O'Connor Carnathan and Mack LLC

SESSION WATCH

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Summarizing opinions from July 1, 2018 through Sept. 30, 2018

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

Hennessy v. Brookdale Senior Living Cmtys., 2018 Mass. Super. LEXIS 121

(July 27, 2018) (Salinger, J.).

Assisted Living Facility Subject to Landlord-Tenant Law

Claire Hennessy, a resident of an assisted living facility, sued Emeritus Corporation ("Emeritus"), the operator of the facility at the time she started living there, and Brookdale Senior Living Communications, Inc. ("Brookdale"), the subsequent manager of the facility. Hennessy alleged that Emeritus violated Massachusetts landlord/tenant law by charging her a community fee and that Brookdale charged her for services it never provided. She asserted claims on behalf of herself and a putative class. Defendants moved to dismiss all claims.

The court denied the motion except with regard to her claim for fraud. The court first found that the resident agreement between Hennessy and Defendants was, in part, a residential lease and therefore subject to G.L. c. 186, § 15B. The court rejected Defendants' argument that G.L. c. 19D supersedes Chapter 186 and exempts assisted living facilities from the obligations imposed upon other landlords. The court noted that assisted living facilities "can easily comply with both statutory schemes" and that Chapter 19D "is not intended to be an exhaustive regulatory scheme that governs all aspects of assisted living operations."

The court also declined to strike Hennessy's class allegations and rejected Defendants' argument that Hennessy lacked standing to assert claims on behalf of residents at Brookdale facilities other than the one where she lives, noting that Hennessy alleged that all residents were subjected to the challenged practices as a matter of uniform policy.

Finally, the court declined Defendants' request that it report its decision to the Appeals Court. The court stated that "[i]nterrupting this case while awaiting an appeal that could take a year or two to be resolved seems inconsistent with the Legislature's directive [in G.L. c. 231, § 59F] that older civil litigants are entitled to a prompt resolution of their claims at the trial court level.

Hyperactive, Inc. v. Young, 2018 Mass. Super. LEXIS 225

(July 20, 2018) (Davis, J.).

Preliminary Injunction Requires Former Employees to Make Electronic Devices Available for Forensic Inspection

Hyperactive, Inc. ("Hyperactive") sued a former company executive and one of its two shareholders, D. Douglas Young ("Young"), alleging that he conspired with an aspiring competitor to steal Hyperactive's trade secrets, customer relationships, and key employees. Hyperactive also alleged that another former employee, Joseph Pannoni ("Pannoni"), wrongfully copied and retained source code to Hyperactive's software. Hyperactive moved for a preliminary injunction requiring, among other things, Defendants to turn over any confidential information and submit their electronic devices for forensic examination.

The court allowed the motion for preliminary injunction, finding that Young owed Hyperactive a duty of loyalty, both as a long-time employee and significant shareholder in a closely-held corporation, and that there was a high likelihood that Hyperactive would be able to prove a breach of that duty as a result of Young "encouraging and assisting other key employees of Hyperactive . . . to jump ship . . . and . . . attempting to woo away current Hyperactive clients." The court also found that Pannoni's downloading of the source code and various confidential files violated the duty of loyalty he owed as an employee. The court enjoined Young from competing, required Young and Pannoni to return all Hyperactive confidential information and certify that they had returned or destroyed everything confidential, and required Young and Pannoni to make their electronic devices available for a full forensic examination by Hyperactive.

Virtusa Corp. v. Seniorlink Inc., 2018 Mass. Super. LEXIS 224

(Aug. 14, 2018) (Sanders, J.).

Disclaimer of Warranty Provision Bars Claim for Negligent Misrepresentation

Virtusa Corporation ("Virtusa") sued Seniorlink Incorporated ("Seniorlink"), alleging that Seniorlink failed to pay for work Virtusa performed. Seniorlink counterclaimed, alleging that the work was defective. Virtusa moved to dismiss Seniorlink's counterclaims for intentional and negligent misrepresentation.

