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FYI

RCBA NewsBrief

Volume 6

June 2010

COMMERCIAL LITIGATION ISSUES OF INTEREST

*Submitted by Paul Savad, Esq., Chair, Commercial and Corporate Law Committee;
Joseph Churgin, Esq., and Susan Cooper, Esq., of SAVAD CHURGIN, Attorneys at Law*

Your client, a New York corporation that imports and exports goods sold worldwide, wants to sue a California corporation that has not paid for \$100,000 worth of goods it purchased from your client. The California corporation sent your client a purchase order from California, and does not have a New York office. However, you believe that you can obtain long-arm jurisdiction in New York, because the California corporation sells its own products nationally by soliciting business through its own national website. The website allows viewers, including New Yorkers, to download a brochure and to find a local dealer by entering a zip code. Will you be successful in defeating the California corporation's motion to dismiss your New York action for lack of jurisdiction?

The answer is no.

In *LB International Inc. v. Rainmaker Liquidators Inc.*, 28 NYLJ 5/4/10, col.1, the plaintiff, a New York corporation, claimed that Cal Spas, the d/b/a of a California corporation, did not pay \$116,000 for goods it purchased from the plaintiff. The plaintiff claimed long-arm jurisdiction in New York, pursuant to CPLR §302(a)(1), arguing that Cal Spas sells its spa products nationally and advertises its products over the Internet via its website, thereby regularly soliciting and doing business in New York.

The defendant, on the other hand, claimed that they did not maintain an office in the State of New York, were not authorized to do business in the State of New York and had never transacted business in the State of New York. It claimed that its website does not allow a direct purchase from the Internet, but allows the viewer to download a brochure and to enter a zip code to find a local independent dealer, presumably including independent dealers in New York.

The Court's decision turned on whether the website, in and of itself, was sufficient to confer long-arm jurisdiction in New York. The Court reviewed the recent Second Department decision in *Grimaldi v. Guinn*, 72 A.D.3d 37 (2010), where the court distinguished what it called "interactive websites" from "passive websites". An interactive website allows the user to exchange information with the host computer. A passive website, on the other hand, merely provides information.

While a passive website does not confer jurisdiction, an interactive website may confer jurisdiction, depending on the degree of interactivity. Jurisdiction will be found where the defendant enters into a contract with the residents of a foreign jurisdiction by the knowing and repeated transmission of computer files over the Internet.

Cal Spa's website permitted limited interactivity. It allowed the download of a brochure and the entry of a zip code to find a local independent dealer, but did not permit the consumer to order goods. Accordingly, there was insufficient relationship with the State of New York.

The lesson?

Out-of-state businesses that promote and sell their products through a website that allows for the repeated exchange of information and permits the customer to purchase products directly from the website will be subject to New York long-arm jurisdiction.

We welcome your articles.

****All articles submitted will be reviewed by the Executive Committee for approval****

You are cordially invited to attend the **Graduation Ceremony** of

The Rockland County Drug Court

at the Jury Department, 2nd Floor
Rockland County Courthouse
1 South Main Street New City, NY

on
Thursday, June 17, 2010 at 2:00 p.m.

Keynote Speaker:

Father "Bill" Drobach, SA
Vice President
St. Christopher's Inn

Please join us for refreshments immediately following the ceremony as we celebrate the accomplishments of our graduates

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Writing Tip of the Month
by Susan Cooper, Esq.

A Call for Straight Talk

Today I googled "persuasive writing" and found the following recommendations:

Quote statistics and use them to mean what you want them to mean.

Use emotive or biased vocabulary rather than straightforward words.

Blind the reader with science – technical terms work well.

Yikes! We're bombarded with this daily from all directions – TV, politicians, corporations, our kids....

In legal writing, these tactics are often dead give-aways of a weak case. Using too many "emotive", "biased", and "technical" words boldly announces your intent to "blind" the reader to the truth.

Try a little straight talk. A good argument is weakened by flowery embellishment. And a weak argument is seldom improved by trumpeting.

Here's Mark Twain's good advice. "When you catch an adjective, kill it. No, I don't mean utterly, but kill most of them - then the rest will be valuable. They weaken when they are close together. They give strength when they are wide apart."

Susan Cooper, Esq., has provided legal research and writing services to the Rockland Bar for over 25 years. She can be reached at SusanCooperEsq@gmail.com.

