

By the Honorable Nancy Stein Nowak, Soledad Valenciano, and Melanie Fry

Judge Nowak's summaries of significant decisions rendered by San Antonio federal judges from 1998 to the present are available for keyword searching at Court Web found at <http://courtweb.pamd.uscourts.gov/courtweb/>. Full text images of most of these orders can also be accessed through Court Web.

If you are aware of a Western District of Texas order that you believe would be of interest to the local bar and should be summarized in this column, please contact Soledad Valenciano or Melanie Fry by phone at 554-5500 or by email at svalenciano@coxsmith.com or mlfry@coxsmith.com with the style and cause number of the case, and the entry date and docket number of the order.

Post-Judgment Discovery Sanctions

Lear Siegler Serv's, Inc. v. Ensil Int'l Corp., SA-05-CA-679-XR (Recommendations by Mathy, Mar. 15, 2011; accepted by Rodriguez, Apr. 7, 2011)

Following jury verdict in favor of plaintiff, court granted motion for new trial on the amount of damages and ultimately entered judgment for approximately \$528,650 in damages plus interest, attorneys' fees, and costs. LSI began post-judgment discovery. After entering four orders regarding the conduct of post-judgment discovery, magistrate judge entered a report recommending granting plaintiff's motion to hold defendant in civil contempt and award sanctions. No party filed an objection to the report, which the district court accepted, finding defendant in civil contempt, precluding defendant from relying on information requested in outstanding discovery requests in any proceeding with plaintiff, including those to collect the judgment, and awarding plaintiff its attorneys' fees and costs.

Alter Ego; Limitations; Merger Clause
Andres Holding Corp. v. Villaje Del Rio, Ltd. and Geis v. Andres Holding Corp., SA-09-CV-127-XR, SA-09-CV-268-XR (Rodriguez, March 8, 2011)

Alter Ego; Law of the Case Doctrine

Plaintiff sought to pierce defendant's corporate veil to hold an individual liable. Plaintiff moved to compel arbitration on ground that individual was an alter ego of defendant. Court denied the motion for lack of sufficient evidence of alter ego. Nearly a year and a half later, individual moved for summary judgment, arguing that the law of the case doctrine prevented plaintiff from piercing corporate veil. Court held that the doctrine did not apply because the question of whether to pierce the corporate veil to compel individual to arbitration was distinct from that of alter ego liability. Availability of evidence regarding relationship between the parties had substantially increased now that discovery was complete.

Alter Ego; Limitations

Court denied summary judgment on limitations. Plaintiff sued prior to the running of limitations to foreclose on contractor's liens on the property. After limitations had run, plaintiff amended to add individual defendant and assert claims for tortious interference and piercing the corporate veil. Court held that new claims were not barred by limitations because parties in alter ego relationship are considered identical for purposes of determining limitations, and plaintiff's tort claims arose out of a contract that was the basis for its claims against corporate defendant.

Merger Clause; Fraudulent Inducement

Defendant argued plaintiff's fraud claims were barred by contractual merger clause. Court held that the contract, which stated, "This Contract constitutes the entire agreement between the parties, and any previously existing contract concerning the work contemplated by the Contract Documents is hereby revoked," did not expressly waive fraudulent inducement claims and, therefore, did not bar such claims.

Merger clause does not bar claims of fraud or fraudulent inducement unless it clearly expresses the parties' intent to waive fraudulent inducement claims or disclaims reliance on representations about specific matters in dispute. Compare the Texas Supreme Court's recent decision on this issue: *Italian Cowboy Partners, Ltd. v. The Prudential Ins. Co. of Am.*, No. 08-0989, 2011 WL 1445950 (Tex. April 15, 2011).

