O'Connor Carnathan and Mack LLC

SESSION WATCH

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

June 2017

Volume 14 Number 1

Summarizing opinions from Jan. 1, 2017 through Mar. 31, 2017

FEATURED DECISION:

Holyoke Mut. Ins. Co. v. Vibram USA, Inc., 2017 Mass. Super. LEXIS 12

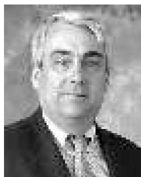
(Mar. 20, 2017) (Kaplan, J.).

No Recoupment of Defense Costs for Insurers Who Defended Under Reservation of Rights

Holyoke Mutual Insurance Company and Maryland Casualty Company (collectively, the "Insurers") insured Vibram USA, Inc. ("Vibram") through general commercial liability policies. When Vibram was sued and asserted coverage under the policies, the Insurers undertook Vibram's defense subject to a reservation of rights letter. After paying some of Vibram's defense costs, the Insurers filed a suit against Vibram seeking a declaration that the underlying action was not covered by the policies and, therefore, they had no duty to defend. In a prior decision, the court held that the policies did not provide coverage. The parties then filed cross motions for summary judgment addressing the issue of recoupment of costs.

The court declined to allow the Insurers to recoup the previously advanced defense costs. The court explained that the Insurers had made a business decision to advance defense costs in a scenario where they believed there might not be coverage. In addition, the Insurers could have addressed the issue of recoupment in the policies, which they did not. The court stated that, in order for an insurer to prove that it is unjust for an insured to retain advanced defense costs, the insurer must do more than prove that a court ultimately held that the underlying claims were uncovered. For example, retention of defense costs may be unjust if the insured made misrepresentations to the insurer or engaged in other wrongful conduct. The court stated, "[c]laims of unjust enrichment ought not be used to imply rights that the parties have not included in the written contract." ■

OCM is a Business Litigation Boutique, Emphasizing Complex Commercial and Employment Litigation, Corporate and Fiduciary Litigation and Alternative Dispute Resolution. We represent clients in complex business litigation, and also offer first-rate alternative dispute resolution services, including arbitration and mediation.


Thomas N. O'Connor

Sean T. Carnathan

Tara J. Myslinski

David B. Mack

Benjamin S. Kafka

Marlissa Shea Briggett

Stephanie Parker

Joseph Calandrelli

O'Connor, Carnathan and Mack LLC offers the highest level of legal representation available anywhere to clients ranging from Fortune 500 companies to small, closely-held businesses to astute individuals. We represent clients in complex business litigation, and also offer first-rate alternative dispute resolution services, including arbitration and mediation.

Taylor v. Moskow, 2017 Mass. Super. LEXIS 29

(Mar. 10, 2017) (Kaplan, J.).

After Plaintiff's Suit Dismissed Twice on Statute of Limitations Grounds, Defendant Entitled to Award of Attorneys' Fees Under G.L. c. 231, § 6F

Plaintiff Jane Taylor ("Taylor") sued her brother, James Moskow ("Moskow"), for the fourth time based on Moskow's conduct as manager of certain LLCs in which Taylor and Moskow had an interest. Taylor's suit was twice dismissed because it was filed well after expiration of the applicable statute of limitations. After the first dismissal, the court granted Taylor leave to replead, but only if a careful investigation revealed facts supporting a delay in the accrual date of the claim. Following the second dismissal, Moskow sought attorneys' fees, costs and expenses under G.L. c. 231, § 6F and G.L. c. 156C, § 57.

The court stated that this case was "a paradigm example of the type of litigation that G.L. c. 231, § 6F was intended to address." However, the court declined to award attorneys' fees incurred throughout the entire litigation. The court explained that it was not the filing of the original untimely complaint which provided a basis to award fees under § 6F, but, rather, Taylor's decision to continue filing amended pleadings and affidavits seeking to prolong the litigation after her initial complaint was dismissed on statute of limitations grounds, despite having no good faith basis to do so. Accordingly, the court awarded Moskow his fees and expenses incurred after the date of the first dismissal, including the fees and expenses incurred in preparing the Section 6F motion. ■

Dorrian v. LVNV Funding, Inc., 2017 Mass. Super. LEXIS 34

(Mar. 30, 2017) (Sanders, J.).

Massachusetts Debt Collection Practices Act Extended to Entities That Delegate Collection Activity to Others

In two consolidated proposed class actions against Defendant LVNV Funding, LLC ("LVNV"), Plaintiffs alleged that LVNV violated the Massachusetts Fair Debt Collection Practices Act ("MDCPA") and Chapter 93A by engaging in collection activities without a license. The Plaintiffs moved for class certification and both sides moved for summary judgment.