Although the court declined to dismiss the fraud claim, it dismissed the negligent misrepresentation claim on the basis that it was barred by a disclaimer of warranty provision in the parties' agreement. The court explained that, although it is well settled that a party cannot rely upon such provisions to protect it against fraud, "a contracting party is entitled to enforcement of an unambiguous integration or disclaimer clause when that party is faced with a claim of negligent misrepresentation.

Digital Strategists, LLC v. Leap Payments, Inc., 2018 Mass. Super. LEXIS 220

(July 16, 2018) (Salinger, J.).

Carelessly Relaying False Information in Trade or Commerce May Violate Chapter 93A

Plaintiff Digital Strategists, LLC ("Digital") retained Defendants Leap Payments, Inc. ("Leap") and Elavon, Inc. to process credit and debit card payments. Digital subsequently brought suit alleging that Defendants contacted Northeastern University ("Northeastern"), a significant new client of Digital's, and told Northeastern that they were conducting a fraud investigation of Digital. Digital alleged that those statements were false and caused Northeastern to terminate its relationship with Digital. Defendants moved to dismiss all claims in the complaint.

The court denied the motion with respect to claims for violation of Chapter 93A, breach of contract, and intentional interference with contractual relations. With respect to the 93A claim, the court stated that the allegation that Defendants could have easily determined their representations were false if they had done some rudimentary fact checking stated a claim because "[c]arelessly relaying false information in trade or commerce can violate c. 93A." The court also found that Digital had stated a viable claim for breach of the implied covenant of good faith and fair dealing, noting that Digital did not need to allege or prove that Defendants acted in bad faith. The court stated that although Defendants may not have had an abstract contractual duty not to damage Digital's good will, the facts alleged plausibly suggested that Defendants did have a contractual duty to act in good faith in processing the credit card payment.

In addition, the court held that Digital had stated a claim for intentional interference where "[o]ne can reasonably infer from the facts alleged in the complaint that Defendants knew or were substantially certain that Northeastern would terminate its contractual relationship with Digital . . . [t]ortious interference with contractual relations does not require specific intent to interfere with a contract . . . This tort also applies where the defendant . . . knows that the interference is certain or substantially certain to occur as a result of his action."

The court did dismiss Digital's claims for negligence and fraud, however. The court held that the negligence claim was barred by the economic loss rule because the complaint alleged no facts suggesting Digital suffered any personal injury or property damage. The court dismissed the fraud claim – which was based on allegedly false promises regarding the terms of the parties' business relationship – because Digital had not alleged with particularly how the alleged fraud caused any harm.

Mogavero v. Elephant Biotechnologies Inc., 2018 Mass. Super. LEXIS 116

(July 16, 2018) (Sanders, J.).

Allegation that Defendants were Majority Shareholders Insufficient to Plead Demand Futility under Delaware Law

Michael Mogavero and his company, MCC Global Ventures, LLC ("MCC"), sued Loutfi Kachouh and his wife, Gina Bandar-Kachouh, alleging that Defendants made false representations to him which induced him to make substantial investments in a new product Defendants were developing through their company, the Elephant Corporation ("Elephant"). Defendants alleged that Plaintiffs, along with certain third-party defendants, engaged in conduct harmful to the business and breached fiduciary and contractual duties. The parties both filed motions to dismiss.

With respect to Defendants' motion to dismiss, the court first declined to consider documents attached not to the complaint, but to the counterclaim and Defendants' memorandum. The court then rejected Defendants' argument that disclaimer clauses contained in certain agreements between the parties barred Plaintiffs' fraud and misrepresentation claims. The court explained that not every agreement relevant to the dispute had a disclaimer clause and "it is well settled that a party to a contract cannot use an exculpatory or merger provision as shelter against a claim of deceit."

The court dismissed Plaintiffs' derivative claim asserted on behalf of Elephant, holding that, under Delaware law, the complaint fell short of showing that a demand had been made or that such a demand would have been futile. The court stated that the allegation that demand would have been futile because the Kachouhs are majority shareholders was insufficient because there were no allegations that the board members – who were not identified in the complaint – were incapable of exercising their business judgment in connection with the alleged wrongdoing.