Title VII Claims; Lily Ledbetter Fair Pay Act

Mackie v. Post, Buckley, Schuh & Jernigan, Inc., SA-09-CV-737-XR (Rodriguez, Mar. 9, 2011)

Plaintiff filed charge of discrimination with EEOC, which issued Dismissal and Notice of Rights letter. Plaintiff failed to file Title VII lawsuit within requisite 90 days from receipt of the letter. EEOC issued a second letter, and within 90 days, plaintiff brought Title VII lawsuit. Defendant argued plaintiff's claims were barred by limitations. Court held plaintiff's claims were barred and granted summary judgment for defendant. Court rejected the argument that the Lily Ledbetter Fair Pay Act of 2009 extends the 90-day filing period. That Act, which provides that a charge with the EEOC shall be filed within 180 days after unlawful employment practice occurs, did not purport to expand the 90-day period in which to file a complaint after the EEOC has addressed such a charge.

Fair Labor Standards Act; Summary Judgment

Whitehead v. Hidden Tavern, Inc., SA-09-CA-0316-FB (Biery, Mar. 23, 2011)

Plaintiffs sought summary judgment, asserting defendant employer failed to pay minimum wage in violation of Fair Labor Standards Act ("FLSA") because defendant was not entitled to rely on a "tip credit" in calculating wages. Defendant responded that material fact existed as to whether it was entitled to claim the tip credit. Burden was on defendant to show entitlement to tip credit by showing it informed employees of the tip credit provisions and that all tips would be retained by the employees.

Court granted summary judgment for plaintiffs. Defendant created material fact issue as to whether it informed its employees of the tip credit provisions but failed to create material fact issue as to whether employees retained all tips because defendant's co-owner participated in tip pool, and defendant required employees to pay for cash register shortages, in violation of the FLSA.

Diversity; Amount in Controversy; Remand

San Antonio Nat'l Bank v. Daktronics, Inc., SA-11-CA-0149-XR (Rodriguez, Mar. 17, 2011)

In response to plaintiff's motion to remand, defendant provided a copy of the parties' disputed contract as proof that the amount allegedly still owed by plaintiff was \$150,000. Holding defendant met its burden of proving by a preponderance of the evidence that the amount in controversy exceeded \$75,000, court denied the motion to remand. Plaintiff failed to "show to a legal certainty that it will not be able to recover in excess of the jurisdictional minimum."

Injunction; Breach of Contract; Fraud; Mediation and Arbitration

Custom Teleconnect, Inc. v. Billing Concepts, Inc., SA-11-CA-204-FB (Recommendations by Mathy, Apr. 8, 2011; accepted by Biery on Apr. 25, 2011)

CTI, a telecommunications provider of primarily pay telephones in prisons and elsewhere, sued Billing Concepts, Inc. ("BSG") and associated individuals for breach of contract, fraud, and related claims, concerning BSG's handling of CTI's billing of its third-party customers and sought a preliminary injunction to reinstate certain advance credit payments BSG had been making to CTI and prevent BSG from stopping or changing such payments pending the conclusion of the case. CTI's contracts with BSG contained mandatory arbitration and mediation provisions not contested by any party, but arbitration and mediation had not yet commenced, thus subject matter jurisdiction was in issue. Following a two-day evidentiary hearing, a report issued that recommended denying the requested preliminary injunction,

based in part on contractual provisions that gave BSG the right to adjust, without notice, the credit line it had afforded to CTI and that CTI had not demonstrated that it could not arrange alternative funding to replace the funding BSG was no longer providing. No party filed an objection to the report, which was accepted by the district court, which vacated any remaining aspects of a previously granted TRO in favor of CTI and ordered the return of moneys deposited with the District Clerk.

Motion to Dismiss; Motion for More Definite Statement

Garcia v. Chase Home Fin., LLC, SA-10-CV-1015-XR (Rodriguez, Mar. 15, 2011)

To enjoin the non-judicial foreclosure of his residence, plaintiff filed an Application for Temporary Restraining Order and Temporary Injunction in state court. Defendant removed the action to federal court and filed a motion to dismiss and a motion for a more definite statement. Court held that plaintiff's pleading did not state a cause of action and, therefore, was subject to dismissal as it failed to provide a "short and plain statement of the claim." Fed. R. Civ. P. 8(b), 12(b)(6). Court also found that plaintiff's allegations did not provide enough information regarding the underlying cause of action to enable a response. Court granted the motion for more definite statement and denied the motion to dismiss.

