O'Connor Carnathan and Mack LLC

SESSION WATCH

A quarterly summary and brief analysis of significant decisions issued by the Massachusetts Superior Court Business Litigation Session. A service of O'Connor, Carnathan and Mack LLC.

April 2017

Volume 13 Number 4

Summarizing opinions from Oct. 1, 2016 through Dec. 31, 2016

FEATURED DECISION:

OBP Corp. v. Welch Allyn, Inc., 2016 Mass. Super. LEXIS 815

(Nov. 14, 2016) (Leibensperger, J.).

Misappropriation of Confidential Business Information Claim Does Not Require Confidential Relationship Between Plaintiff and Defendant

OBP Corporation ("OBP") sued defendant Welch Allyn, Inc. ("Welch Allyn") for alleged misappropriation of OBP's confidential business information, which consisted of confidential sales information and a list of OBP's customers. Welch Allyn obtained the information from OBP's primary distributor. OBP alleged that Welch Allyn used the information to draft a marketing plan for the purpose of stealing OBP's customers. Welch Allyn moved to dismiss the complaint, and the Court denied that motion.

Welch Allyn argued that OBP had not taken sufficient steps to ensure the confidentiality of the information at issue because it did not require the distributor to sign a nondisclosure agreement. The Court found that the lack of a nondisclosure agreement was not fatal to its misappropriation claim, explaining that, even absent a written confidentiality agreement, "a confidential relationship will be implied where the facts demonstrate that the disclosures were made to facilitate a specific relationship." Because OBP disclosed its customer and sales information to the distributor in order to promote OBP's supplier/distributor relationship, the court found an implied confidential relationship.

Welch Allyn also argued that it had no duty to refrain from using OBP's confidential information. The Court disagreed, finding that the complaint stated a claim for misappropriation "despite the absence of allegations that Welch Allyn and OBP themselves had a confidential relationship." The Court found that the complaint alleged facts sufficient to support either constructive or actual notice to Welch Allyn that it was in possession of OBP's confidential information. Welch Allyn, therefore, had an obligation to refrain from using that information to compete with OBP. ■

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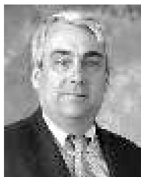
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Noble v. Collias, 2016 Mass. Super. LEXIS 812

(Nov. 10, 2016) (Sanders, J.).

Failure to Make Reasonable Settlement Offer Does Not Support Chapter 93A Claim

This case arose form plaintiffs' purchase of common stock in defendant Progressive Gourmet, Inc. ("Progressive"), a close corporation, and plaintiff George Noble's $300,000 loan to Progressive. Plaintiffs asserted claims for violation of the Blue Sky Statute, G.L. c. 110A, § 410, fraud, negligent misrepresentation, violation of c. 93A, and unjust enrichment. Progressive's CEO and two individuals holding the majority of shares in Progressive moved for summary judgment. The Court largely denied the motions for summary judgment, primarily based on the fact that the claims at issue included elements regarding knowledge and reasonableness – questions of fact that required resolution at trial. In denying summary judgment, the Court emphasized that the question is not whether a plaintiff is likely to succeed at trial but whether there is a material dispute of fact. The Court stated, "summary judgment is a disfavored remedy where it relates to a party's knowledge or state of mind ... That is equally true with respect to whether a party exercises reasonable care, since that necessarily depends on the circumstances."

The Court did, however, dismiss a Chapter 93A claim based on defendants' failure to make a reasonable settlement offer after receiving a 93A demand letter. The Court explained that it was unaware of any case law, outside of the insurance context, suggesting that the failure to make a settlement offer is, in and of itself, an unfair and deceptive practice. ■

Kiribati Seafood Co., LLC v. Crovo, 2016 Mass. Super. LEXIS 809

(Nov. 18, 2016) (Sanders, J.).

Malpractice Claim Time-Barred Where Plaintiff Knew of Harm More than Four Years Prior to Bringing Suit

Plaintiff Kiribati Seafood Company, LLC ("Kiribati") filed a legal malpractice action against defendant M. Delacy Crovo ("Delacy"). Delacy moved for summary judgment on statute of limitations grounds, which the Court allowed.

Delacy is a Massachusetts attorney who acted as counsel for Kiribati at various times since 2000. Kiribati is a Washington state limited liability company. Kiribati entered into a settlement agreement in 2010. At the time of that agreement, Delacy's brother, Charles, was the majority owner of Kiribati. Kiribati's subsequent malpractice claim against Delacy pertained to the role Delacy played in the transfer of the settlement funds. Specifically, Delacy had sent letters representing herself as Kiribati's corporate counsel and requesting a transfer of the settlement funds to Charles. A Washington court ultimately entered an order requiring the settlement funds to be deposited with the court. Kiribati did not comply with the order. On July 2, 2010, the Washington Court found Kiribati to be in contempt and appointed a receiver. Kiribati brought suit against Delacy more than four years later.

