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SESSION WATCH

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Summarizing opinions from January 1, 2019 through March 31, 2019

FEATURED DECISION:

Fid. Brokerage Servs., LLC v. Callinan, 2019 Mass. Super. LEXIS 32

(Feb. 7, 2019) (Davis, J.).

Departure Announcements May Constitute an Impermissible Solicitation in Violation of Non Compete

Plaintiff Fidelity Brokerage Services, LLC ("Fidelity") sought a preliminary injunction preventing its former employee, defendant Devin Callinan ("Callinan"), from violating the terms of his employment agreements with Fidelity and from utilizing any of Fidelity's confidential information to solicit Fidelity customers to join Callinan's new employer, defendant UBS Financial Services, Inc. ("UBS"). Callinan's employment agreement prohibited him from using Fidelity's confidential information to solicit customers to leave Fidelity. When Callinan left Fidelity, he created a list of Fidelity customers from memory and telephoned them to notify them of his departure. Fidelity presented evidence that he used the calls as an opportunity to persuade clients to transfer to UBS. Callinan argued that the information in his memory did not constitute confidential information and he was legally entitled to announce his departure to his former clients.

The court granted Fidelity's request for preliminary injunctive relief. The court first found that the identity of Fidelity's clients, which was not publicly available information, fell within the definition of "Confidential Information" in Callinan's employment agreement. This finding was not changed by the fact that Callinan retained the information only in his memory: "[t]he manner in which confidential information is retained by a former employee does not affect whether the information itself is . . . confidential."

The court then found that Callinan's calls to his former clients constituted impermissible solicitation. The court noted, however, that not every departure announcement to former clients constitutes a solicitation, and a former employee is entitled to make a simple announcement of a change in employment to former clients. In this case, the court found that Callinan crossed the line based on "the manner in which [he] reached out to his former clients (i.e., primarily by telephone), the extended period of time during which he did so (i.e., approximately four months), the relatively low level of interest that his former clients needed to show when contacted in order to elicit an immediate sales pitch for UBS . . . and the actual content of [the] communications." In reaching this conclusion, the court advised that the "best practice" for a departing financial advisor to follow is to send a brief departure announcement in writing, and "anything beyond a written announcement . . . can and should be viewed by the courts with great suspicion." ■

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America's Test Kitchen, Inc. v. Kimball, 2019 Mass. Super. LEXIS 37, 38, 41, 43, 44, and 45 *(Mar. 19-22, 2019) (Sanders, J.).*

Court Resolves Six Summary Judgment Motions in Trade Secrets Case Involving America's Test Kitchen

America's Test Kitchen, Inc. ("ATK"), the sole general partner in America's Test Kitchen Limited Partnership ("ATK LP"), brought suit against Christopher Kimball ("Kimball"), its former CEO and a limited partner in ATK LP, and others after Kimball left the television and radio show "America's Test Kitchen" and began a competing cooking show. The competing show was operated by an entity called CPK Media, LLC ("CPK"). ATK alleged that Kimball misappropriated its trade secrets and confidential information. Kimball maintained that he had simply engaged in legitimate competition and ATK's lawsuit was an effort to drive him out of the marketplace. The parties filed six summary judgment motions, which the court addressed in separate decisions.

The court allowed Kimball's motion for summary judgment with respect to two duplicative and unnecessary causes of action but otherwise denied it. Whether information retained by Kimball constituted protectable trade secrets required factual findings. The court also rejected Kimball's argument that he owed no fiduciary duties to ATK. Kimball, as a high level employee who played a key role in the business, owed his employer a duty of loyalty. In addition, the court noted that, although mere status as a limited partner does not impose heightened fiduciary obligations, "there is some support for the proposition that, where a limited partner also possesses management authority, that control and power carries with it certain responsibilities."

The court denied ATK and ATK LP's motion for summary judgment with respect to certain of Kimball and CPK's counterclaims. The defamation counterclaim survived, for example, because the court rejected ATK's argument that Kimball is a "public figure" for purposes of defamation law. Kimball is neither a national household name nor a central figure in a matter of public concern.

The court also denied a summary judgment motion brought by Kimball's wife, Melissa Baldino ("Baldino"), who had signed an employment agreement prohibiting her from assisting another in any activity in competition with ATK. There was a dispute of fact regarding whether Baldino breached that agreement and aided and abetted Kimball's breach of fiduciary duty when she contacted ATK employees to recruit them to the new company and provided other assistance to Kimball.