The court denied Plaintiffs' motion to dismiss the breach of fiduciary duty and unjust enrichment counterclaims against Mogavero but allowed the motion with respect to the same claims against MCC. The fiduciary duty claim failed because MCC was only a minority shareholder of Elephant, and Delaware law does not impose a heightened fiduciary duty on shareholders of a close corporation. The unjust enrichment claim failed because the counterclaim failed to explain how MCC received a benefit to which it was not entitled.

Angevine v. Giuffrida Sports Ctr., LLC, 2018 Mass. Super. LEXIS 219

(Aug. 8, 2018) (Sanders, J.).

Complaint Alleging Unlawful Attempt to Unwind LLC Dismissed on Ripeness Grounds

Harry Angevine ("Angevine"), a twenty-five percent owner of Giuffrida Sports Center, LLC ("GSC"), sued GSC and other defendants, alleging that the defendants attempted to unwind GSC in violation of the Operating Agreement and that the defendants were unlawfully refusing to pay Angevine over $1.6 million. The defendants moved to dismiss the complaint under Mass. R. Civ. P. 12(b)(6).

The court allowed the motion, describing the complaint as "bare bones," though it allowed Angevine to file an amended complaint. The court held that Angevine had not stated a claim that was ripe for adjudication because there was no allegation that any of the members of GSC actually pursued an unwinding or dissolution of GSC. As to Angevine's claim of being owed $1.6 million, the court pointed out that the complaint alleged that the payment was due only upon liquidation of GSC, and the Operating Agreement contemplated that GSC would first be dissolved before liquidation occurred. Therefore, the money was "not yet (and may never be) due and owing."

Lambert-Egan v. Lambert, 2018 Mass. Super. LEXIS 248

(Sept. 11, 2018) (Davis, J.).

Trustee's Failure to Remedy Predecessors' Misdeeds May Support a Claim for Breach of Fiduciary Duty

This case involves an intra-family dispute over the management and operation of a family owned business, the Lambert Realty Trust ("LRT"), which owns two commercial shopping centers. The sole beneficiary of LRT is The Lambert Brothers Partnership, LLP (the "Partnership"). Plaintiff Tracy Lambert-Egan brought suit against her brother and uncle, alleging that Defendants engaged in self-dealing transactions and failed to protect LRT and the Partnership from being depleted by third parties. The parties dispute which of two agreements (one entered into in 1994, the other in 2011) govern the Partnership.

Defendants moved to dismiss the complaint based on an arbitration clause in the 1994 agreement. Defendants also argued that Plaintiff – a beneficiary of a trust which holds an equity interest in the Partnership, the sole beneficiary of LRT – lacked standing to assert direct or derivative claims concerning LRT or the Partnership. In addition, Plaintiff's brother argued that the fiduciary duty claims against him should be dismissed because they were based on events which occurred prior to him becoming trustee of LRT.

The court denied the motion to dismiss. The court first stated that the complaint made out a plausible case that the Partnership and LRT are governed by the 2011 agreement. The issue of which agreement actually governs those entities could not be resolved on a motion to dismiss. The court then held that Plaintiff had sufficient standing to assert direct and derivative claims, particularly where LRT was a nominee trust and all actual authority resided in the Partnership. With respect to the fiduciary duty claims against Plaintiff's brother, the court stated that the allegation that a trustee failed to remedy certain misdeeds perpetrated by predecessors can constitute a breach of fiduciary duty.

Grabau v. Commerce Ins. Co., 2018 Mass. Super. LEXIS 217

(Aug. 2, 2018) (Sanders, J.).

Court Orders Preliminary Discovery to Test Factual Basis of Complaint Allegation

Joseph Grabau ("Grabau" or "Plaintiff") brought a putative class action against Commerce Insurance Company ("Commerce" or "Defendant") based on its alleged failure to pay post-award interest on an arbitration award. With respect to Grabau, the failure alleged was nonpayment of one day of interest in the amount of $22.03. Grabau asserted claims for breach of contract and violation of Chapter 93A. Defendant moved to strike the class allegations, arguing that the failure to pay the $22.03 was a simple oversight and Plaintiff's counsel was not in possession of any information that there were others like Grabau.

