O'Connor Carnathan and Mack LLC

SESSION WATCH

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F E A T U R E D D E C I S I O N :

Mooney v. Diversified Bus. Communs., 2017 Mass. Super. LEXIS 133

(July 20, 2017) (Sanders, J.).

Former Corporate Officer Denied Access to Privileged Communications Exchanged During His Tenure

This case involves a dispute between members of a limited liability company, Pri-Med LLC ("Pri-Med"). The minority owners brought suit against Pri-Med and the majority owner. One of the Plaintiffs, John Mooney ("Mooney"), was Pri-Med's former CEO. In discovery, Mooney demanded certain communications between Pri-Med and its counsel during Mooney's tenure as CEO.

When Mooney moved to compel their production, the Court held that he was not entitled to the privileged communications. The Court noted that the SJC has yet to explicitly address whether former directors or officers can access privileged communications created during their tenure. The Court emphasized not the timing of the creation of the communications, but the reason for the officer demanding them. The key question for the Court was whether the former officer or director seeks the documents in order to serve his or her individual interest or the corporation's interest. The Court held that Mooney was "clearly seeking the communications to further his own personal interest, not that of Pri-Med. That his interests were not adverse to Pri-Med at the time the communications were exchanged is irrelevant." ■

Siew-Mey Tam v. Fed. Mgmt. Co., 2017 Mass. Super. LEXIS 127

(July 21, 2017) (Kaplan, J.).

General Complaint About Pay Insufficient to Qualify as Protected Complaint for Purposes of G.L. c. 149, § 148A

Plaintiffs Siew-Mey Tam and Mary Jane Raymond ("Plaintiffs") brought suit against their former employer, Federal Management Co. ("FMC"), and several individuals (collectively with FMC, "Defendants"), alleging that they were misclassified as exempt employees under G.L. c. 151, § 1A and that FMC had failed to pay them for overtime hours worked. Mary Jane Raymond ("Raymond") also asserted a claim for retaliation under G.L. c. 149, § 148, alleging that she complained to FMC concerning the amount of her salary and lack of support and was subsequently fired in retaliation for exercising her right to be paid overtime. Defendants moved for summary judgment with respect to the claims asserted by Raymond. The court allowed Defendants' motion.

The court first held that the claim under G.L. c. 151, § 1A was time barred. The court rejected Raymond's argument that the limitations period should be tolled because FMC allegedly failed to post a notice in Raymond's office informing her of her rights under the Wage Act. The court pointed out that FMC sent the notice to Raymond. The court also declined to toll the limitations period on the basis of fraudulent concealment, stating that the record showed that Raymond "was well aware of all the facts that form the basis for her claim at the time she was terminated."

The court then analyzed Raymond's retaliation claim. The court began its analysis by noting that there are no Massachusetts appellate cases analyzing the types of complaints that qualify for protection under G.L. c. 149, § 148A and, therefore, looked to federal decisions for guidance. The court explained that "abstract grumblings" about pay are insufficient to qualify as a protected complaint. In this case, there was no evidence that Raymond ever explicitly or implicitly communicated to FMC any suggestion that she thought FMC was violating the law by not giving her a raise or more staff to do her work. The court held that, although Raymond did not have to explicitly complain of a Wage Act violation to trigger § 148A's protections, "she had to, at the very least, communicate to FMC a belief that it was potentially engaging in unlawful activities in connection with her pay . . . Not every complaint by an employee that her salary was too low and she had to work too many hours to do her job is sufficient to place an employer on notice that an employee is asserting rights under the Wage Act." Because Raymond's complaint was "far too general" to constitute protected activity, the court allowed summary judgment for Defendants on her retaliation claim. ■

Smith v. Unidine Corp., 2017 Mass. Super. LEXIS 137

(July 25, 2017) (Leibensperger, J.).

Former Employer Entitled to Summary Judgment on Wage Act Claims Where Commissions Were Not Earned Following Employees' Termination

Plaintiffs, former employees of Defendant Unidine Corporation ("Unidine"), brought Wage Act claims against Unidine, alleging that they were entitled to recover for the non-payment of commissions and a bonus. Unidine argued that Plaintiffs were not entitled to recover because of the terms and conditions of a governing agreement ("the Plan") for calculating and paying commissions and bonuses. The Plan provided that, to be eligible for commissions or bonuses, the employee must be employed by Unidine at the time the commission or bonus is processed and paid. Both parties moved for summary judgment. The court denied Plaintiffs' motion and allowed in part Defendants' motion.

Plaintiffs argued that the provision of the Plan that makes a person ineligible to receive commissions after his or her employment is terminated is a special contract that is prohibited by the Wage Act. The court disagreed, explaining that the commissions sought were not earned and, therefore, not "due and payable," after the termination of employment. The court contrasted this case with a recent federal case in which the court held that the Wage Act prohibits a contract provision that would relieve an employer of the obligation to pay an earned commission based solely on whether the employee remained employed on the date the company elects to issue payment. Therefore, the court allowed summary judgment as to Plaintiffs' commissions-related claims.