In addition, the court denied a summary judgment motion brought by William Thorndike ("Thorndike"), a former ATK advisor who provided Kimball advice in connection with starting his new venture and eventually became a major investor in that venture. ATK's claim for misappropriation of trade secrets survived because Thorndike participated in ATK Board meetings and had access to protectable information. The claim that Thorndike assisted Kimball in breaching his fiduciary duties also survived because Thorndike worked closely with Kimball to open his new venture at a time when Thorndike understood that Kimball faced the risk of being sued for breach of fiduciary duty.

The court allowed a motion for summary judgment brought by Kimball's executive assistant, Christine Gordon ("Gordon"). The record was devoid of evidence that Gordon knew Kimball was engaged in any wrongdoing – she merely undertook certain tasks at his direction in her capacity as his assistant.

The court also allowed a motion for summary judgment brought by Deborah Broide ("Broide"), a media consultant for ATK who later provided services to CPK. ATK's misappropriation claim failed because it was based on documents containing publicly available information. ATK's claim for aiding and abetting breach of fiduciary duty also failed because there was no evidence to suggest that Broide had any reason to suspect that Kimball's plan to set up his own company was wrong, particularly in light of the fact that Kimball had not signed any restrictive covenants. The fact that Broide sent Kimball a handful of emails providing general advice regarding how to handle his departure from ATK from a public relations point of view "hardly constitutes the kind of substantial assistance necessary for the tort of aiding and abetting breach of fiduciary duty." ■

Gowen v. Benchmark Senior Living, LLC, 2019 Mass. Super. LEXIS 4

(Jan. 2, 2019) (Sanders, J.).

Claim Alleging Violation of G.L. c. 186, § 15B Survived Plaintiff's Death

Plaintiff brought a putative class action against defendant Benchmark Senior Living, LLC ("Benchmark"), which operates assisted living facilities in Massachusetts, challenging Benchmark's practice of charging its residents a community fee in violation of G.L. c. 186, § 15B. Plaintiff sought to amend its complaint to substitute a new named plaintiff in light of the former plaintiff's death and to add a co-plaintiff. The proposed new named plaintiff was the legal representative of the former plaintiff's estate. Benchmark argued that the proposed amendments would be futile because the claims were not within the scope of the Massachusetts Survival Statute and could not be pursued by the representative of plaintiff's estate.

The court disagreed and explained that the Survival Statute was intended to expand the type of actions that survive, not restrict them. The court found that plaintiff's claim of a violation of G.L. c. 186, § 15B, which regulates the contractual relationship between landlord and tenant, was "essentially quasi contractual in nature" and, therefore, survived. ■

Middlesex Corp. v. Fay, 2019 Mass. Super. LEXIS 27

(Jan. 28, 2019) (Kaplan, J.).

Parties Working Together to Prepare a Response to a Request for Proposal May Be Engaged in a Private Relationship Outside the Scope of Chapter 93A

Plaintiff, The Middlesex Corporation, Inc. ("Middlesex"), was the general contractor for a bridge design project. Defendant engineering firm, Fay, Spofford & Thorndike, Inc. ("FST"), pursuant to an agreement with Middlesex, provided designs for the project. Middlesex used the designs to estimate the costs it would incur in connection with the project. Middlesex brought suit against FST alleging that FST performed its design work negligently and that such negligence caused Middlesex to underestimate the cost of steel needed for the project by $4 million. Middlesex asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, misrepresentation, fraud, and violation of Chapter 93A. FST moved for summary judgment on all but the negligence claim.

The court denied summary judgment on all claims except the implied covenant claim. The court rejected FST's argument that the gist of the contract claim was professional negligence, not breach of contract, and stated that Middlesex could pursue claims under both contract and tort theories. With respect to the fraud and misrepresentation claims, the court found evidence in the record that FST's principal engineer represented to Middlesex that the steel design was "conservative," meaning that it might be possible to achieve even further savings on the steel cost, while knowing that the design was inadequate and more steel would be required.

