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 :

Chen v. Huang, 2016 Mass. Super. LEXIS 293

(Sept. 2, 2016) (Salinger, J.).

$2.2 Million Attorneys' Fee Request on $154,000 Judgment Deemed Excessive

In this case, plaintiffs obtained a $154,171 judgment against defendant Wen Jing Huang ("Ms. Huang") under the Wage Act. Although the Superior Court case was relatively simple, there was an associated bankruptcy proceeding that was much more litigious, in which Ms. Huang attempted to have her personal liability discharged. The Bankruptcy Court ultimately held that Ms. Huang was not entitled to a discharge. Following this determination, the plaintiffs sought to recover approximately $2.2 million in attorneys' fees, the majority of which were incurred in connection with the bankruptcy proceedings.

The Court found that, although a reasonable amount of fees incurred in connection with the related bankruptcy matter was properly recoverable, the requested $2.2 million in fees was excessive. Specifically, the Court took issue with the number of senior attorneys staffed on the case, stating that the bankruptcy issues in the case were "simple and straightforward" and "could easily have been handled by a relatively junior lawyer with a few years of bankruptcy experience." The Court also found that the number of hours spent on the case was excessive, as were the nearly $1,000-per-hour rates charged by New York bankruptcy counsel. Quoting the Third Circuit, the Court noted that "even a Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."

Accordingly, the Court found that a reasonable attorneys' fee and cost award in this case was $332,289. ■

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Chasse v. Day, 2016 Mass. Super. LEXIS 290

(July 19, 2016) (Sanders, J.).

Legal Malpractice Case Based on Failure to Prove Damages Proceeds to Trial

In this case, plaintiffs Ronald and Phyllis Chase ("Plaintiffs") brought a legal malpractice case against defendant John S. Day ("Defendant"). Defendant had represented Plaintiffs through a jury trial and post-trial motions, including a motion for new trial that was denied on March 24, 2011. The primary basis for Plaintiffs' loss at trial was based on their failure to prove damages.

Plaintiffs filed their action on September 26, 2013. Defendant moved for summary judgment on the basis that the claims were time-barred. Plaintiffs claimed that they did not understand that Defendant could have introduced additional damages evidence at their trial until they consulted new counsel. Defendant argued that Plaintiffs, who attended the entire trial, were aware of what evidence had been presented and, therefore, knew that they had suffered harm once the jury returned with its verdict.

The Court held that questions of fact concerning when the limitations period started to run precluded summary judgment. The Court agreed that the Plaintiffs knew they had suffered harm when they received the jury verdict, but said the "more difficult question is when they knew or reasonably should have known that their attorney was the cause of that harm." The Court held that there were facts in the summary judgment record showing that the Plaintiffs relied on Defendant's expertise and had no reason to link their harm with Defendant's conduct until a later date. ■

Rogier v. Chambers, 2016 Mass. Super. LEXIS 315

(Aug. 31, 2016) (Leibensperger, J.).

Plaintiff Employees Lacked Standing to Sue Non-Employer Corporations Under the Wage Act

This case is a putative class action brought by former employees of automobile dealerships owned by defendant, Herbert G. Chambers ("HC"). Plaintiffs allege violations of the Massachusetts Wage Act and minimum wage and overtime laws. The defendants in the case included corporate entities that did not directly employ Plaintiffs. These non-employer defendants moved to dismiss the complaint, and the Court allowed their motion.

The Court held that the Massachusetts statutes involved in the case "do not recognize the concept of multiple and simultaneous employers of a single employee." In addition, Plaintiffs had not alleged any factors that would allow the court to pierce the corporate veil to hold HC's companies that were not direct employers liable as a single employer. Therefore, the Plaintiffs did not have standing to sue corporations that were not their direct employers. The Court also dismissed claims against an individual defendant who was not the president, treasurer, or officer of any of the corporations that directly employed Plaintiffs. ■

P. Gioioso & Sons, Inc. v. Liberty Mut. Ins. Co., 2016 Mass. Super. LEXIS 299

(Aug. 24, 2016) (Kaplan, J.).