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Nanuet Law Office at 55 Old Nyack Tpke, has (2) offices for rent with waiting area, use of library, conference room as well as ample parking available. For additional info call (845) 624-0100

Nanuet Small Upper Level office for Solo Practitioner Available in Nanuet Area. Available immediately; Common Fax available and shared conference room. Call Wayne (845) 624-2525

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New City Office available, 254 S. Main St, access to all office equipment/conference room and kitchen. Call Doreen at (845) 634-3775

New City Main Street, 3 conference rooms, law library, p/t receptionist, furniture available, utilities, 24 hour access, 2 kitchens, copiers, scanners. Call Lynn 639-1415

New City Nice bright office, sublet at a reasonable price. Good parking & walking distance to all courts. Call (845) 638-0660

New City Ground floor single office with built-in shelves, counters and desk areas in modern law office suite with use of conference room in professional office building at Esquire Road w/ beautiful lobby and ample parking. Reasonable rent. Contact Dave Castagna at @ (845) 300-2889

Nyack Idyllic private setting 700 sq. ft. monthly rent, \$1,180. Great landlord, 2 large sky windows, off Broadway, central heat/air, lobby/office + 2 conference rooms. Avail immediately. Call Melissa @ (914) 629-9591

Spring Valley Spring Valley Professional building for sale. Great location, 1800sq ft, completely renovated, very suitable for attorneys, plenty of parking. Asking \$340,000. Call Serge @ (845) 659-9164

Stony Point Office space available. Shared secretarial space, conference room and copier. Please call (845) 942-2222. Possible overflow work.

West Haverstraw Law office building available, furnished or unfurnished. Centrally located, on street level, with law office secretarial office and reception room, all services available. Apt w/ kitchen upstairs. Ideal for lawyer not wishing to pay rent. On site parking. Call (845) 358-4597

Executive Secretary Former executive secretary interested in working part time at home doing clerical work. Also available weekdays or Saturday as part time/substitute office worker or receptionist. Contact June Tierney @ (845) 638-4493

Legal Secretary Experienced and efficient, 10+ years of experience. Seeking full time employment with Rockland County firm. Knowledge of Microsoft Word, WordPerfect & Windows. Call Leslie @ (845) 634-2149

Legal Secretary Experienced and efficient, 20+ years of experience seeking work, heavy phone contact w/ attorneys, clients and title companies, document prep and extensive estate matters. Call Barbara @ (845) 356-1597

Paralegal seeking part-time position (2:00-5:00 p.m., everyday or when needed) Call Elaine @ (845) 664-7265

Paralegal seeking full-time entry-level position with local Rockland County law firm. Particularly interested in legal research. Flexible in terms of law practiced. Please contact Judith Altman at: (845) 352-3294

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SITUATIONS WANTED

Administrative Assistant Available for evening work, per diem or part-time: typing, phones, WordPerfect, Word, dictation. E-mail Sondra327@aol.com for resume. Call (845) 634-2149

Bookkeeper Experienced full charge bookkeeper seeking part time employment in Rockland. All phases of bookkeeping including general ledger, quickbooks, payroll, multiple bank accounts, time-slips, word, excel and real estate closing statements. Cell# (845) 507-3138 or (845) 354-8666



**STATE OF NEW YORK
UNIFIED COURT SYSTEM
NINTH JUDICIAL DISTRICT**

RE: E- Filing in Supreme Court, Westchester County

The Office of Court Administration, the Ninth Judicial District Technological Department, and the Office of Westchester County Clerk Timothy C. Idoni have been working diligently to implement e-filing in Supreme Court, Westchester County.

We are anticipating the commencement of e-filing, on a voluntary basis, in the Commercial Division, Westchester County, on or about June 21, 2010. That will be followed, over the summer, by the introduction of e-filing, on a voluntary basis, in tort cases in Supreme Court Westchester County. We are anticipating that, as permitted by legislation, e-filing will become mandatory in tort cases in the Supreme Court, Westchester County in Fall 2010.

In advance of these developments, training for attorneys on the New York state e-filing system will be offered in both morning and afternoon sessions on both June 10 and June 15, 2010. The morning sessions will be conducted between 10 a.m. and 12 p.m. and the afternoon sessions will be held between 1 p.m. and 3 p.m. The sessions will be held in the 18th Floor Computer Training Room in the Westchester County Courthouse, 111 Dr. Martin Luther King Jr., Boulevard, White Plains. There is no charge for the training and 2 CLE skill credits will be given upon completion. Because of space constraints, we are asking that persons interested in attending pre-register at: <https://survey.nycourts.gov/TakeSurvey.aspx?SurveyID=m2MK5n7>.