The court also found that issues of fact precluded summary judgment on the Chapter 93A claim. However, the court noted that if it were ultimately found that Middlesex and FST were engaged in a joint undertaking to submit a response to a request for proposal with respect to construction of the bridge, "it may well be that the parties were not in a commercial relationship within the meaning of Chapter 93A, § 11 during their joint efforts to prepare the bid response." ■

Sugarman & Sugarman, P.C. v. Shapiro, 2019 Mass. Super. LEXIS 22

(Feb. 1, 2019) (Salinger, J.).

Court Denies Law Firm a Constructive Trust on Departing Attorney's Post-Departure Fees

In 2016, Defendant attorney Daniel Shapiro ("Shapiro") joined plaintiff Sugarman & Sugarman, P.C. ("Sugarman") and brought his workers' compensation law practice with him. Shapiro and his law practice left Sugarman in 2017. Sugarman brought suit seeking quantum meruit compensation for its work on Shapiro's cases, an accounting of moneys received by Shapiro's law practice, and alleging breach of contract and duty of loyalty. Shapiro counterclaimed. Sugarman then moved for imposition of a constructive trust on the proceeds of all matters on which Sugarman provided services while Shapiro worked there. Sugarman's request for a constructive trust was based on Shapiro's alleged breach of a duty of loyalty to the firm. Shapiro moved to dismiss Sugarman's quantum meruit claim.

The court denied both motions. Although the court agreed that Shapiro owed Sugarman a duty of loyalty while at the firm, and, therefore, if Sugarman prevailed in proving a breach, it may be entitled to a constructive trust at that point, Sugarman had not yet prevailed. The court therefore treated the motion as a request to enjoin Shapiro from using or alienating funds received in connection with the disputed client accounts. The court denied that request based on a failure to demonstrate likelihood of success on the fiduciary duty claim: "the mere fact that Shapiro left the firm and took clients with him does not mean that he breached any fiduciary duty." The court denied the motion to dismiss Sugarman's quantum meruit claim because Sugarman was permitted to plead in the alternative and there was a plausible argument that the parties' contract did not define the obligations of the parties in the event Shapiro left the firm with his practice. ■

Shachoy v. Conrades, 2019 Mass. Super. LEXIS 34

(Mar. 6, 2019) (Salinger, J.).

Failure to Define Material Term Renders LLC Agreement Too Indefinite to Be Enforced

Plaintiff Meredith Shachoy ("Shachoy") sought to enforce the amended limited liability company agreement ("LLC Agreement") of Longfellow Venture Partners I, LLC ("Longfellow") against Defendant George Conrades ("Conrades"). The LLC Agreement provided that Shachoy was entitled to receive Longfellow's income up to a certain unspecified "Threshold Amount," and ten percent of the income above that amount.

The court held that the LLC Agreement was not enforceable under Delaware law because it was missing a material term: the definition of "Threshold Amount." The missing term was material because without it there was no way to allocate Longfellow's profits between Shachoy and Conrades. Absent a definition of that term, there was also no way to determine what remedy Shachoy would be entitled to if she prevailed. The court also stated that Delaware law did not permit it to use extrinsic evidence to create a reasonable Threshold Amount.

The court allowed Shachoy to pursue an alternative claim that Conrades orally agreed to amend the original agree-ment and permit Shachoy to receive ten percent of Longfellow's profits, despite a clause in the original agreement requiring modifications to be in writing. The court held that, under Delaware law, such a clause "cannot bar an otherwise valid oral agreement to amend the LLC Agreement." The court also stated that the unenforceable LLC Agreement and evidence regarding the discussions leading up to its execution may be admissible in connection with the claim of oral modification. ■

All Tech Networking, LLC v. Pryor, 2019 Mass. Super. LEXIS 23

(Feb. 22, 2019) (Salinger, J.).

Counsel for Two-Member LLC Permitted to Represent One Member in Litigation Against the Other

Defendant Richard Pryor ("Pryor") moved to disqualify the law firm Newman & Newman, P.C. and Attorney Richard Joyce ("Joyce") from representing All Tech Networking, LLC ("All Tech") and Steven Wojcik ("Wojcik"). Pryor and Wojcik are the sole members and managers of All Tech. Litigation arose between them after Wojcik attempted to terminate Pryor's employment with All Tech and prevent Pryor from taking action on behalf of the company. Wojcik had retained Joyce to represent All Tech in connection with terminating Pryor's employment.