The court did, however, deny summary judgment as to one of the Plaintiffs' claims for an unpaid bonus, explaining that entitlement to the bonus would depend on the parties' understanding of the terms of the Plan and the reasonable expectations of the parties as to how bonus calculations were to be made, which issues could not be resolved on summary judgment. ■

Smith-Berry v. Nat'l Amusements, 2017 Mass. Super. LEXIS 148

(Aug. 29, 2017) (Leibensperger, J.).

Movie Theater Not Required to Pay Premium Pay for Work on Sundays

Plaintiffs brought a putative class action on behalf of hourly employees at Showcase Cinemas movie theaters. Plaintiffs alleged that Defendants violated the Wage Act, G.L. c. 149, §§ 149, 150, by failing to pay Plaintiffs for work on Sundays and holidays at the rate of one and one-half times their regular hourly rate. Defendants moved to dismiss the Wage Act claim.

The court agreed with Defendants that they were not required to pay premium pay for work on Sundays, relying on the language of the Sunday closing statute, G.L. c. 136, § 6(28). The court found that the operation of a movie theater is not the type of activity, under the statute, that triggers an obligation to pay premium pay for work on Sundays.

Based on the statutory language of G.L. c. 136, § 13, however, the court found that, as a "retail establishment," the movie theaters are required to pay premium pay for work on New Year's Day, Columbus Day, and Veteran's Day, and, therefore, Plaintiffs' claims for pay on those days could not be dismissed. ■

Element Prods. v. Editbar, LLC, 2017 Mass. Super. LEXIS 139

(Aug. 14, 2017) (Leibensperger, J.).

Defendants Waived Right to Arbitration By Actively Litigating for Thirteen Months

Plaintiff Element Productions, Inc. ("Element") brought suit against its former employee, Defendant Mark Hankey ("Hankey"), alleging that, while he was still employed by Element, Hankey secretly aided Element's direct competitor, Defendant Stir Films LLC ("Stir Films"), by disclosing Element's confidential information to Stir Films and working to assist Stir Films in luring away Element employees. Hankey answered the complaint and asserted counterclaims, as well as a third-party claim against an officer of Element. The parties engaged in discovery over the course of a year, including negotiating a protective order and litigating over discovery requests. Thirteen months after answering the complaint, Defendants moved to compel arbitration pursuant to an arbitration clause in Hankey's employment agreement.

The court denied Defendants' motion, finding that Defendants had waived their right to proceed to arbitration through their litigation conduct. The court explained that the case had been actively litigated in court for more than a year and, prior to serving the motion to compel arbitration, none of the Defendants had mentioned the possibility of arbitration. The court found this conduct to be "completely inconsistent with" Hankey's contractual right to arbitration. The court also found prejudice to Element resulting from Defendants' delay in asserting the arbitration right based on, among other things, the fact that the parties had negotiated a litigation timetable that would be adversely affected by moving the case to arbitration and the fact that discovery in the arbitration would be more limited than under the Massachusetts Rules of Civil Procedure. ■

Buffalo Water 1 v. Fid. Real Estate Co., 2017 Mass. Super. LEXIS 125

(July 21, 2017) (Sanders, J.).

Allegations of Bias Insufficient to Overturn Independent Appraisal

Plaintiff, Buffalo Water 1, LLC ("Buffalo"), owned property in Boston ("the Property") which Defendant Fidelity Real Estate Company, LLC ("Fidelity") occupied under a long-term lease with an option to purchase. Fidelity's option agreement set forth a specific appraisal process to be followed for determining fair market value of the property if the parties could not agree on that value. Fidelity exercised its option to purchase, and the parties, unable to agree on fair market value, engaged an independent appraiser. Buffalo subsequently brought suit challenging the validity of the appraisal based on allegations that the entity employing the appraiser failed to disclose a prior business relationship with Fidelity.

Fidelity moved to dismiss the complaint, which the court allowed. The court stated that even assuming that the nondisclosure of the business relationship violated some kind of ethical or contractual obligation, such a violation did not amount to the kind of bad faith, fraud, or corruption that is required for a court to invalidate an independent appraisal agreed to by the parties. The court noted that it was not aware of any Massachusetts case in which a plaintiff had been successful in invalidating an appraisal. The court explained that that is because "the bar is extremely high . . . courts have analogized this standard to the parallel statutory provision that restricts review of arbitration awards." The court was unwilling to permit a plaintiff to "keep two strings in its bow – that is, move forward with an appraisal and then, if dissatisfied with the result, seek to overturn the appraisal with only vague allegations of bias." ■

Brining v. Donovan, 2017 Mass. Super. LEXIS 156

(Sept. 14, 2017) (Kaplan, J.).

