

The bankruptcy court also properly entered the filing injunction. Debtor had notice and an opportunity to be heard prior to issuance of the injunction. She waived any argument by failing to oppose the injunction or appear at the hearing in the bankruptcy court.

Additionally, the bankruptcy court has inherent authority to sanction improper litigation conduct, as it did here, when a litigant abuses the judicial process. Here, debtor commenced multiple actions and filed numerous pleadings, many of them irrelevant and vexatious, including filing a grievance against BANA's counsel and a challenge to BANA's standing. These filings resulted in additional costs to BANA. Slip op. 16.