Insurer Not Obligated to Pursue an Appeal with Small Chance of Success

Plaintiff P. Gioioso & Sons, Inc. ("Gioioso") purchased insurance policies from defendant, Liberty Mutual Insurance Company ("Liberty"). Under the terms of the policies, Liberty would initially pay all covered claims and then seek payment from Gioioso for any losses falling within the deductible amount. As a condition of issuing those policies, Liberty required Gioioso to enter into a Security Agreement and provide a letter of credit. Gioioso brought suit against Liberty, alleging that after Gioioso stopped purchasing insurance from Liberty, Liberty set the amount of the letter of credit at an unreasonably high level, thereby causing Gioioso to lose business. Liberty counterclaimed for breach of contract based on allegations that it paid a judgment and was owed reimbursement from Gioioso. Liberty had paid that judgment and dismissed an appeal based on a law firm's opinion that the appeal only had a 5% to 10% chance of success. Liberty moved for summary judgment on both parties' claims.

The Court granted Liberty summary judgment on Gioioso's claims, finding that the Security Agreement granted Liberty discretion in setting the amount of the letter of credit and there was no evidence in the summary judgment record indicating that Liberty used that discretion as a pretext to gain some unfair advantage.

The Court also granted summary judgment on Liberty's breach of contract claim. The Court rejected Gioioso's argument that it had no obligation to pay Liberty because Liberty had a duty to prosecute an appeal. The Court explained that "the duty to defend cannot reasonably compel Liberty to pursue any appeal that has any conceivable chance of being successful" and disagreed with Gioioso that a duty to appeal arises if there is only a 5-10% chance of success. The Court went on to state that, to establish a breach of the insurer's duty to defend, the insured must point to a particular appellate issue and explain why the trial court committed error and why that error was sufficiently prejudicial that the judgment might be reversed. ■

Todesca v. Todesca, 2016 Mass. Super. LEXIS 364

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

Corporate Self-Dealing Claims Barred By Statute of Limitations

Plaintiff Charles E. Todesca, Jr. ("Charles") sued two of his cousins, Albert M. Todesca ("Albert") and Paul A. Todesca ("Paul"), alleging wrongdoing in connection with a series of financial transactions dating back to the 1990s. Specifically, Charles alleged that Charles, Albert and Paul were each one-third owners in Todesca Equipment Co., Inc. ("TEC") and that Albert and Paul engaged in self-dealing and took valuable assets of TEC in violation of their fiduciary obligations. Albert and Paul moved to dismiss the complaint on statute of limitations grounds, and the Court granted their motion. The Court found that Charles knew about the transactions he challenged at or near the time they occurred. In addition, the Court noted that Charles became the sole officer and director of TEC in 2010 and therefore had complete access to TEC's corporate records and had a legal responsibility to familiarize himself with TEC's financial circumstances.

The Court also held that many of Charles' claims should be dismissed because, to the extent they were premised on transfers of TEC's assets to other entities, they were claims belonging not to Charles individually but to TEC, and, therefore, the lawsuit should have been brought as a derivative action. The Court stated that Charles had not alleged he had suffered an injury "separate and distinct from that suffered by TEC." ■

Botanical Research Inst. v. Tien-Tsai Lin, 2016 Mass. Super. LEXIS 311

(Aug. 2, 2016) (Leibensperger, J.).

Summary Judgment Seeking Enforcement of Preliminary Settlement Agreement Denied

A dispute arose between plaintiffs Lin-Huey Chen and Dr. Lan Bo Chen ("the Chen Family") and defendants, the Lin Family, regarding the Lin Family's investment of $5 million in plaintiff, Botanical Research Institute, Inc. ("BRI"), a corporation organized by the Chen Family. The parties negotiated a settlement of their dispute and contemplated that their settlement would be documented by a single, written agreement; however, such written agreement was never executed. The Chen Family and BRI brought suit to enforce the settlement agreement, seeking a declaration that the agreement is enforceable, an order of specific performance, and damages for the Lin Family's alleged breach of the agreement. The Chen Family and BRI then moved for summary judgment and requested a determination that the settlement agreement is an enforceable contract.

The Court denied the motion, finding an issue of fact regarding the parties' intentions to be bound. The draft settlement agreement stated that it would only become effective "upon execution of the Agreement by all signatories thereto." The Court held that, "under Massachusetts law, when parties have agreed to execute a final written agreement, there is a strong inference that the transaction is still open and that the parties are not bound until such a written agreement is produced." ■

Pellegrini v. Northeastern Univ., 2016 Mass. Super. LEXIS 237

(July 21, 2016) (Kaplan, J.).