The court denied the motion to strike, finding that the complaint's allegations that Commerce was engaging in a companywide policy not to pay interest on arbitration awards and there were many others like Grabau were sufficient. The court stated, however, that it shared Commerce's concern that class allegations were being used as a vehicle to discover a right of action. The court also warned that if Plaintiff's counsel did not really have information that there were others besides Grabau who had not received interest due on an arbitration award, "then to have signed a pleading essentially alleging that such information exists would be a violation of Rule 11 and sanctions would be in order." The court entered an order permitting Defendant to conduct limited discovery into the factual basis for the allegation that Commerce had a policy or practice of not paying interest and stayed all other discovery until such discovery was completed.

Martz v. Dranetz, 2018 Mass. Super. LEXIS 226

(Aug. 30, 2018) (Sanders, J.).

No Breach of Fiduciary Duty for Failure to Follow Through with Proposed Customer Following LLC Dissolution

Plaintiff Shane Martz and Defendant Andrew Dranetz had formed Dynamic Lighting Systems, LLC ("Dynamic"), which installed and produced laser light show productions. The relationship between Martz and Dranetz deteriorated, and Martz accused Dranetz of misusing company funds. Dranetz, in turn, complained about Martz's relationship with Dynamic customers. Martz and Dranetz eventually signed a dissolution agreement, pursuant to which Dranetz promised to give Martz 50% of any income received as payment for work provided to a certain customer. Martz subsequently brought suit against Dranetz and his current business, Pinnacle Laser Productions, LLC ("Pinnacle"), for breach of the agreement and other claims. Defendants moved for summary judgment.

The court allowed the motion, finding that there was no evidence in the summary judgment record to suggest that Dranetz or Pinnacle performed any work on the project at issue after Dynamic dissolved. The court rejected Martz's argument that, by failing to do anything on the project at issue, Dranetz was liable to Martz for wasting a valuable corporate asset. The court found that there was nothing in the dissolution agreement that imposed upon Dranetz a duty to do the work after the parties parted ways. The court also stated that there was no fiduciary duty to preserve a project still in the proposal stage, which had not yet become a corporate asset.

Bertolino v. Fracassa, 2018 Mass. Super. LEXIS 213

(Aug. 30, 2018) (Salinger, J.).

MUSA Claims Allowed to Proceed Against Defendants Who Did Not Directly Sell Securities to Plaintiffs

Plaintiffs sought to rescind their purchases of membership units in a Delaware LLC called Kettle Black of MA, LLC ("Kettle Black"), on the grounds of materially misleading statements connected with the sale of those securities. Plaintiffs brought suit against Defendants Terence Fracassa ("Fracassa") and Frederick McDonald ("McDonald") (collectively, "Defendants"), alleging that they were liable under the Massachusetts Uniform Securities Act ("MUSA"). Neither Fracassa nor McDonald sold any securities to Plaintiffs, but the complaint alleged that they participated in road shows where they met with prospective investors, distributed an offering memorandum that they helped prepare, and encouraged investors to buy membership units in Kettle Black. Defendants moved to dismiss, which the court denied.

The court held that Plaintiffs' allegations may satisfy MUSA's definition of an offer to sell securities. The court rejected Defendants' argument that the claims failed because neither Defendant had solicited Plaintiffs directly, stating "Plaintiffs need not allege or prove that Defendants' alleged misstatements actually caused Plaintiffs to buy any Kettle Black securities . . . [t]he statute requires only some causal connection between the alleged communication and the sale, even if not decisive." The allegations that whomever directly solicited each Plaintiff was doing so at the behest of Fracassa and McDonald was a sufficient connection between Plaintiffs' purchases and Defendants' activities.

The court also found that the complaint stated claims for secondary liability against Defendants. Specifically, the complaint adequately alleged that McDonald exercised the power to control Kettle Black as its manager, president, secretary, and treasurer, and that Fracassa was an agent who materially aided Kettle Black by participating in the road shows and helping to prepare the offering memorandum.