The Court found that the statute of limitations began to run no later than July 2, 2010 because, at that point, "Kiribati knew that Delacy had caused some appreciable harm to it – harm that would ultimately consist of the attorneys' fees it incurred in connection with [the appointment of the receiver] and the recovery of the disbursed monies." Therefore, Kiribati's malpractice claim was time-barred. ■

Wildlands Trust of Southeastern Mass., Inc. v. Cedar Hill Retreat Ctr., Inc., 2016 Mass. Super. LEXIS 830 *(Dec. 30, 2016) (Sanders, J.).*

Chapter 93A Claim Dismissed in Case Involving Enforcement of Conservation Restriction

In this case, Plaintiffs, the Wildlands Trust of Southeastern Massachusetts, Inc. ("Wildlands") and the John and Cynthia Reed Foundation ("the Foundation") (collectively, "Plaintiffs"), brought suit to enforce a Conservation Restriction. Plaintiffs alleged that the current owner of the land, defendant Cedar Hill Retreat Center, Inc. ("Cedar Hill"), was engaging in activities in violation of the Conservation Restriction. Plaintiffs also named Ballou Channing District Unitarian Universalist Association, Inc. ("Ballou"), the original landowner and grantor of the Restriction, as a defendant. Plaintiffs' complaint alleged that the Foundation had gifted Ballou $3 million for preservation of the land and in exchange for the Restriction (this agreement referred to as the "Gift Agreement"). Defendants moved to dismiss the complaint, which the Court granted in part.

First of all, the Court declined to dismiss the case based on alleged lack of standing or the Statute of Frauds. With respect to standing, the Court held that, although individual plaintiffs are typically barred, by statute, from challenging the manner in which a charitable institution uses its money, the Foundation in this case had a specific interest based on its $3 million donation that gave it standing. With respect to the Statute of Frauds, the Court delayed this determination until after discovery.

The Court also held that, although Plaintiffs stated a viable claim against Ballou for breach of the Gift Agreement based on its use of the $3 million, Cedar Hill could not be liable for breach of the Gift Agreement because it was not a party to that agreement. In addition, the Court held that Ballou could not be liable for violating the Conservation Restriction because, as the grantor, Ballou's obligations under the Conservation Restriction "ended once it conveyed the premises to Cedar Hill." Finally, the Court held that Plaintiffs' c. 93A claim should be dismissed because Cedar Hill was not engaged in trade or commerce in its dealings with Plaintiffs. ■

Red Door Real Estate, LLC v. Karwashan, 2016 Mass. Super. LEXIS 371

(Oct. 26, 2016) (Sanders, J.).

Trademark Infringement and Chapter 93A Claims Failed Where There Was No Evidence of Confusion in the Marketplace or Damages

Plaintiff Red Door Real Estate, LLC ("Red Door"), a real estate brokerage firm focusing on the South Shore, alleged that defendants, a real estate firm called Red Door Properties, Inc. ("Red Door Properties") and its owner and president Susan Karwashan (collectively, "Defendants"), had infringed upon its state trademark and engaged in unfair and deceptive practices. After a bench trial, the Court entered judgment in favor of Defendants on all counts in the complaint.

The Court found that the two companies focused their business on different parts of the state, did not use the same channels for marketing, and that there was "virtually no evidence that the similarity in the names of the two companies actually caused any confusion among those interested in procuring the services of a real estate brokerage firm." The Court also noted the "complete absence of proof that plaintiff suffered any damages;" to the contrary, Red Door's sales had consistently increased each year. Red Door also failed to offer any evidence of intangible harm to reputation. ■

MMA Lincoln Gardens, LLC v. Lancaster, 2016 Mass. Super. LEXIS 825

(Dec. 7, 2016) (Leibensperger, J.).

Claims Allowed to Proceed Despite Failure to Assert them as Compulsory Counterclaims

This case consists of two consolidated actions between general partners and investor limited partners pertaining to limited partnership agreements for the development of real property. In the first action, the limited partners ("Limited Partners") brought suit against the general partners ("General Partners") for nonpayment of certain amounts owed. In response, the General Partners commenced a separate action against the Limited Partners, alleging that the General Partners had been wrongfully removed from the development projects. The two actions were subsequently consolidated upon motion of the General Partners. The Limited Partners moved to dismiss the complaint in the second action on procedural and substantive grounds.