The court denied Pryor's motion for disqualification because he had not shown that Joyce learned of any confidences from Pryor that would be relevant to the litigation. The court stated that Pryor had not shown any attorney-client relationship between him and Joyce, noting that counsel for a closely held corporation "does not by virtue of that relationship have an attorney-client relationship with the individual shareholders."

The court recognized that Joyce may have owed Pryor a fiduciary duty of loyalty even in the absence of an attorney-client relationship. However, such a finding would not automatically disqualify Joyce from representing All Tech and Wojcik: "Since Pryor has not proved that he ever shared any confidential information with Attorney Joyce that he withheld from Wojcik, there would be no grounds for disqualifying [Joyce] and his law firm even if [Joyce] once owed Pryor a fiduciary duty." ■

Barton & Assocs. v. Barry, 2019 Mass. Super. LEXIS 24

(Feb. 1, 2019) (Kaplan, J.).

Forum Selection Clause in Contract Does Not Preclude Forum Non Conveniens Motion

Plaintiff Barton & Associates, Inc. ("Barton"), a recruiting and staffing firm, brought suit against its former employee, Colin Barry ("Barry"), alleging that Barry left Barton and solicited former colleagues to join a competitor, in violation of his employment agreement. Barry's employment agreement contained a forum selection clause which provided that any action to enforce the agreement must be brought in Massachusetts, contained a consent to jurisdiction in Massachusetts, and contained a waiver of any defense that Massachusetts was an inconvenient forum. Barry, acting pro se, moved to transfer the case to Arizona, where he lives and last worked for Barton. His motion did not request dismissal on the grounds of forum non conveniens.

The court denied the motion to transfer because it "has no power to transfer any case to a court in Arizona." However, the court expressly stated that it was not deciding a motion to dismiss on forum non conveniens grounds and took the opportunity to explain that a forum selection provision does not necessarily preclude a court from entertaining such a motion. The court stated: "Forum non conveniens considers both public concerns . . . and private concerns . . . These are matters affecting the 'interest of substantial justice' . . . that a court cannot ignore regardless of any prior agreement between the parties." The court noted that a forum selection provision does, however, have "some bearing on the consideration by a judge of the private factors." Therefore, the court stated that the waiver in Barry's employment agreement did not preclude a properly supported forum non conveniens motion, should he choose to bring one. ■

Genis v. Campbell, 2019 Mass. Super. LEXIS 31

(Feb. 22, 2019) (Salinger, J.).

No Viable Misappropriation Claim Against Third Parties Without Plausible Allegations They Knew About Defendant's Confidentiality Agreement

Plaintiff Alfred Genis ("Genis") sought to amend his complaint to substitute four named defendants for previously unidentified "John Doe" defendants in a case involving alleged misappropriation of trade secrets. Genis alleged that he disclosed certain confidential information to defendant Pure Crystal, LLC ("Pure Crystal"), with the understanding that Pure Crystal would not share that information with anyone else. Genis alleged that Pure Crystal did share that information with the proposed new defendants. Two of the four new defendants, Fraunhofer USA, Inc. ("Fraunhofer") and Thomas Schuelke ("Schuelke"), opposed the motion to add them to the case.

The court denied the motion to amend on the grounds that amendment would be futile. The court held that the proposed complaint did not state a viable trade secret claim against Fraunhofer or Schuelke because it did not allege facts plausibly suggesting that those parties knew or had reason to know that Pure Crystal had an obligation not to disclose the alleged confidential information. The court held that the tortious interference claim failed for the same reason. The proposed conversion, unjust enrichment, and quantum meruit claims were also futile because the proposed complaint did not allege facts plausibly suggesting that Fraunhofer or Schuelke retained possession of Genis' personal property. ■

Muffin Trust v. MONY Life Ins. Co. of Am., 2019 Mass. Super. LEXIS 18

(Jan. 23, 2019) (Sanders, J.).

No Private Right of Action Under the Elder Protection Statute

Plaintiffs owned three life insurance policies. Defendant MONY Life Insurance Company of America ("MONY") issued two of the policies ("the MONY Policies") and Defendant AXA Equitable Life Insurance Company ("AXA") issued the third policy ("the AXA Policy"). Plaintiffs alleged that MONY charged them far in excess of the amounts permitted under the policies and that AXA raised the cost of insurance beyond anything that is equitable or justified. Plaintiffs alleged that the Defendants targeted the elderly by raising premiums so high that policyholders are forced to abandon their policies and relinquish their death benefits. Plaintiffs asserted various claims. Defendants moved to dismiss some of those claims.