Jacobs Law, LLC v. Boston Out-Patient Surgical Suites, LLC, 2018 Mass. Super. LEXIS 232 *(Aug. 16, 2018) (Davis, J.).*

Class Counsel Denied Attorneys' Fees Incurred After Court Replacement

Jacobs Law, LLC ("Plaintiff" or "Jacobs Law") brought a putative class action against Boston Out-Patient Surgical Suites, LLC ("Defendant" or "BOSS"), alleging that BOSS illegally overcharged for providing copies of patient medical records. Jacobs Law initially acted as both lead plaintiff and lead counsel; however, after BOSS moved to dismiss on the ground that Jacobs Law was ethically prohibited from serving in both roles, Jacobs Law retained new counsel from W. Jacobs and Associates – the father and sister of lead counsel. When the court held that this still presented a conflict of interest, Plaintiffs retained different counsel.

The parties subsequently reached a settlement in which they agreed that Plaintiffs' counsel could recover its legal fees, and W. Jacobs and Associates filed a petition for over $96,000 in fees. The vast bulk of those fees pertained to work performed after the court ordered W. Jacobs and Associates to be replaced. Therefore, the court reduced the number of hours for which W. Jacobs and Associates could receive compensation and ordered recovery of only $18,160 in fees. The court stated that it was "not inclined to reward W. Jacobs and Associates for rendered legal services that its attorneys had been told they could not provide."

SLP Enters., LLC v. Solarna, LLC, 2018 Mass. Super. LEXIS 114

(July 27, 2018) (Davis, J.).

Determination of Whether Conduct Occurred Primarily and Substantially in Massachusetts under Chapter 93A Not Appropriate for Resolution on Motion to Dismiss

SLP Enterprises, LLC ("SLP"), My First Shades, Inc. ("MFS"), and their competitor, Solarna, LLC ("Solarna"), settled a dispute in 2016 regarding use of certain trademarks. As part of that settlement, Solarna agreed to stop using the trademarks. SLP and MFS subsequently brought suit alleging that Solarna continued to use the trademarks in violation of their rights and the settlement agreement. They asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and violation of Chapter 93A.

Solarna filed a motion to strike portions of the complaint that it alleged incorporated representations made in the context of the parties' mediation of their first dispute in 2016. Solarna also moved to dismiss the complaint on the grounds that, among other things, Plaintiffs did not allege fraud with particularity and the challenged acts did not occur primarily and substantially in Massachusetts for purposes of the Chapter 93A claim.

The court allowed the motion to dismiss the breach of implied covenant claim as duplicative of the breach of contract claim but otherwise denied the motion. The court held that the allegations in the complaint set out a "reasonably detailed and plausible case" that Solarna acted fraudulently and committed unfair or deceptive acts by misrepresenting to Plaintiffs its intention to abide by the settlement agreement. The court also explained that the determination of whether Solarna's acts occurred primarily and substantially in Massachusetts "is not a determination that a court typically can make at the motion to dismiss stage." Finally, the court denied the motion to strike based on Plaintiffs' counsel's representations in court that Plaintiffs were not relying on any state-ments made in the course of the prior mediation.

Berardi Lending, LLC v. LS Southfield, LLC, 2018 Mass. Super. LEXIS 230

(Aug. 23, 2018) (Davis, J.).

Court Freezes Assets of Defendant in Financial Distress

Plaintiff Berardi Lending, LLC ("Plaintiff" or "Berardi") brought suit to obtain repayment of a $2.5 million loan it made to Defendant LS Southfield, LLC ("LS Southfield"). Plaintiff also named several guarantors of the note, including LS Southfield's corporate affiliates and their CEO (collectively, the "Guarantors"). Berardi moved for a preliminary injunction prohibiting LS Southfield and the Guarantors, as well as several reach and apply defendants, from selling, assigning, transferring or encumbering any assets of LS Southfield or the Guarantors during the litigation.

The court allowed the motion. The court first found that LS Southfield had defaulted under the note and breached the terms of that note. The court then found that Berardi's fears that the assets of LS Southfield and the Guarantors would be dissipated during the litigation were well-founded because LS Southfield was experiencing serious financial distress and, therefore, may not have assets on the day of judgment to satisfy Plaintiff's claims.