Summary Judgment in Commercial Disparagement Case Allowed Based on Lack of Evidence of Damages Resulting from Challenged Statements

Plaintiff Gerald N. Pellegrini ("Pellegrini") brought suit against defendants, Northeastern University ("Northeastern") and Nian X. Sun (collectively, "Defendants"), alleging that they published false and misleading statements regarding the results of certain experimental research Pellegrini had commissioned, thereby diminishing the value of Pellegrini's patents. Pellegrini asserted claims for commercial disparagement, breach of contract, breach of the duty of good faith and fair dealing, fraud, violation of c. 93A, and declaratory relief. The parties cross-moved for summary judgment. The Court allowed Defendants' motion and denied Pellegrini's motion.

The Court found that Pellegrini could not show that the statements in the article at issue were "of and concerning" his intellectual property and had not met his burden of creating a question of fact as to whether he suffered pecuniary loss resulting from publication of the article. The Court stated that there was "no evidence that anyone would have invested in the intellectual property or offered to purchase the patent but for the article."

With respect to Pellegrini's c. 93A claim, the Court first stated that Northeastern's status as a charitable corporation was not dispositive of the issue of whether c. 93A applies because there was a question of fact regarding whether Northeastern was engaged in trade or commerce with respect to the research at issue. However, Pellegrini's failure to produce evidence of damages again proved fatal for his claim. The Court explained that Pellegrini's loss of a "sense of security" or "peace of mind" regarding his ability to profit from his patents was "not enough to establish a loss of property under G.L. c. 93A, § 11, as a matter of law . . . Neither personal frustration nor disappointment is sufficient to support his cause of action." ■

Penebre v. Kurland, 2016 Mass. Super. LEXIS 365

(Sept. 15, 2016) (Leibensperger, J.).

Preliminary Injunction Granted to Frozen Out LLC Minority Member

This case involves the power and authority of defendants Daniel Kurland and Scott Kurland ("Defendants"), the majority owners of Shakensoft, LLC ("Shakensoft"), a Florida corporation, to effect a termination of the business. On September 1, 2016, Defendants had voted for an immediate shutdown of the Boston office of Shakensoft, resulting in the termination of nine salespeople.

Plaintiff Dylan Penebre ("Plaintiff"), a 20% member of Shakensoft and its Executive Vice President, as well as one of the terminated salespeople, brought suit against Defendants and moved for a preliminary injunction to preserve Shakensoft in the state it was in immediately prior *Continued on page 6*

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to termination. Plaintiff alleged that the vote to terminate Shakensoft was in violation of its Operating Agreement.

The Court held that Plaintiff had established a likelihood of success on the merits because the vote to terminate the Boston office failed to comply with the requirements of the Operating Agreement. The Court also found that Plaintiff was likely to succeed on his breach of fiduciary duty claim because the majority members had denied Plaintiff the fruits of his employment and member interest, a "classic example of a corporate 'freeze out' of a minority shareholder." The Court also found the existence of irreparable harm because the closure of the Boston office would harm the goodwill of Shakensoft in a manner that would be difficult to measure in money damages. Accordingly, the Court ordered Defendants to return Shakensoft to its pre-September 1, 2016 condition and to take no further action to interfere with or obstruct the Boston office of Shakensoft for a period of ninety days. ■

Crane & Co. v. Jordan, 2016 Mass. Super. LEXIS 316

(Aug. 31, 2016) (Sanders, J.).

Court Finds Personal Jurisdiction over Georgia Resident in Frequent Contact with Massachusetts Company and Employed by its Subsidiary

Plaintiff Crane & Co., Inc. ("Crane") brought suit against defendants Gregory R. Jordan ("Jordan") and Ad Lucem Corporation ("Ad Lucem") (collectively, "Defendants"), claiming that Defendants misappropriated Crane's trade secrets and confidential information after Jordan left his employment at Crane. Defendants moved to dismiss based on an alleged lack of personal jurisdiction. The Court denied the motion.