Business Judgment Rule Did Not Protect Board of Directors' Decision Not to Pursue Derivative Claims

Plaintiff Jennifer Brining ("Brining") is a minority shareholder of Sendlater, Inc. ("Sendlater"), a Vermont corporation. Brining originally brought direct claims against Defendant John J. Donovan ("Donovan") and two companies he owns, alleging that, while a Director of Sendlater, Donovan took nearly all of the money invested in Sendlater and used it for his personal benefit.

Brining then sent a demand letter to Sendlater's Board of Directors ("the Board") demanding that the Board cause the company to bring suit against Donovan, and she amended her complaint to assert derivative claims in the name of Sendlater, as a nominal defendant. The Board retained a forensic accounting firm to investigate Brining's allegations and concluded that it was not in Sendlater's interests to pursue legal action against Donovan "at any point now or in the future." Sendlater then filed a motion to dismiss the derivative claims.

The court denied Sendlater's motion to dismiss. Although there were facts which called into question the independence of the Board, the court assumed, for purposes of its decision, that the Board was independent. The court also stated that there was "no question that an adequate investigation occurred." Nevertheless, the court found that the Board's decision was not protected by the business judgment rule because there were facts which raised a reasonable doubt that the Board had acted in good faith. Specifically, the investigative report suggested a strong likelihood that Brining would prevail against Donovan. In addition, Sendlater had generated very little in profits and, therefore, the claim against Donovan may well be the company's only significant asset. Therefore, the court found "no rationale" for the Board's decision not to pursue the derivative claims now or in the future. ■

Therapy Res. Mgmt., LLC v. Whittier Health Network, Inc., 2017 Mass. Super. LEXIS 142 *(Aug. 3, 2017) (Leibensperger, J.).*

Party Permitted to Invoke Indemnification Provision to Recover Money Paid to Settle False Claims Act Case

Plaintiffs (referred to collectively as "Therapy") and defendants (referred to collectively as "Whittier") are parties to a contract containing a provision whereby Therapy agreed to indemnify Whittier for costs stemming from negligence or malfeasance caused by Therapy. Whittier and Therapy were both sued for fraud under the federal False Claims Act ("FCA"), 31 U.S.C. § 3729. The claims against Therapy were dismissed, but Whittier entered into a settlement that required Whittier to make a payment of $2.5 million.

Therapy subsequently sought a declaration that Whittier was barred from seeking indemnity from Therapy for the settlement payment and related litigation costs. Therapy argued that the indemnification provision in the parties' contract was unenforceable as against public policy and the FCA because it would relieve Whittier of liability for its own fraud. The parties agreed that, had Whittier been found by a court to have committed fraud, it would be prohibited from obtaining indemnification.

The court rejected Therapy's arguments, pointing out that Whittier denied that it committed fraud and that there had been no finding or admission that Whittier committed fraud. The court stated: "Whittier should not be precluded from making a claim for indemnification merely because it settled the FCA case." Therefore, the court denied summary judgment as to the declaratory judgment claim. ■

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Boston Sci. Corp. v. Takaahashi, 2017 Mass. Super. LEXIS 187

(Sept. 26, 2017) (Sanders, J.).

Preliminary Injunction Denied Where Court Suspected Plaintiff's Motive Was to Delay or Prevent Lawful Solicitation

Plaintiff Boston Scientific Corporation ("Boston Scientific") brought suit against three former employees and their current employer, Nuvectra Corporation ("Nuvectra"). Boston Scientific alleged that the former employees took proprietary information with them to Nuvectra and solicited at least one Boston Scientific employee to join them at Nuvectra. Boston Scientific sought a preliminary injunction prohibiting the former employees from using or disclosing the information, prohibiting them from soliciting other Boston Scientific employees, and prohibiting them from performing work for Nuvectra while an accounting was done of the information they allegedly took.

The court denied the requested injunction. The court first pointed out that the former employees' employment agreements with Boston Scientific did not include prohibitions on working for a competitor or soliciting Boston Scientific customers. The court then explained that it was denying the requested relief for the following reasons: (1) the information allegedly taken did not contain trade secrets and had apparently been shared with customers and otherwise made publicly available; (2) it appeared unlikely that Boston Scientific could prove that the former employees actually took the identified information with them to Nuvectra; and (3) Nuvectra, upon learning of potential litigation, had taken steps to ensure that the former employees returned all Boston Scientific devices and information. Finally, the court stated its concern that "what is truly motivating Boston Scientific is its hope that it can delay if not outright prevent its former employees from soliciting Boston Scientific customers – something that they are clearly permitted to do." ■