I would note that, if there is sufficient interest additional, larger sessions will be held, including sessions held in the evening. Additionally, the training staff is available to do training at larger law offices for groups of more than 25. Such a session can be arranged by calling the resource center at 646-386-3033 or by e-mailing a request to Efile@courts.state.ny.us

Very Truly Yours,

Alan D. Scheinkman
Administrative Judge
Ninth Judicial District

UNITED STATES DISTRICT COURT
CHAMBERS OF JUDGE JOHN G. KOELTL
UNITED STATES COURTHOUSE

The United States District Court for the Southern District of New York is now accepting applications for the Criminal Justice Act Panel for the Court. Lawyers from this Panel provide representation to defendants who, based on their financial need, qualify for appointed representation funded pursuant to the Criminal Justice Act. Applicants can apply for membership on the panels that represent defendants in capital cases and that represent defendants in non-trial work, primarily habeas corpus proceedings.

We are very interested in expanding the pool of qualified lawyers from whom the Panel is chosen so that we can ensure the highest standard of representation. The Court is interested in increasing the diversity of the applicant pool and encourages qualified women and minority lawyers to submit their applications.

The Court also has a mentoring program designed to help and identify and prepared experienced state practitioners for appointment to the Panel. While the program's primary objective is to improve the diversity of the Panel, the program is open to all who might benefit.

The application is available on the Court's Web site at www.nysd.uscourts.gov. Completed applications should be sent to Leonard F. Joy, Esq., 52 Duane Street, 10th Floor, New York, NY 10007 . The deadline for receiving applications is June 30, 2010.

Sincerely yours,

John G. Koeltl

PROTECTING FUTURE RETIREMENT CONTRIBUTIONS

Many attorneys clearly recognize the need for protecting their income in the event of an accident or illness by implementing a sound program of Long Term Disability Insurance.

By applying for individual disability insurance, if you become totally or partially disabled, you may receive a monthly benefit that allows for the payment of rent/mortgage, utilities, food and other expenses. However, the flow of money definitely tightens up, and long-term allocations, such as retirement deposits, go on immediate hold. "I'll worry about retirement when I'm back at work. Today I have to fill the refrigerator!"

Halting retirement deposits can be extremely damaging to the accumulation process. For example, a forty year old depositing \$20,000 into a defined contribution plan would accumulate \$1,579,088 at age 65 assuming 8% interest. If this individual missed three years of deposits in the early years, the accumulation is \$1,125,428. That is almost a 30% loss by missing 3 out of 25 deposits.

Some disability income policies help replace 100% of an amount equal to the retirement plan contributions (including both the employee's and the employer's contributions) that would have been made to an eligible retirement plan had the person not become disabled.

This type of disability policy is not a retirement plan, nor a substitute for one. During a period of total disability the insurance company pays benefits into an irrevocable trust that offers different investment options at the time of claim, so that a client can select the option that best meets his/her retirement goals.

Eligible retirement plans may include:

*Defined Contribution Plans

- *401k plans
- *Profit-Sharing Plans
- *Keogh Plans
- *Stock Bonus Plans

*Employment Stock-Ownership Plans (ESOPs)

* Individual Retirement Accounts (IRAs)

* Simplified Employee Pensions (SEPs)

* Tax-Sheltered Annuity Arrangements/403(b) Plans

*Certain Non-Qualified Deferred Comp. Plans

The cost for a policy of this type is on the low end of disability policy premiums. Age, health and the amount of retirement years, you should look into this type of coverage to help create a safety-net for such a valuable asset.

This information was submitted by Sam Olshan of CASTLEBROOK PARTNERS, 530 Fifth Avenue, 14th Floor, NY, NY 10036

Tel# 212-536-6006

solshan@castlebrookpartners.com



Join us for our General Dinner Meeting and the Swearing In of

Lynne S. Hilowitz,

as President,

*and the Officers and Directors of the
Bar Association for fiscal year 2010/11.*

Guest Speaker: Willard H. DaSilva, Esq.

Thursday, June 24, 2010

6:00 p.m. Cocktails (cash bar) 7:00 p.m. Dinner

Restaurant X, 117 North Route 303, Congers, N.Y.