The court first declined to dismiss the declaratory judgment count, finding that MONY's challenge to the factual accuracy of the allegations in the complaint reflected a misunderstanding of the standard on a Rule 12(b)(6) motion, where facts are taken as true. MONY also attempted to rely on documents – an actuary's affidavit and attached exhibits – that could not be considered on a motion to dismiss.

The court also declined to dismiss a fiduciary duty claim based on an alleged fiduciary relationship between Plaintiffs and their insurance agent, noting that the question of whether a fiduciary relationship exists based on special circumstances "is inherently a factual one not easily resolved by way of a 12(b)(6) motion."

The court did dismiss Plaintiffs' claim for violation of the Elder Protection Statute, G.L. c. 19A, § 1, on the grounds that Chapter 19A was intended to apply to exploitation of the elderly arising outside of the commercial context and there was no indication that the statute created a private right of action. It also dismissed the unjust enrichment claim based on the existence of an enforceable contract. ■

Guarino v. MGH Inst. of Health Professions, Inc., 2019 Mass. Super. LEXIS 17

(Jan. 15, 2019) (Salinger, J.).

Claims for Wrongful Termination in Violation of Public Policy Limited to At-Will Employees

Plaintiff Anthony J. Guarino ("Guarino") brought suit against The MGH Institute of Health Professions, Inc. ("IHP"), alleging that IHP breached its contract and wrongfully terminated him when it decided not to renew his appointment as a faculty member. He also alleged that IHP's Provost, Alex Johnson ("Johnson"), unlawfully interfered with his employment contract and defamed him.

The court allowed defendants' motion for summary judgment. The court first found that Guarino had engaged in a pattern of disruptive and insubordinate conduct that justified IHP's decision not to renew his contract. The court explained that "[u]nless they make a clear contractual commitment to the contrary, colleges, universities, and similar institutions have broad discretion in deciding who may join or remain on their faculty . . . [a]bsent a violation of a reasonable expectation created by contract or arbitrary and capricious conduct by the institution, courts and juries may not second-guess decisions by an academic institution about who should serve on its faculty."

The court also held that Guarino could not assert that his discharge violated public policy because he was employed for a term of years, not at-will: "[u]nder Massachusetts law, only at-will employees can sue for wrongful termination in violation of public policy." Even if Guarino had been an at-will employee, however, he would not have been able to prove he was discharged in violation of public policy because that legal theory is available only in situations where an employee is terminated for asserting a legally guaranteed right, for doing what the law requires, for refusing to do that which the law forbids, or for doing things that are expressly encouraged by statute.

The court further held that there was no evidence Johnson acted with a legally improper motive or used improper means in firing Guarino. Finally, Guarino's defamation claim was barred by defendants' conditional privilege to disclose negative allegations in connection with determining whether an employee should be fired. The defamation claim was based primarily on paragraphs in the Statement of Cause that informed the Hearing Committee of the factual basis for the recommendation to terminate Guarino's appointment. The court explained that dissemination of allegations against Guarino to the three faculty members comprising the Hearing Committee was "reasonably necessary to serve IHP's legitimate interest in determining whether Guarino was fit to continue as a faculty member." There was also no evidence that IHP or Johnson had any reason to believe the allegations against Guarino were false. The remainder of the defamation claim was based on "inadmissible hearsay or conjecture" and therefore could not defeat a motion for summary judgment. ■

Vigor Works, LLC v. Skanska, 2019 Mass. Super. LEXIS 15

(Feb. 12, 2019) (Kaplan, J.).

Privileged Document Deemed Inadvertently Produced Despite Attorney Review

Plaintiff Vigor Works, LLC ("Vigor"), a subcontractor, brought suit against its general contractor, Defendant White Skanska, JV ("WS"), in connection with a construction project. During the course of litigation, Vigor realized that it had previously inadvertently produced two privileged documents in discovery: (1) an email sent by Vigor's counsel to a Vigor executive, which was imaged with a FedEx cover sheet that made it appear that the email had been sent externally; and (2) a draft letter that also had the

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same attorney email contained within it. The first document had been identified for review as potentially privileged but the reviewer had erroneously decided to produce it because it appeared to have been sent externally. Subsequent investigation revealed that it had never been sent. The second document had mistakenly never been identified as potentially privileged and therefore was produced without attorney review.