The Court explained that, although Jordan was a Georgia resident, he had engaged in numerous conversations with Massachusetts-based Crane employees over the course of a four-year time period. The Court found unpersuasive Defendants' argument that Jordan was not directly employed by Crane until one month before he left the company. The Court pointed out that Jordan was employed by a wholly owned subsidiary of Crane and, therefore, Jordan "had to have known that he was part of a larger organization, at the top of which was the Massachusetts-based parent, Crane." The Court also found that the fact that Jordan was directly employed by Crane for one month "is not itself insignificant." ■

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SCVNGR, Inc. v. Punchh, Inc., 2016 Mass. Super. LEXIS 236

(July 22, 2016) (Kaplan, J.).

No Personal Jurisdiction over Defendant, Which Allegedly Made False Statements to Corporations Doing Business in Mass.

The Plaintiff, SCVNGR, Inc., doing business as LevelUp ("LevelUp"), brought suit against one of its competitors, Punchh, Inc. ("Punchh"), alleging that Punchh had engaged in a campaign of knowingly false statements to LevelUp's restaurant clients regarding how LevelUp treats confidential client data. Punchh moved to dismiss for lack of personal jurisdiction. LevelUp argued that the Court had jurisdiction over Punchh as a result of Punchh's alleged efforts to cause harm to LevelUp in Massachusetts.

The Court allowed Punchh's motion. The Court noted that Punchh has no offices or employees in Massachusetts and does not regularly solicit business in Massachusetts. The Court found no suggestion that any of the business representatives receiving the allegedly false statements were located in Massachusetts. The Court stated that the fact that some of these representatives worked for companies with restaurants located in Massachusetts was insufficient to show that Punchh had the requisite contacts with Massachusetts. The Court further stated: "the fact that LevelUp is a Massachusetts-based business, and therefore might be said to have suffered its injury in Massachusetts, is not sufficient to connect *Punchh's conduct* to Massachusetts." ■

Sullivan v. Kahn, Litwn, Renza & Co. Ltd., 2016 Mass. Super. LEXIS 363

(Sept. 15, 2016) (Leibensperger, J.).

Purported Liquidated Damages Clause Ambiguous

This case involves Plaintiff Timothy J. Sullivan's ("Sullivan") sale of his public accounting firm, Sullivan, Shuman & Freedberg, LLC ("SSF") to defendant Kahn, Litwin, Renza & Co., Ltd. ("KLR") and his subsequent employment with KLR. Sullivan alleged that, after his employment with KLR ended, KLR wrongfully withheld payments due to Sullivan. KLR alleged that Sullivan breached his employment agreement with KLR. Sullivan moved in limine to preclude KLR from recovering actual damages on its breach of contract claim, alleging that his employment agreement contained a liquidated damages clause.

The clause at issue stated: "if a court, in a final, non-appealable judgment, determines that Employee has breached his obligations under . . . this Agreement, Company shall be entitled to recovery of any payments made to Employee during any period that the court determines such breach existed." The Court denied Sullivan's motion, finding that the clause at issue was ambiguous as to whether it was intended to serve as a liquidated damages provision or merely to provide an additional remedy to KLR as an element of damages. The Court held that resolution of the issue required an understanding of the parties' intent at the time of contracting. ■

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SolmeteX, LLC v. Dube, 2016 Mass. Super. LEXIS 314

(Aug. 31, 2016) (Sanders, J.).

Summary Judgment Denied in Misappropriation of Trade Secrets Case

Plaintiff SolmeteX, LLC ("SolmeteX") sued its former employee, defendant Al Dube ("Dube"), along with defendants Enpress, LLC ("Enpress"), Apavia, LLC ("Apavia"), and Air Techniques, Inc. ("Air Techniques") (collectively, "Defendants"). SolmeteX contended that Dube, who was subject to a non-disclosure agreement with SolmeteX, went to work for Air Techniques and funneled SolmeteX's confidential information to that company, which Air Techniques, Enpress, and Apavia used in connection with plans to develop a competing product.

Defendants moved for summary judgment, which the Court denied based on the fact-intensive nature of the dispute. The Court noted that what Dube did with the information he downloaded from SolmeteX prior to his departure would largely turn on his credibility. With respect to SolmeteX's c. 93A claim, the Court stated that "an allegation of unfair and deceptive conduct cannot be resolved on summary judgment unless no reasonable inferences can be drawn from the undisputed facts that would support a 93A violation." ■