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Federal Pleadings are Receiving Heightened Scrutiny Under New Standard

By Kevin Schlosser

The dust is starting to clear from the United States Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), which altered the pleading standards in federal court. It is an opportune time, therefore, to assess how the federal judges in Central Islip have applied these precedent-altering decisions in determining motions to dismiss pleadings.

Conley's "Retirement"

One of the most widely-known and oft-cited cases in federal procedural jurisprudence is the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), and its edict that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. Exactly 50 years after that monumental decision was rendered, the Supreme Court observed in *Twombly* that "*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough … and after puzzling the profession for 50 years, this famous observation has earned its retirement." 550 U.S. at 562.

The Supreme Court chose to celebrate *Conley's* retirement in *Twombly* in the context of an antitrust case. In *Twombly*, plaintiff consumers attempted to assert a class action against a group of major telecommunications providers, alleging that they conspired to foreclose competition to maintain inflated telephone and internet charges. The main weakness in the complaint was that plaintiffs failed to allege facts to establish that there was any actual agreement among the defendant telephone companies to restrain trade or commerce. Rather, plaintiffs sought to establish the existence of an agreement and, in-turn the conspiracy, by merely relying upon the telephone companies' conscious "parallel behavior," such as refraining from competing against each other and not seeking business opportunities in each other's territories. In reversing the Second Circuit, the Supreme Court ruled that the complaint did not pass muster under Fed.R.Civ.Proc. 8, observing: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [an antitrust] agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" 550 U.S. at 557. The Supreme Court further noted that under "a focused and literal reading of *Conley's* 'no set of facts,' [standard] a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 561.


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Because the Supreme Court's analysis in *Twombly* was so intertwined with antitrust precedent, it was uncertain whether the Court intended its new standard to apply only to antitrust claims. In another decision reversing the Second Circuit, *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court quickly laid that question to rest and further imbedded the new *Twombly* standard into federal procedural jurisprudence. In *Iqbal*, a Pakistani Muslim filed a *Bivens* action against several federal officials, including the former Attorney General and the Director of the FBI, alleging that they violated his constitutional rights when he was arrested and detained along with thousands of other Arab Muslims in the aftermath of the September 11, 2001 terrorist attacks. Unlike the District Court and the Second Circuit, which sustained the allegations of the complaint, the Supreme Court ruled that the plaintiff did not satisfy the "plausibility" standards announced in *Twombly*. The Court made clear that the pronouncements it issued in *Twombly* and its interpretation of Fed.R.Civ.Proc. 8's pleadings requirements apply to "all civil actions" and not merely to antitrust litigation. Among other things, the Court also observed that "bare assertions" that the defendants knew of, condoned and willfully and maliciously agreed to subject plaintiff to conditions in violation of his constitutional rights were merely a "formulaic recitation" of the elements of the claim and, as such, were not entitled to the assumption of truth. The Court also noted that the allegations of wrongdoing, while theoretically consistent with the claim, could be plausibly interpreted as constituting legitimate conduct as well, and as such, were insufficient to form the basis of the claim.

Recent Eastern District Decisions Applying *Twombly* and *Iqbal*

Recent decisions by federal district court judges in Central Islip shed light on how *Twombly* and *Iqbal* have impacted motions to dismiss. In *Argeropoulos v. Exide Technologies*, 2009 WL 2132443 (E.D.N.Y. July 8, 2009), for example, Judge Seybert specifically noted that while the complaint would have survived under the *Conley* standard, the allegations were insufficient to satisfy the new *Twombly* and *Iqbal* standards.