Am Project Norwood, LLC v. Endicott South Dev. Corp., 2018 Mass. Super. LEXIS 228 *(Aug. 20, 2018) (Sanders, J.);* Am Project Norwood, LLC v. Endicott South Dev. Corp., 2018 Mass. Super. LEXIS 231 *(Aug. 24, 2018) (Sanders, J.).*

Colorable Abuse of Process Claim Defeated Anti-SLAPP Motion to Dismiss

These two decisions arose from a dispute between the members of EW Development, LLC ("EW"): Plaintiff AM Project Norwood, LLC ("AM Project") and Defendant Endicott South Development Corporation ("Endicott"). AM Project brought suit to enforce a buy-sell provision in EW's Operating Agreement. After Endicott asserted counterclaims based on its contention that AM Project had failed to provide it with important corporate information, AM Project amended its complaint to allege abuse of process, claiming that the counterclaims were part of a campaign of harassment designed to avoid compliance with the Operating Agreement and to obtain financial or business concessions from AM Project. Endicott sought dismissal of the abuse of process claim pursuant to the anti-SLAPP statute.

The court denied the motion to dismiss, explaining that the affidavits submitted by AM Project contained evidence that Endicott and its de facto manager engaged in conduct aimed at trying to extract financial and business concessions from AM Project. The court also found that AM Project's claim was "colorable" and it had met its burden of showing that its primary purpose in bringing the abuse of process claim was not to chill legitimate petitioning activity but to seek damages for personal harm.

In a separate decision, the court denied Endicott's motion for partial summary judgment on the counts of the complaint relating to the buy-sell provision. The court found that whether AM Project had turned over certain corporate information was in dispute, and if Endicott were able to prove that such failure constituted a material breach of the Operating Agreement, then AM Project may not be able to enforce the buy-sell provision.

Bailey v. CID Equity Capital VII, LP, 2018 Mass. Super. LEXIS 253

(Sept. 26, 2018) (Davis, J.).

Court Denies Request to Call Lead Counsel as a Trial Witness for Impeachment Purposes

In a dispute over the proper apportionment of attorneys' fees that the Plaintiff, Douglas Bailey, incurred on behalf of shareholders in connection with certain litigation, Defendants filed a motion seeking a determination that they were permitted to call Plaintiff's lead counsel, Steven Cowley ("Cowley"), as a witness at trial. Defendants sought to examine Cowley for the specific purpose of testing Plaintiff's credibility.

The court denied Defendants' request, explaining that, by using Cowley to challenge Plaintiff's credibility, Defendants would be "attempting to pit Attorney Cowley against his own client in front of the jury to the Plaintiff's perhaps severe prejudice. This the Court will not allow." The court further stated: "No doubt many litigants would like the opportunity to question opposing counsel at trial in order to identify and probe possible inconsistencies in the evidence that might undermine the credibility of their adversary. Our system of justice, however, directs the parties' energies to other methods of challenging an opponent's truthfulness, except in the rarest of cases."

SS Strathmore, MA LP v. Pillar Biosciences, Inc., 2018 Mass. Super. LEXIS 227

(Aug. 29, 2018) (Sanders, J.).

Expense of Arbitration for Wealthy Entities Did Not Constitute Irreparable Harm

Plaintiffs SS Strathmore, MA LP and SSI 3 Strathmore, MA LP ("Plaintiffs" or "SSI") were the property owners under a commercial lease agreement with Defendant Pillar Biosciences, Inc. ("Defendant" or "Pillar"). Pursuant to the agreement, Pillar was supposed to move into the premises on a certain date but could not do so because the prior tenant remained in possession. Pillar filed a demand for arbitration under the lease, arguing that SSI's failure to deliver the premises breached the lease. SSI then filed suit alleging that the parties' dispute does not fall within the scope of the arbitration clause and sought preliminary injunctive relief enjoining the arbitration proceedings until the court could determine arbitrability.

The court denied the motion, stating that the only harm resulting from a denial of a stay would be that SSI would have to incur the expense of expedited arbitration. In light of the fact that SSI had "millions of dollars in assets," the court failed to see how the expense of arbitration would constitute irreparable harm to such a large entity. In contrast, if arbitration were stayed and it was then determined that the case was arbitrable, Pillar would have been deprived of its contractual right to an expedited decision.