Vigor sought a court order compelling WS to return or destroy these two documents. WS argued that the disclosure was not inadvertent and, therefore, it was not required to return the documents. The court first found that the draft letter was a paradigm example of an inadvertently disclosed communication. The court then explained that the FedEx documents presented a much more difficult question because they did not involve a failure of a search protocol but, rather, a reviewer's error that occurred in analyzing whether the document could be produced. The court pointed out that the reviewer could have investigated whether the FedEx documents were actually sent before producing them.

Nevertheless, the court found the reviewer's mistake to be "understandable," and held that the disclosure of the FedEx documents, "while arguably preventable with more careful attention," was also inadvertent. The court also noted that the privilege belongs to the client and "a lawyer's mistake that seems reasonable under the circumstances . . . ought not prejudice the client." ■

NSTAR Elec. Co. v. Veolia Energy N. Am. Holdings, Inc., 2019 Mass. Super. LEXIS 7 *(Jan. 29, 2019) (Salinger, J.).*

In Context of Continuous Tort, Initial Accrual Outside of Limitations Period Did Not Bar Claims Based on Later-Occurring Additional Damage

Eversource Energy ("Eversource") alleged that the underground cables for its electrical distribution system in Boston were damaged by steam or heat leaks from a steam distribution system operated by Veolia Energy North America Holdings, Inc. ("Veolia"). Eversource asserted claims for negligence, trespass, and breach of contract. Veolia moved for partial summary judgment and sought to bar any claim for damages incurred before commencement of litigation on the basis of spoliation of evidence.

With respect to spoliation, Veolia established that, by the end of 2009, Eversource suspected that leaks from Veolia's system were damaging its facilities but it did not preserve any electric cables that failed prior to commencement of litigation, thereby preventing Veolia from inspecting them. The court agreed that this constituted spoliation but declined to dismiss any claims as a sanction, noting that it was unclear whether Veolia had been unfairly prejudiced. Eversource had presented an expert opinion that any evidence as to cause of failure would have been destroyed by the event of failure itself. Instead of dismissing Eversource's claims, the court permitted Veolia to present evidence of spoliation at trial and receive an adverse inference instruction if spoliation were to be found.

The court also found that Eversource's tort claims were time-barred to the extent they sought compensation for damage occurring more than three years before it filed suit. The court rejected Eversource's argument that no cause of action accrued until it was "sure" that Veolia's system had caused the damage. The court did, however, permit Eversource to seek compensation for further, timely damage caused by continuing negligence or trespass: "[w]here a party continues to breach a duty of care or commits a continuing trespass over a period of time, a new cause of action accrues each time the continuing negligence or trespass causes new or additional damage, and thus the statute of limitations period begins to run anew with respect to each additional injury." The court rejected Eversource's argument that Veolia's failure to disclose discovery of certain steam leaks constituted fraudulent concealment because, absent a fiduciary

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duty of disclosure, "a failure to disclose facts that may support a cause of action does not amount to fraudulent concealment."

The court denied summary judgment on the trespass claim and the portion of the negligence claim pertaining to heat leaks. The trespass claim turned on disputed issues of fact. Eversource had presented evidence that Veolia became aware that steam was leaking from its system and continued to use the system without fixing it. With respect to heat leaks, the court held that, even though Veolia did not design or install the steam system, Veolia, like any property owner, had a duty to exercise ordinary prudence and care in the maintenance of its steam lines and could be sued for negligence if it knew of dangerous conditions on its property and failed to take reasonable efforts to protect Eversource against those dangers. ■

City of Somerville v. Somerville Police Emples. Ass'n, 2019 Mass. Super. LEXIS 40

(Mar. 11, 2019) (Kaplan, J.).