The court allowed the motion for class certification. The court rejected the argument that the named class representative was inadequate because LVNV had not been successful in obtaining a judgment against her. The court held that the fact that the named plaintiff may have smaller damages than other plaintiffs or may have difficulty proving damages did not make her claim so atypical as to make her an inadequate representative. The court also held that the possible existence of class action waivers in some of the creditor agreements did not bar class certification because, if LVNV proved the existence of such waivers, the court could address the issue by creating a subclass or modifying the class definition.

On the merits, this case raised several issues of law not yet addressed by any Massachusetts appellate court. Notably, the court held that LVNV is a debt collector under the MDCPA even though it used another entity to perform the collection activity because the MDCPA expressly states that it applies to those who collect debts directly or indirectly. The court reached this conclusion despite Advisory Opinion Letters from the Massachusetts Division of Banks opining that LVNV's conduct was lawful.

With respect to Plaintiffs' Chapter 93A claim, although a violation of the MDCPA is typically a per se violation of Chapter 93A, the court found that the statutory exception in G.L. c. 93A, § 3 applied because the Division of Banks had condoned LVNV's conduct. ■

Mirra v. Mirra, 2017 Mass. Super. LEXIS 2

(Jan. 31, 2017) (Salinger, J.).

No Standing for Minority Shareholders to Bring Derivative Claims for Wrongs Occurring Before They Acquired Shares

The minority shareholders in a closely-held corporation ("the Company") brought suit, individually and derivatively, against the majority shareholder ("Defendant"). Plaintiffs sought, among other claims, a declaration that Defendant's transfers of new shares of stock to his children violated a shareholder agreement containing stock transfer restrictions. Plaintiffs also alleged that Defendant breached his fiduciary duties by usurping a corporate opportunity in connection with development of an apartment complex ("Longview Project"). On summary judgment, the Court issued declaratory relief in favor of Plaintiffs but allowed Defendant's motion for summary judgment on the claim pertaining to the Longview Project.

With respect to the declaratory judgment claim, the Court held that the shareholder agreement was unambiguous in its transfer prohibitions and, therefore, that the transfer of stock to Defendant's children was voidable. The Court noted that "[t]he fact that the parties disagree sharply as to the scope of the stock transfer restriction does not mean that the contract is unclear."

With respect to the fiduciary duty claim, however, the Court held that Plaintiffs did not have standing to assert derivative claims because the claims were based on acts or omissions that occurred before Plaintiffs acquired any stock in the Company. Although the Court recognized a "continuing wrong doctrine" in the context of the derivative action provision of the Massachusetts Business Corporation Act, the Court held that this doctrine did not save Plaintiffs' claims. The Court explained that the relevant determination is when the acts of wrongdoing occurred, not when their effect was felt. The Court stated, "[t]he continuing wrong exception to the contemporaneous ownership requirement does not apply where a corporation was owed money before the plaintiff acquired stock in the company, even if the debt remains uncollected after the plaintiff first acquired stock." Finally, the Court held that the doctrine of fraudulent concealment, though relevant in the context of assessing statutes of limitations, had no bearing on the contemporaneous ownership requirement. ■

254 Newbury, LLC v. Wabora Newton, LLC, 2017 Mass. Super. LEXIS 30

(Mar. 2, 2017) (Kaplan, J.).

Restaurant Cooking Odors Do Not Breach Lease

Plaintiff landlord 254 Newbury, LLC ("the Landlord") brought suit against its tenant Wabora Newton, LLC ("Wabora"), alleging breach of contract and nuisance and seeking an order of eviction as a result of the Asian fried cooking odors emanating from the restaurant. Wabora counterclaimed for breach of contract and violation of Chapter 93A. The court entered judgment for Wabora following a two-day bench trial.

The court found that Wabora was engaging in activities typical of restaurants of its kind and its lease specifically permitted it to use a fryolator. The Landlord did not offer any evidence that Wabora lacked any necessary permits or misused the fryolator. The court found that the smell generated by Wabora was "to be expected."

With respect to Wabora's counterclaims, the court held that the Landlord breached the lease when it charged Wabora for expenses incurred in attempting to remediate the odor. However, the court also held that the Landlord's conduct did not constitute a violation of Chapter 93A because the Landlord "had a good faith, albeit mistaken, belief that it was Wabora's responsibility to ameliorate the smell." ■

G4s Tech., LLC v. Mass. Tech. Park Corp., 2017 Mass. Super. LEXIS 21

(Jan. 30, 2017) (Sanders, J.).