McCarthy v. Genesee & Wyo. R.R. Servs., 2018 Mass. Super. LEXIS 117

(July 23, 2018) (Sanders, J.).

Jurisdictional Provision in Contract Did Not Affect Mandatory Arbitration Clause

Thomas McCarthy ("McCarthy") sued his former employer, Genesee & Wyoming Railroad Services, Inc. ("Genesee"), for alleged failure to pay severance benefits. Genesee moved to dismiss on the ground that the underlying contract contained a mandatory arbitration clause. McCarthy opposed the motion by arguing that: (1) the contract was ambiguous because it also contained a provision whereby the parties consented to the jurisdiction of a Massachusetts court; and (2) Genesee had waived its right to arbitration.

The court allowed the motion to dismiss and found the contract to be unambiguous, stating, "[t]hat the Agreement also states that it is governed by Massachusetts law and that Massachusetts courts have jurisdiction over the parties does not abrogate this arbitration requirement." The court noted that the jurisdictional provision may come into play where a party seeks a court order compelling arbitration or where a party seeks judicial review or enforcement of an arbitration decision. The court also held that Genesee had not waived its right to arbitration because it raised the issue in its first responsive pleading.

Misra v. Credico (USA), 2018 Mass. Super. LEXIS 222

(July 24, 2018) (Salinger, J.).

Claim Preclusion Bars Massachusetts Wage Claims

Plaintiffs sought to bring claims against Credico (USA), LLC ("Credico"), DFW Consultants, Inc., and Jason Ward (collectively, "Defendants") for alleged misclassification and failure to make minimum wage and overtime payments under Massachusetts law. Credico moved to dismiss the claims brought by two Plaintiffs who had opted into a federal collective action in New York asserting similar claims under the federal Fair Labor Standards Act ("FLSA Action"). Those two Plaintiffs had not sought leave to assert their Massachusetts claims in the FLSA Action. Credico argued that, as final judgment had entered in its favor in the FLSA Action, Plaintiffs were barred by res judicata or claim preclusion from bringing Massachusetts claims.

The court agreed. The court explained that where the requirements of claim preclusion are met, final judgment in a federal court on a federal claim can bar a state court action asserting a state law claim if the federal court could have exercised supplemental jurisdiction over the state law claim. The court stated that Plaintiffs had not established that the federal court would have clearly declined to exercise supplemental jurisdiction over the state law claims – the mere possibility of such a refusal was not enough. The court also rejected Plaintiffs' argument that the claim preclusion doctrine should not apply in the context of FLSA collective actions.

Scvngr, Inc. v. Punchh, Inc., 2018 Mass. Super. LEXIS 459

(Sept. 14, 2018) (Kaplan, J.).

No Personal Jurisdiction Over Foreign Defendant Based on Forum Contacts of Defendant's Customers

SCVNGR, Inc., doing business as LevelUp ("Plaintiff" or "LevelUp"), brought suit against Punchh, Inc. ("Punchh" or "Defendant"), alleging that Punchh made knowingly false statements to LevelUp's clients and potential clients. The court allowed Punchh's motion to dismiss on the basis of a lack of personal jurisdiction, holding that Punchh did not have sufficient Massachusetts contacts to satisfy the due process requirements of the United States Constitution. On appeal, the Supreme Judicial Court held that a Massachusetts court must first consider the Long-Arm Statute before approaching the constitutional question and remanded to the Superior Court.

On remand, the court found that it did not have jurisdiction over Punchh under the Massachusetts Long-Arm Statute. Evidence that some of Punchh's customers operate restaurants in Massachusetts was insufficient to support a finding that Punchh transacted business in Massachusetts. There was also no jurisdiction under G.L. c. 223A, § 3(c) because there was no allegation that the statements at issue were delivered into Massachusetts or that anyone relied on them in Massachusetts. Finally, there was no jurisdiction under § 3(d) because there was no evidence that Punchh derived substantial revenue from services rendered in Massachusetts. The fact that Punchh received income from customers not based or incorporated in Massachusetts, but which could possibly be traced to those customers' Massachusetts restaurant locations, was insufficient to establish general jurisdiction under § 3(d).

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