Department of Labor Relations Has Primary Jurisdiction Over Claims Involving Breach of a Union's Duty of Fair Representation

Plaintiff City of Somerville ("City") has a collective bargaining agreement ("CBA") with defendant Somerville Police Employees Association ("SPEA"). The CBA addresses calculation of overtime pay. It also contains an arbitration provision limiting the scope of arbitration to disputes involving "an alleged violation of a specific provision" of the CBA. Eighty-two Somerville police officers brought a federal action asserting that the manner of calculating overtime pay violates the Fair Labor Standards Act and the Massachusetts Wage Act (the "Federal Action"). The City brought suit against SPEA in state court, alleging that, at a union meeting, SPEA's president solicited police officers to be plaintiffs in the Federal Action and SPEA financed that litigation. The City alleged that this violated the implied covenant of good faith and fair dealing in the CBA and that, if the City were found liable in the Federal Action, SPEA should be liable to the City as a joint tortfeasor. SPEA moved to dismiss or stay the state court litigation pending arbitration or resolution by the Massachusetts Department of Labor Relations (the "DLR").

The court allowed the motion to dismiss. With respect to the implied covenant claim, the specific question before the court was whether the claim of breach of the implied covenant constituted an alleged violation of a specific provision of the CBA that must be arbitrated. The court first found that it, not the arbitrator, should determine whether the dispute is subject to arbitration. The court then held that the City's claim, in practical effect, constituted a dispute involving the City's rights under a specific contract provision (the section of the CBA addressing overtime wages) and therefore must be submitted to arbitration.

With respect to the City's joint tortfeasor argument, the court first recognized that a joint tortfeasor may enforce its right to contribution through a separate action. However, the court held that the joint tortfeasor statute, G.L. c. 231B, did not apply to the Federal Action because it was "essentially a contract claim, not a tort claim." The court explained that even if the Federal Action involved tort claims, "primary jurisdiction" over matters involving claims of breach of the duty of fair representation lies with the DLR. ■

Sevinor v. Sahni, 2019 Mass. Super. LEXIS 42

(Mar. 28, 2019) (Sanders, J.).

No Basis to Pierce Corporate Veil With Respect to Entities Owned and Controlled by Defendants

Defendants Surinda and Arbreed Sahni ("Defendants") own cell phone stores throughout the United States operating as franchisees of Cricket Wireless. One of those stores was located in a building owned by Plaintiff Ralph Sevinor ("Sevinor") in Massachusetts. Defendants and Sevinor discussed going into business together for the purpose of opening additional stores in New England. That venture failed, and a dispute arose between the parties. Sevinor brought claims against the Defendants and the various corporate entities through which they operated cell phone stores. Defendants moved for summary judgment with respect to claims against corporate entities operating stores outside of Massachusetts ("Outside Entities"). None of the Outside Entities has any connection to New England, they each maintain their own bank account, and they each file separate tax returns.

The court agreed with Defendants that the Outside Entities must be dismissed from the case. The court first found that the venture agreement between Sevinor and Defendants was unambiguous and did not involve the Outside Entities. The court also rejected Sevinor's argument that Defendants operated their companies as a single company because there was no evidence in the record that would permit piercing the corporate veil. The court explained that "common ownership of stock in two or more corporations together with common management is not enough." The court found that, although funds were transferred among Defendants' entities, such transfers were tracked by an accountant, and there was no confused intermingling of assets. In addition, there was no evidence that the corporations were formed to perpetrate a fraud on Sevinor or that Defendants used the corporate structure to mislead Sevinor. Finally, the court stated that there was "no need" to invoke the equitable doctrine of piercing the corporate veil because Sevinor could "obtain meaningful recovery" from Defendants themselves. ■

Mooney v. Diversified Bus. Communs., 2019 Mass. Super. LEXIS 30

(Feb. 25, 2019) (Sanders, J.).

Submission of Documents Concerning Underlying Legal Issues to Appraiser Conducting Corporate Valuation Did Not Bar Subsequent Litigation of Those Issues

Plaintiffs, minority-interest holders in DBC Pri-Med, LLC ("Pri-Med"), brought suit against Pri-Med, certain of its managers, and Diversified Business Communications ("Diversified"), which holds a majority interest in Pri-Med. Plaintiffs alleged that, in anticipation of buying out Plaintiffs' shares, defendants attempted to deflate the value of Pri-Med by having Pri-Med incur more than $3 million in unapproved expenditures and taking on over $12 million in debt from Diversified. In 2017, an appraiser, Duff & Phelps, issued a report on the valuation of Plaintiffs' shares after the parties could not agree on value. The parties agreed that this appraisal was final and binding and carried the same finality as a court decision.