In *Argeropoulos*, plaintiff alleged that he was subjected to discrimination and harassment by his employer because of his national origin (he was a U.S. citizen of Greek origin) and perceived sexual orientation. In reciting the standard of review under Fed.R.Civ.Proc. 12(b)(6), the Court relied upon *Twombly* and *Iqbal* exclusively. The Court noted that a "complaint must plead facts sufficient 'to state a claim for relief that is plausible on its face.'" 2009 WL 2132443 * 2 (citing *Twombly*). The Court then noted: "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*). The Court relied upon the following additional key language from *Iqbal*:

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal citations and quotations omitted). Examining whether a complaint states a plausible claim for relief is "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint fails to state a claim. *Id.* The plaintiff's factual allegations, in short, must show that the plaintiff's claim is "plausible," not merely "conceivable." *Id.* at 1951. In applying the plausibility standard set forth in *Twombly* and *Iqbal*, a court "assume[s] the veracity" only of "well-pleaded factual allegations," and draws all reasonable inferences from such allegations in the plaintiff's favor. *Id.* at 1950. Pleadings that "are no more than conclusions," however, "are not entitled to the assumption of truth." *Id. Argeropoulos,* 2009 WL 2132443*2-3.

In granting the motion to dismiss, and rejecting plaintiff's complaint, the Court analyzed in detail the various discrimination claims attempted to be asserted. After easily rejecting most of plaintiff's claims because he had alleged "no facts" that could even plausibly support his discrimination claims, in a particularly enlightening portion of the decision, Judge Seybert distinguished between the old pleading standard under *Conley* and the new standard under *Iqbal* and *Twombly*. The Court acknowledged that plaintiff's "hostile work environment claim predicated on national origin harassment is pled somewhat better, but still fails to survive Defendants' motion to dismiss." *Id.* *5. In recognizing that work environment hostility is assessed based upon the "totality of the circumstances," Judge Seybert focused on plaintiff's attempt to satisfy the elements of the claim by providing a few "isolated incidents" while claiming they were "merely some examples of discrimination that occurred on 'daily and continuous basis because he is Greek.'" In rejecting this conclusory effort, the Court held:

"When combined with the two anti-Greek statements pled in the Amended Complaint, this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss. [Citing *Conley.*] But it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in *Iqbal*…. In applying the plausibility standard set forth in *Twombly* and *Iqbal*, a court 'assume[s] the [ ] veracity' only of 'well-pleaded factual allegations.' … Thus, the Court need not accept as true Plaintiff's conclusory and entirely non-specific allegation that similar conduct occurred on a 'daily and continuous basis because he is Greek.' Rather, Plaintiff must plead sufficient 'factual content' to allow the Court to draw a 'reasonable inference' that Plaintiff suffered from a hostile work environment… And Plaintiff has not done so. At most, Plaintiff's national original hostile work environment claim is 'conceivable.' … But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is 'plausible.'"

Id. at *6. The Court did, however, grant plaintiff leave to amend the complaint again insofar as *Iqbal* was issued after the Amended Complaint was filed.

In *Ferri v. Berkowitz,* 2009 WL 2731339 (E.D.N.Y. Aug. 25, 2009), Judge Wexler was faced with a motion to dismiss civil RICO claims and state law claims for fraud and breach of contract. In reciting the new pleading standards under *Twombly* and *Iqbal*, the Court noted that a "formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." The Court added:

"'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'"

*Id. *3-4* (quoting *Iqbal*). The Court further recognized that its task was to "identify bare legal conclusions in the complaint" and "[w]here such conclusions are not supported by allegations of fact, they are not entitled to the assumption of truth. *Iqbal,* 129 S.Ct. at 1950. Well-pleaded factual allegations, on the other hand, are assumed to be true and may plausibly give rise to an entitlement to relief. *Id." Id.* at *4.

After reviewing the allegations attempting to assert a civil RICO claim, the Court ruled, among other things, that the plaintiff failed to allege sufficient facts to establish either an "open or closed-ended continuity" under RICO. In summarizing its analysis under the new pleading standard, the Court held: "In sum, Plaintiff's conclusory pleading that Defendants' acts were neither 'isolated nor sporadic,' is precisely the factually unsupported pleading of the law that is not entitled to any presumption of truth." *Id.* at *8 (citing *Iqbal).*