Government Entity Acting in Pursuit of Legislative Mandate Not Permitted to Proceed with Chapter 93A Claim

Plaintiff G4S Technology LLC ("G4S"), the design-builder on a state and federally-funded project to design and construct a fiber optic network in western Massachusetts, brought suit against Defendant Massachusetts Technology Park Corporation ("MTPC"), a state development agency established for the purpose of, among other things, expanding broadband infrastructure in Massachusetts. G4S claimed that MTPC wrongfully withheld millions of dollars from G4S in connection with the fiber optic project. MTPC counterclaimed for fraud and violation of Chapter 93A. G4S moved for summary judgment on MTPC's Chapter 93A counterclaim, arguing that MTPC was not engaged in trade or commerce because it is a government entity acting in pursuit of its legislative mandate. MTPC moved for judgment in its favor on its counterclaims. The Court allowed G4S' motion.

The court agreed that MTPC was not engaged in trade or commerce because it is a "creature of statute" that was "clearly acting pursuant to a legislative mandate" when it contracted with G4S to expand high speed internet access to certain targeted communities. The court held that any revenue MTPC generated in connection with that contract was "purely incidental to the achievement of its core mission." The court also rejected MTPC's attempt to draw a legal distinction between itself, a Chapter 93A plaintiff, and public entities defending against a Chapter 93A claim: "there is no indication in the case law that the test for determining whether a party is engaged in trade or commerce should turn on whether that party is the plaintiff or the defendant of a Section 11 claim." ■

ABM Indus. Grps., LLC v. Palmarozzo, 2017 Mass. Super. LEXIS 37

(Mar. 30, 2017) (Salinger, J.).

Non-Compete Cannot Be Used to Prevent Ordinary Competition

The court denied Plaintiff ABM Industry Groups, LLC ("ABM") a preliminary injuntion to enforce restrictive covenants against its former employee, Joseph Palmarozzo ("Palmarozo"), after he left ABM, finding that ABM had failed to show a likelihood of success on the merits.

At the outset, the court rejected Palmarozzo's contentions that the agreement was not supported by adequate consideration – it was supported by Palmarozzo's continued at-will employment – or that it was signed under duress. The fact that Palmarozzo was told he could not continue to work for ABM if he did not sign the agreement did not make the agreement voidable because "[m]erely urging another party to accept a deal that is less generous than they would like, and threatening not to do business with them if they do not, is not economic duress even if the demand is made of someone in difficult financial circumstances."

Nevertheless, although the employment agreement as a whole was enforceable, ABM did not persuade the court that it was likely to prove that the agreement's non-competition covenant was enforceable. ABM did not present evidence of misuse of confidential information or loss of good will. Rather, the court found that ABM's purpose in attempting to enforce the covenant was to protect itself from "ordinary competition," which is impermissible. ■

Hlatky v. Horowitz, 2017 Mass. Super. LEXIS 28

(Mar. 27, 2017) (Salinger, J.).

Motion to Disqualify Opposing Counsel Denied Where Plaintiff Did Not Prove Counsel Had Access to Confidential Information That Could Be Used Against Her

Plaintiff Lynn Hlatky, Ph.D. ("Hlatky") asserted claims arising from her work at GeneSys Research Institute, Inc. ("GRI"). While Hlatky worked at GRI, Attorney John Dennis ("Dennis") served as GRI's lawyer. Dennis is a partner at Lynch Brewer Hoffman & Fink, LLP ("LBHF"). LBHF represented GRI in connection with Hlatky's claims. Hlatky moved to disqualify LBHF, claiming that Dennis also represented her while representing GRI.

The court denied the motion to disqualify. The court first explained that disqualification is a "drastic measure." The court then held that disqualification was not justified in this case because Hlatky had not shown that she had any attorney-client relationship with Dennis. Hlatky "has not produced any contemporaneous documentation suggesting that Dennis ever agreed to serve as her personal attorney, that Hlatky believed he had done so, or that Hlatky was ever billed for any services provided by Dennis." The fact that Hlatky may have reasonably believed that Dennis was looking out for her interests was not sufficient to establish an attorney-client relationship. In addition, the court held that Hlatky had not proved that she ever shared any confidential information with Dennis or that LBHF had access to any confidential information that could be used against Hlatky in her case.

Finally, the court held that the possibility that Hlatky may call Dennis as a witness at trial did not require LBHF to be disqualified. Although Dennis may be barred from serving as GRI's trial counsel, that future possibility provided no basis for disqualifying Dennis' colleagues from continuing to represent GRI. ■

Governo v. Law, 2017 Mass. Super. LEXIS 16

(Jan. 11, 2017) (Salinger, J.).