Motion to Alter or Amend Judgment; Motion for New Trial; Motion for Costs and Attorneys' Fees

Kinnison v. City of San Antonio, SA-08-CV-421-XR (Rodriguez, Mar. 14, 2011; April 12, 2011)

Kinnison sued the City of San Antonio for demolishing his house and an adjacent structure. Court granted summary judgment in Kinnison's favor on his procedural due process and Fourth Amendment claims. A jury awarded \$52,000 in damages. Court denied the City's motion to alter or amend the judgment, holding the City failed to submit new evidence not previously available and provided no intervening change in the controlling law. Court denied the City's renewed

motion for judgment as a matter of law, holding the jury had sufficient evidence, primarily based on Kinnison's lay opinion, to conclude that Kinnison had suffered damages in the form of a loss of market value of the property. Court denied the City's motion for new trial as the verdict was not against the great weight of the evidence. Plaintiff filed a motion for attorneys' fees and a bill of costs. Court analyzed the motion under Rule 54(d) (allowing costs to prevailing party) and 28 U.S.C. § 1920 (defining "costs"). Plaintiff's motion lacked any receipts or authority for billing so court ordered plaintiff to submit proof of costs. Regarding attorneys' fees, court determined a "lodestar" by calculating the number of such hours reasonably spent on the litigation multiplied by a reasonable hourly billing rate. In doing so, court was guided by the twelve *Johnson* factors and any adjustment to the lodestar must be justified by specific evidentiary findings and reasoning. Court applied the 2009 State Bar of Texas Hourly Rate Fact Sheet and *Johnson* factors to determine hourly rate and then looked at hours billed on prevailing claims. Court then reduced hours billed from 535 to 295.1 and legal assistant hours from 26.7 hours to 22.1. Court denied request for expert witness fees because they are not available under 42 § USC 1988(c) and because plaintiff never qualified an expert in his case.

Ineffective Assistance of Counsel; Strickland Analysis

Ruiz v. Thaler, SA-03-CA-303-OG (Garcia Apr. 6, 2011)

Having found that no Texas state court had issued a ruling on petitioner's ineffective assistance of counsel claim, court held *de novo* evidentiary hearing and denied petitioner's federal habeas relief and request for a Certificate of Appealability. Applying the *Strickland* analysis, court found that once petitioner's trial counsel obtained expert's report suggesting petitioner had an abusive childhood and addiction issues, counsel's failure to investigate petitioner's background beyond interviewing petitioner and his mother and failure

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Federal Court Update

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to investigate petitioner's mental health was objectively unreasonable. Evaluating additional mitigating evidence brought forth by petitioner, court concluded petitioner failed to show a reasonable probability that the outcome of the punishment phase of his capital murder trial would have been different. Court held it was objectively reasonable for petitioner's counsel not to call expert or offer his report given the possibility of expert's testimony satisfying provisions of capital sentencing guidelines and likely inadmissibility of expert's report, and petitioner failed to show a reasonable probability that the outcome of the punishment phase would have been different with the inclusion of the expert testimony or report.

Amend Scheduling Order; Good Cause *Rindorf v. Clayton Homes, Inc.*, SA-08-CV-1011-NSN (Nowak, Apr. 21, 2011)

Court denied parties' joint and agreed motion to amend scheduling order for failure to show good cause. Although parties argued case was complex regarding liability and damages and only requested additional six months to complete discovery, court noted deadlines had been extended several times, case had been on file two and a half years, and there had been a lack of activity for previous nine months.



Nancy Stein Nowak is a United States Magistrate Judge for the Western District of Texas. Since 1986, Judge Nowak has summarized significant decisions of the local judiciary for the Subpoena and the San Antonio Lawyer.



Soledad Valenciano and Melanie Fry practice commercial litigation with Cox Smith Matthews.