Procedurally, the Limited Partners argued that the claims in the second action should have been brought as compulsory counter-claims in the first action and, having not been brought in that first action, should be barred. Although the Court found that the claims were compulsory counter-claims, it declined to dismiss the complaint on that basis, finding that the Limited Partners' argument "exalt[ed] form over substance" and that the General Partners' motion to consolidate was effectively a motion to be allowed to file a late counterclaim. Because the Court would have allowed such a motion, it declined to dismiss the complaint on this basis. The Court also declined to dismiss the complaint on substantive grounds, holding that the complaint provided sufficient factual detail to state a claim. ■

Mackinnon v. Berluti, 2016 Mass. Super. LEXIS 375

(Oct. 21, 2016) (Sanders, J.).

Attorney Did Not Violate Chapter 93A in Connection with Fees Collected Pursuant to Settlement Agreement

Plaintiffs in this case are former clients of an attorney, Robert Berluti ("Berluti"), who alleged that Berluti misled them as to the value of their claims and then collected an excessive fee as part of settlement of the case. The fee that Berluti accepted as part of the settlement differed than the amount Berluti was originally entitled to pursuant to his fee agreement. Plaintiffs asserted claims for breach of contract and violation of Chapter 93A. A jury found in favor of Berluti on the breach of contract claims. The Court reserved the Chapter 93A claim for itself and held that Berluti did not violate Chapter 93A.

The Court found that Berluti acted ethically and fairly with respect to the settlement, that each of the plaintiffs fully understood the settlement offer that they accepted, including the amount that Berluti was to receive, and that the plaintiffs understood that the apportionment of attorneys' fees under the settlement was different from that contemplated by the original fee agreement. Therefore, the Court held that plaintiffs had not been misled and Berluti had not engaged in any unfair or deceptive conduct. ■

Abrano v. Abrano, 2016 Mass. Super. LEXIS 808

(Nov. 30, 2016) (Sanders, J.).

Derivative Action Allowed to Proceed Where Close Corporation Performed Inadequate Investigation of Derivative Claims

This case is a derivative action brought on behalf of a closely held corporation, the Bryan Corporation ("the Company"), by two minority shareholders, Bryan Abrano and his sister Bridget Rodrigue. The defendant is Frank Abrano, the Company's founder. As part of a settlement agreement with the Food and Drug Administration, Frank agreed not to have any affiliation with the Company. The complaint alleged that Frank violated that agreement by continuing to meddle in the Company's operations and by enriching himself at the Company's expense.

The Company moved to dismiss on the grounds that a committee of two independent directors had determined that pursuing the derivative action would not be in the Company's best interest. The Court denied this motion, based on concerns that the individuals conducting the investigation were not truly independent. The Court noted that the law firm conducting the investigation of the prospective derivative action had represented Frank in the federal proceedings which resulted in the settlement agreement that banned him from being involved in the Company. In other words, the law firm was in the position of investigating its own client. The Court also expressed concerns about the scope of the investigation that was conducted, noting that the law firm did not interview the plaintiffs or review Frank's email, phone, or bank account records. ■

Tam v. Fed. Mgmt. Co., 2016 Mass. Super. LEXIS 517

(Nov. 30, 2016) (Leibensperger, J.).

Class Decertified Based on False Statements in Class Representative's Affidavit

This decision arose from a dispute over class certification. In December of 2015, the Court allowed a motion to certify a class of current and former employees of defendant Federal Management Co., Inc. ("Federal"), who alleged that Federal failed to pay them for overtime hours worked. Federal subsequently moved to decertify the class based on the ground that discovery revealed that the two named class representatives were not adequate representatives.

The Court allowed the motion to decertify, largely based on the fact that one of the class representatives admitted at her deposition that testimony she submitted in an affidavit in support of class certification was untrue. The Court found that the representative "intended to mislead the court or recklessly signed the Affidavit without caring whether her statements in the Affidavit were true." The Court held that the representative's "admitted falsehoods and recklessness with respect to her sworn statements" would adversely affect the credibility of the claims of the putative class. The Court also found that the other class representative was inadequate because her claims were likely barred by the applicable statute of limitations. The Court preferred to resolve the statute of limitations question before moving forward with a certified class. ■

Columbia Plaza Assocs. v. Northeastern Univ., 2016 Mass. Super. LEXIS 832

(Dec. 15, 2016) (Sanders, J.).

Chapter 93A Claim Time-Barred Where Plaintiff Knew of Claim More than Four Years Before Bringing Suit

This case arose from a dispute between plaintiff Columbia Plaza Associates ("CPA") and defendant Northeastern University ("Northeastern") concerning agreements to develop land adjacent to Northeastern's campus. Northeastern owned the land, and CPA held certain development rights. CPA alleged that Northeastern developed the parcel without adequately compensating it and had misrepresented CPA's participation in the development to the Boston Redevelopment Authority. CPA alleged that this conduct violated Chapter 93A. After a jury-waived trial, the Court entered judgment for Northeastern.