Plaintiffs moved for summary judgment. Defendants, in turn, argued that the appraisal resolved questions regarding the propriety of Pri-Med's debts and requested an order that the doctrine of res judicata barred Plaintiffs from relitigating that issue. The court denied both motions.

With respect to Plaintiffs' motion, the court held that there were factual

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disputes as to the purpose of the loans as well as Plaintiffs' knowledge and approval of them. The court noted that Plaintiffs' summary judgment motion appeared to have been filed for "strategic purposes" so that Plaintiffs could have an additional opportunity to make arguments pertinent to defendants' motion.

With respect to defendants' motion, the court held that the appraiser's authority was narrow and there was no indication that Duff & Phelps, in the course of its valuation decision, was going to determine whether the defendants conducted themselves lawfully. The court explained that Duff & Phelps was "applying accounting principles, not legal principles." The fact that Plaintiffs submitted documents to the appraiser related to defendants' alleged misconduct did not change the outcome because the court was "not convinced that Duff & Phelps actually resolved the legal disputes regarding defendants' compliance with the LLC Agreement." ■

Friedman v. Wang, 2019 Mass. Super. LEXIS 29

(Feb. 28, 2019) (Salinger, J.).

Breach of Settlement Agreement Did Not Void Release of Claims

Jonah Friedman ("Friedman") and Cynthia Wang ("Wang") entered into a written settlement agreement in 2016 in which Wang agreed to pay $60,000 to Friedman within 45 days. Wang never paid. Friedman then brought suit against Wang for breach of the settlement agreement, fraud, and violation of Chapter 93A. Friedman sought to rescind the settlement agreement and revive his underlying claims against Wang that the settlement agreement had released. Both parties moved for summary judgment.

The court found that Friedman was entitled to summary judgment on his breach of contract claim because it was undisputed that Wang failed to pay $60,000 under the settlement agreement. The court granted summary judgment in Wang's favor, however, on the fraud claim because Friedman had failed to identify evidence that Wang did not intend to perform at the time she entered into the settlement agreement. The court explained that "an intention not to perform a promise cannot be inferred merely from later nonperformance." The court also granted summary judgment to Wang on the Chapter 93A claim.

The court went on to hold that the release in the settlement agreement barred Friedman from pursuing the underlying claims and did not become void as a result of Wang's failure to pay. The court noted that the agreement could have stated that the claims would be released upon payment of the $60,000, but it did not. The court also rejected the argument that the failure to pay the $60,000 constituted a failure of consideration because Wang's promise to pay was sufficient consideration to make the settlement agreement binding. ■

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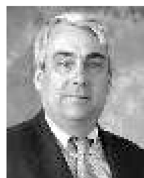
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Am Project Norwood, LLC v. Endicott South Dev. Corp., 2019 Mass. Super. LEXIS 8 *(Jan. 17, 2019) (Salinger, J.).*

Preliminary Injunction Request Denied Due to Absence of Underlying Claim

Plaintiff AM Project Norwood, LLC ("AM Project") owns 51 percent of EW Development, LLC ("EW"); Defendant Endicott South Development Corporation ("Endicott") owns 49 percent. AM Project brought suit seeking to compel Endicott to sell its interest in EW pursuant to a provision in EW's operating agreement. AM Project also moved for a preliminary injunction, alleging that Endicott improperly withheld consent to modification of the terms of a loan made to EW and seeking an order requiring Endicott to give its consent.

The court denied the request for preliminary injunctive relief. The court first stated that the request was premature because AM Project had not yet asserted any claim that Endicott's withholding of consent was a breach of contract or otherwise unlawful. The court explained that "[t]he filing of a meritorious claim or counterclaim is . . . a condition precedent to seeking injunctive relief . . . AM Project cannot demonstrate a likelihood of success on the merits as to a claim that has never been asserted in this action."

The court also held that AM Project lacked standing to seek an injunction intended to benefit EW as a corporate entity. Any claim regarding withholding consent to the loan modification would have to be asserted derivatively on behalf of EW because the alleged wrong harmed EW rather than any individual member.

Finally, AM Project's request for preliminary injunctive relief was denied because it had failed to show that EW would suffer irreparable harm without the injunction. AM Project's affidavits described potential financial injuries that did not constitute irreparable harm because EW could be made whole by money damages. ■