\$55 per person in ADVANCE ONLY \$70 at the door

Reservations are necessary since seating is limited.



Employer Liability Redefined by the New York City Human Rights Law

by Karen L. Zdanis, Esq.

On May 6, 2010 the New York Court of Appeals answered a question certified by the Second Circuit pertaining to the applicability of the *Faragher-Ellerth* defense to sexual harassment and retaliation claims brought against an employer pursuant to the New York City Administrative Code.

Procedural Background and Underlying Allegations

A motion for summary judgment made by the defendant in the case *Zakrzewska vs. The New School* precipitated the certified question. Zakrzewska was a student and part-time employee of The New School. In the Complaint she filed in the Southern District of New York she alleges her immediate supervisor subjected her to sexually harassing conduct and emails. When she complained, her supervisor allegedly monitored her emails in retaliation for her accusation.

The New School, in its motion for summary judgment, argued that it was not vicariously liable for the acts of its employee/supervisor because it had an anti-harassment policy that Zakrzewska failed to utilize. This defense, commonly referred to as a *Faragher-Ellerth* defense, emanates from two twin cases decided by the United States Supreme Court in 1998: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Faragher-Ellerth Defense

In *Faragher* and *Ellerth* the Supreme Court articulated an affirmative defense for employers faced with allegations of vicarious liability. It has been widely used by employers, and is available in circumstances where no tangible employment action against the employee was taken. The *Faragher-Ellerth* defense relieves an employer of liability for workplace harassment under federal law if it can show: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807. Since 1998, the *Faragher-Ellerth* defense has been applied to federal law (Title VII of the Civil Rights Act of 1964), the New York State Human Rights Law, and in some cases the New York City Human Rights Law (NYCHRL).

New York City Human Rights Law

Here, Zakrzewska brought claims under Section 8-107(a) of the NYCHRL prohibiting discrimination, *inter alia*, on the basis of gender.

Section 8-107(13)(b) of the New York City Human Rights Law sets forth employer liability for acts of its employees or agents:

13. Employer liability for discriminatory conduct by employee, agent or independent contractor... (b) An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:

- (1) The **employee or agent exercised managerial or supervisory responsibility**; or
- (2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be Deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
- (3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

New York City Human Rights Law § 8-107(13) (*Emphasis added*)

Zakrzewska argued that the *Faragher-Ellerth* defense was not applicable to the NYCHRL because the NYCHRL's written mandates provided that employers were liable for the actions of managerial or supervisory employees or agents pursuant to § 8-107(13)(b)(1).

Holding in Zakrzewska

The Court of Appeals, in its decision, noted that the plain language of § 8-107(13)(b) was inconsistent with the *Faragher-Ellerth* defense. Giving deference to the plain meaning of NYCHRL § 8-107(13)(b), the Court of Appeals held that the *Faragher-Ellerth* defense is not available to employers who allegedly violate the NYCHRL.

Continued on Page 7.....

While the decision did not reference it, it is worth noting that once actual liability has been established, NYCHRL § 8-107(13)(d) permits an employer to plead and attempt to prove that the employer did not have knowledge of the alleged discrimination and communicated policies/procedures to prevent and detect unlawful discrimination.

Thus, employers operating a business in New York who are subject to the NYCHRL now have an additional reason to monitor supervisors. Nonetheless, anti-harassment policies and the communication and enforcement of these policies are still valuable tools. Arguably, they are even more valuable than before if they are effective in resolving discrimination claims outside of court.

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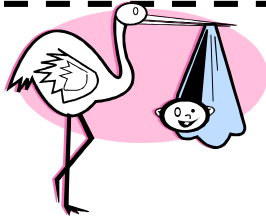
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WOULD LIKE TO THANK
EVERYONE FOR THEIR
CONTINUED SUPPORT
AND WE LOOK FORWARD TO
A GREAT CLE START
IN THE FALL.

HAVE A HAPPY &
SAFE SUMMER

The CLE Committee

THERE WILL NOT BE A JULY PUBLICATION OF NEWS BRIEF
PUBLICATIONS WILL RESUME IN AUGUST

THE BOARD OF DIRECTORS AND STAFF OF THE ROCKLAND COUNTY BAR ASSOCIATION WOULD LIKE
TO WISH ALL OF OUR MEMBERS, SUPPORTERS & SPONSORS
A SAFE, HEALTHY AND HAPPY SUMMER