The Court held that CPA failed to prove that Northeastern had engaged in any unfair or deceptive practices. The Court relied on the fact that Northeastern kept CPA fully informed about its plans and was in regular contact with CPA's outside legal counsel and other representatives. The Court also held that CPA's claim was time-barred because CPA knew, more than four years before bringing suit, that Northeastern planned to develop the parcel without CPA's involvement. For example, CPA "saw that excavation for the dormitory was occurring on that site and knew that CPA was not part of that." The Court stated that it was not necessary for CPA to know the full extent of its harm or for the harm to be fully realized in order for the limitations period to begin running. ■

Stemgent, Inc. v. Orion Equity Partners, 2016 Mass. Super. LEXIS 827

(Dec. 21, 2016) (Sanders, J.).

Acting in One's Own Economic Interest Not Enough to Show Improper Motive in Tortious Interference Case

Plaintiff Stemgent, Inc. ("Stemgent") had acquired a company called Asterand. Plaintiff brought suit against Mark Carthy ("Carthy"), one of the competing bidders for Asterand, alleging that Carthy tortiously interfered with an exclusive negotiation agreement between Stemgent and Asterand. Stemgent alleged that this conduct forced Stemgent to have to pay a higher price for Asterand and violated Chapter 93A. The Court entered judgment for defendants following a jury-waived trial.

The Court held that Stemgent had failed to prove that Carthy had an improper motive or used improper means in connection with his competing bid. The Court found that there was evidence that Carthy was motivated by his own economic self-interest, but that was not enough to satisfy the improper motive element of a tortious interference claim. The Court also explained that it was "not convinced" that it was Carthy's conduct that caused Stemgent to raise its bid for Asterand. The Court further found that the facts did not support a finding that Carthy's conduct was "egregious enough to constitute an unfair or deceptive act or practice." ■

In re Ovascience, Inc. Stockholder Litig., 2016 Mass. Super. LEXIS 829

(Dec. 22, 2016) (Sanders, J.).

Securities Class Action Allowed to Proceed Where At Least One Plaintiff Had Standing

This case is a putative class action brought pursuant to the Securities Act of 1933. Plaintiffs are investors who purchased stock in defendant Ovascience, Inc. ("Ovascience"). Plaintiffs alleged that Ovascience issued a Registration Statement that painted a falsely optimistic picture of an experimental fertility treatment. The defendants moved to dismiss the complaint.

The Court denied the motion to dismiss, finding that the complaint adequately stated a claim that the Registration Statement contained material misrepresentations. The Court also rejected the defendants' argument that the plaintiffs did not have standing. The Court relied on the fact that the complaint alleged that one plaintiff purchased its stock on the day of the offering at issue and stated, "[w]ith at least one named plaintiff having satisfied standing requirements, dismissal of this class action is not warranted under Rule 12(b)(6)." ■

United Salvage Corp. of Am. V. Kradin, 2016 Mass. Super. LEXIS 811

(Nov. 8, 2016) (Sanders, J.).

Possible Claims Against Former Employer Did Not Prevent Employer's Enforcement of Noncompete Obligations

Plaintiff United Salvage Corporation ("USC") brought suit against defendant Richard Kradin ("Kradin") to enforce noncompetition and nonsolicitation agreements that were negotiated in connection with USC's purchase of Kradin's salvage business. USC requested a preliminary injunction, which the Court allowed.

The Court relied on evidence that, following his termination from USC, Kradin, despite his noncompete and nonsolicitation obligations, "almost immediately began to contact [USC] customers and solicited them to do business with him instead." The Court rejected Kradin's argument that USC had materially breached its own obligations to Kradin and had driven him out of the company on "trumped up charges." The Court held that the noncompete and nonsolicitation covenants were independent obligations and any claim Kradin may have against USC was not a defense to their enforcement. ■

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Ilex Invs. L.P. v. Bitran, 2016 Mass. Super. LEXIS 831

(Dec. 22, 2016) (Sanders, J.).

Court Declines to Resolve Issue of Reasonable Reliance on Summary Judgment

In this case, plaintiffs sought to recover investment losses of $1.5 million. Plaintiffs had asserted claims for fraudulent misrepresentation and fraudulent concealment, negligent misrepresentation, and fraud in the inducement. Plaintiffs moved for summary judgment, which the Court denied.

The Court explained that reasonable reliance is a fact-driven inquiry not appropriate for resolution on summary judgment. The Court noted that it was "aware of no Massachusetts case where summary judgment has been granted for a plaintiff on a common-law misrepresentation claim ... Where the plaintiff bears the burden of proving that his reliance was reasonable, it is hard to envision circumstances which would support a summary disposition." ■