Law Firm Denied Preliminary Injunction Against Departing Lawyers Due to Insufficient Evidence of Irreparable Harm

The Governo Law Firm, LLC ("Governo"), which specializes in toxic tort defense, brought suit against six of its former partners and their new firm (collectively, "Defendants"), alleging that they misappropriated Governo's proprietary databases, electronic files, and computers. Governo moved for a preliminary injunction, which the court denied.

The court held that Governo had not met its burden of proving that it would suffer irreparable harm. Governo did not submit any admissible evidence to support its accusation that Defendants misappropriated copies of electronic materials. Such assertions made in affidavits on information and belief were insufficient to support granting a preliminary injunction. Noting that Governo did not file its complaint and motion until five weeks after Defendants left, the court stated that Governo had "ample time" to develop forensic evidence to support its motion. The court also found it "hard to imagine" what irreparable harm could have resulted from theft of a database that contained only publicly-available information. In addition, Governo did not show that it had lost any clients or goodwill as a result of the alleged theft of the database; instead, the court held that the record showed only that some clients wanted the Defendants to continue to represent them. ■

Whittier IPA, Inc. v. Steward Health Care Network, 2017 Mass. Super. LEXIS 18

(Jan. 18, 2017) (Salinger, J.).

Court Denies Request to Bring Third-Party Claims Weeks Before Close of Discovery

Plaintiff Whittier IPA, Inc. ("Whittier"), an association of independent physicians, brought suit against Defendant Steward Health Care Network, Inc. ("Steward"), a physician network, claiming that Steward owed Whittier substantial sums after Steward terminated its contractual arrangement with Whittier. Steward had terminated its agreement with Whittier after learning that Whittier had agreed to join a competing physician network. Steward moved for leave to assert counterclaims against Whittier for breach of contract and third-party claims against Anna Jacques Hospital ("Anna Jacques") for intentional interference and violation of Chapter 93A. The court denied the motion because all of the proposed claims would be futile and because allowing joinder of a third party weeks before the close of discovery would be unfairly prejudicial to Whittier.

The court found the applicable contract unambiguous and explained that it cannot accept a plaintiff's allegations of breach of contract where such allegations are "based on a misreading of the contract." The court also explained that a claim for violation of the implied covenant of good faith and fair dealing based on Whittier's conduct during negotiations with Steward was not viable because the covenant "pertains to bad faith in the performance of a contract, not in its execution."

With respect to the proposed claims against Anna Jacques, the court held that the interference claim was futile because Steward had not alleged facts showing that Anna Jacques' conduct led to a contract being broken. In addition, the fact that Anna Jacques may have pressured Whittier to change networks did not violate Chapter 93A because "hard bargaining is not unlawful."

Finally, the court held that it was too late in the litigation to assert third-party claims against Anna Jacques, particularly where Steward had known of and threatened to assert claims against Anna Jacques since 2014. ■

Bassett v. Triton Techs., Inc., 2017 Mass. Super. LEXIS 32

(Mar. 6, 2017) (Salinger, J.).

Wage Act Encompasses Wages Owed Pursuant to Statute

Plaintiffs alleged that they and other employees of Defendant Triton Technologies, Inc. ("Triton") are owed unpaid wages based on Triton's alleged failure to pay employees one and one-half times their regular rate for work on Sundays, as required by G.L. c. 136, § 6(50). Defendants moved to dismiss, claiming Plaintiffs did not have standing because there is no private right of action to enforce the Sunday pay statute.

The court denied the motion to dismiss. First, the court noted that Defendants were improperly conflating the jurisdictional concept of standing with whether Plaintiffs had stated a viable claim. The court then held that Plaintiffs had stated a viable Wage Act claim. The court explained that the Legislature created a private right of action under the Wage Act to enforce all of an employer's legal obligations to pay wages earned by an employee, which right encompasses claims for nonpayment of wages earned from working on Sundays: "Section 148 applies to all wages earned, whether the obligation to pay the wage is solely a function of a private contractual arrangement or arises in whole or in part under a statute." The court also found it "irrelevant that Plaintiffs may not be able to enforce other aspects of the statute that governs commercial operations on Sundays." ■

Silva v. Todisco Servs., 2017 Mass. Super. LEXIS 17

(Jan. 24, 2017) (Salinger, J.).

Doctrine of Primary Jurisdiction Did Not Require Stay of Case Involving Chapter 93A Claim

Christopher Silva ("Silva") brought suit against Todisco Towing ("Todisco") after it towed Silva's motor vehicle without Silva's consent from a private parking lot. Silva alleged that Todisco's invoice omitted certain information required by statute. Silva asserted claims for, among other things, negligent misrepresentation and violation of Chapter 93A, and he sought to represent a class of all individuals whose vehicles were towed by Todisco and whose invoices omitted the required information. Todisco moved to dismiss, arguing that Silva lacked standing because he was not the individual who paid the tow charge and that the Department of Public Utilities ("DPU") had primary jurisdiction. The court denied the motion to dismiss.