In *Talley v. Brentwood Union Free School District,* 2009 WL 1797627 (E.D.N.Y. June 24, 2009), Judge Hurley decided a motion to dismiss various claims alleging constitutional violations, including plaintiff's First Amendment rights, substantive due process and equal protection. Judge Hurley first noted that the Supreme Court "recently clarified the pleading standard applicable in evaluating a motion to dismiss under Rule 12(b)(6)." Then, relying exclusively upon *Twombly* and *Iqbal*, Judge Hurley summarized the new standard as follows:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

550 U.S. at 555 (citations and internal quotation marks omitted).

More recently, in [*Iqbal*] the Supreme Court provided further guidance, setting a two-pronged approach for courts considering a motion to dismiss. First, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 129 S.Ct. at 1950. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949 (citing *Twombly,* [550 U.S.] at 555).

Second, "[w]hen there are well-pleaded factual allegations a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Id. The Court defined plausibility as follows:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 1949 (quoting and citing *Twombly,* 550 U.S. at 556-57) (internal citations omitted).

In other words, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--that the pleader is entitled to relief." *Id.* at 1950.

Id. at *4.

In *Talley*, plaintiff alleged that she was terminated as a teacher at the defendant school district "in retaliation for associating with her father," who was a member of the school Board and at odds with other Board members who participated in the decision to terminate her. Plaintiff attempted to allege various claims for constitutional and related violations.

In analyzing the First Amendment retaliation claim, alleging that plaintiff was not granted continued employment with the school district because of her association with her father, the Court sustained the claim, notwithstanding the heightened pleadings requirements in *Twombly* and *Iqbal*. The Court held that "the Amended Complaint does sufficiently allege the particular activity engaged in by plaintiff's father that resulted in the retaliation against her. Paragraph 91 of the Amended Complaint alleges that 'Defendants' violated her First Amendment right 'on the basis of her freedom of her association with her father, a protected "familial association" and a direct result of his conduct, the way in which he cast his votes and voting history as a member of the [Board]' resulting in her demotion and eventual termination." *Id.* at *6. The Court specifically stated that it was not "persuaded" by defendants' argument that these allegations were merely conclusory, noting: "While not overly abundant, there are factual allegations to support plaintiff's claim. For example, she alleges that [individual Board member defendants] called for her father's resignation due to disagreements with his voting. … She also alleges that at the October 20, 2007 Board meeting when she inquired of the abstaining members regarding the vote on her appointment, [one Board member] responded 'ask your father.'" *Id.* at *6.

However, in analyzing plaintiff's due process claims, the Court held that plaintiff's "amorphous use of the term 'Defendants,'" was insufficient to plead a factual basis of claims against certain of the defendants that did not participate in the challenged activities. Thus, the Court granted the motion to dismiss as to these defendants.

On the equal protection claims, the Court commented that it was "not overwhelmed" with the factual support, but still found it sufficient only as against one of the Board member defendants, while dismissing these claims against other individual defendants because the complaint did "not contain any factual allegations sufficient to plausibly suggest [their] discriminatory state of mind." *Id.* at *7.

The Court also dismissed the Section 1985 conspiracy claim, finding that the "plaintiff has failed to allege facts to support that [individual Board members] were acting solely in their personal interests, separate and apart from their duties as members of the Board." *Id.* at *8. The Court also observed in a footnote that "plaintiff's allegation that [the Superintendant] 'knew of the conspiracy, but failed to prevent it although he had the power to do so in violation of 42 U.S.C. section 1986' is conclusory and, consistent with [*Iqbal*] is not to be presumed true." *Id.* at *9, footnote 8.

Conclusion

The Supreme Court's decisions in *Twombly* and *Iqbal* appear to be making a significant impact on the analysis and resolution of motions to dismiss. Recognizing the "retirement" of the more liberal *Conley* standard, courts certainly are scrutinizing allegations with vigor in considering motions to dismiss. This has obvious repercussions for both the plaintiff and defense bar. Plaintiffs' counsel are well-advised to obtain as much detail as possible early on and pack the complaint with a firm factual foundation. On the other hand, defense counsel should be more inclined to consider an early dispositive motion even where the issues are "close," in view of the more demanding standard that will be applied to the pleading. ■

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