As to standing, the court found that the individual who paid the tow charge was acting as Silva's agent and paid the charge on his behalf. With respect to the DPU, the court noted that the DPU and the Superior Court share jurisdiction over claims such as Silva's. The court went on to explain that, although a court generally has discretion to dismiss or stay an action where an agency has primary jurisdiction, the fact that Silva sought relief under Chapter 93A made it inappropriate to dismiss or stay the case: "[b]y statute, individuals who are entitled to bring an action under G.L. c. 93A, § 9 shall not be required to initiate, pursue or exhaust any administrative remedies before filing suit or obtaining relief under c. 93A in court." In addition, the court stated that the question at issue was not a highly technical issue that required the DPU's specialized expertise. ■

Kirin Produce Co. v. Lun Fat Produce, Inc., 2017 Mass. Super. LEXIS 26

(Feb. 6, 2017) (Salinger, J.).

Breach of Contract Claims Dismissed Due to Statute of Frauds

Plaintiff Kirin Produce Co, Inc. ("Kirin") alleged that it contracted with Defendant Lun Fat Produce, Inc. ("Lun Fat") and its owner, Peter Tam ("Tam"), to purchase Lun Fat's assets and to lease, and eventually purchase, the property where Lun Fat was located. Kirin alleged that Lun Fat breached the contract by then selling its assets and the property in question to someone else. Defendants moved to dismiss all claims, arguing that they never entered into an enforceable contract with Kirin. The court agreed and dismissed the case.

The court explained that Kirin's alleged acceptance of an oral offer was ineffective as a matter of law because the contract, in part, involved the lease and sale of land, thereby making the proposed deal subject to the Statute of Frauds. Although the portion of the contract involving the asset sale was not subject to the Statute of Frauds, "the sale of Lun Fat's business was inseparable from the lease and sale of the [property] and thus the entire contract was subject to the Statute of Frauds." ■

Are you receiving our e-newsletter, OCM's Razor? Sign up at www.ocmlaw.net/razor.html

O'Connor
Carnathan
and Mack LLC

One Van de Graaff Drive - Suite 104
Burlington, MA 01803
Tel: 781.359.9000 | Fax: 781.359.9001
www.ocmlaw.net

NetScout Sys. v. Hohenstein, 2017 Mass. Super. LEXIS 27 *(Feb. 14, 2017) (Salinger, J.).*
NetScout Sys. v. Hohenstein, 2017 Mass. Super. LEXIS 25 *(Feb. 22, 2017) (Salinger, J.).*

Court Revises Preliminary Injunction Order After Plaintiff Presents New Legal Theory

The court issued two related decisions in a case brought by Plaintiff NetScout Systems, Inc. ("NetScout"), in which NetScout sought to enforce a non-competition covenant against one of its employees, Defendant Carl Hohenstein ("Hohenstein"). Hohenstein had agreed to the non-competition provision when he was employed by a subsidiary of another company, Danaher Corporation ("Danaher"), which NetScout later acquired.

In its February 14, 2017 decision, the Court found as fact that Danaher had assigned its rights under the contract with Hohenstein to NetScout. The court then held that, although NetScout was entitled to enforce the noncompetition agreement assigned to it, that agreement did not bar Hohenstein from selling products which competed with NetScout because the noncompete only barred Hohenstein from competing with Danaher. The court explained that "Danaher had no contractual right to bar Hohenstein from working for a company that instead competes with NetScout. As a result, NetScout cannot do so either in its capacity as Danaher's assignee." There was no evidence that Hohenstein's new employer competed with Danaher.

Following the court's order, NetScout moved for reconsideration and presented a new legal theory. NetScout argued that it was entitled to enforce the agreement not because Danaher assigned its rights to NetScout but because NetScout succeeded to Danaher's rights as the result of a statutory merger. NetScout presented evidence that Hohenstein's employment relationship had been transferred to the entity that merged with a NetScout subsidiary. Therefore, NetScout, through its subsidiary, became the legal successor to the last Danaher subsidiary that was entitled to enforce the agreement against Hohenstein. The court considered this new evidence and held that it was now "convinced" that it should have allowed NetScout's motion for preliminary injunction. The court allowed the motion for reconsideration and entered an amended preliminary injunction barring Hohenstein from competing with NetScout. ■