O'Connor Carnathan and Mack LLC

Session Watch

June 2018

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.

Volume 15
Number 1

Summarizing opinions from Jan. 1, 2018 through Mar. 31, 2018

FEATURED DECISION:

Silva v. Todisco Servs., 2018 Mass. Super. LEXIS 23

(Mar. 6, 2018) (Salinger, J.).

Defendant May Not Avoid Putative Class Action By Attempting to Pay Off Named Plaintiff

Plaintiff Christopher Silva ("Silva") brought suit against Defendant Todisco Services, Inc. ("Todisco") after Todisco towed Silva's motor vehicle without his consent and allegedly failed to include certain information on the invoice as required by the Department of Public Utilities. Silva brought claims for violation of Chapter 93A, declaratory relief, negligent misrepresentation, intentional fraud, and unjust enrichment and moved to certify a class of plaintiffs whose towing invoices also lacked the required information. After Silva filed suit, Todisco sent Silva a check for three times the amount of the tow. Silva rejected the offer and returned the check.

Todisco opposed the motion for certification on the grounds that the action became moot when Todisco tendered payment to Silva. The court disagreed. First, the court explained that Silva sought injunctive and declaratory relief in addition to monetary compensation; therefore, Todisco's tender of payment could not moot the entire action. Moreover, the court held that even if Silva were only seeking monetary relief, tendering full payment to a named plaintiff – who then rejects that offer – does not moot a putative class action. The court explained that "the principle that a defendant cannot evade a viable class claim by paying the named plaintiff's personal claim is of particular importance in the context of class actions brought on behalf of individual consumers under G.L. c. 93A, § 9(2)."

The court then rejected Todisco's argument that Silva must prove that other potential class members expressed an interest in pursuing claims against Todisco. The court explained that Massachusetts law does not require class members to opt into a class.

The court went on to certify a class with respect to the Chapter 93A and related declaratory judgment claims. The court denied certification as to the misrepresentation, fraud, and unjust enrichment claims based on its finding that resolution of those claims would require individualized inquiries into each class member's reasonable reliance and subjective expectations. ■

Garner v. Entm't Mgmt. Complex, LLC, 2018 Mass. Super. LEXIS 31

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

Preliminary Injunctive Relief Denied Where Party Attempted to Deceive the Court

Defendant Entertainment Management Complex, LLC ("EMC") retained Plaintiffs Rashaud Garner ("Garner") and his company, Entertainment One Stop Shop, LLC ("EOSS"), to book events and provide event-related services at a conference center in Brockton, Massachusetts. Plaintiffs alleged that EMC had agreed to extend the parties' contract through the end of 2018 and sought a preliminary injunction that would require EMC to adhere to that extension. Plaintiffs relied on an e-mail exchange with EMC which purported to show EMC telling Plaintiffs to continue to provide booking services in 2018.

EMC presented evidence that Garner falsified those emails, and the court agreed that Garner "created a fictitious version" of the emails. Therefore, the court denied the motion for preliminary injunction because, without the emails, there was no reason to believe that Plaintiffs would succeed in proving that the contract had been extended through 2018.

The court also explained that even if there were a likelihood of success on the merits, it would still deny the requested injunction as a sanction for Garner's attempt to deceive the court. The court stated that it has inherent power and broad discretion to fashion a judicial response warranted by fraudulent conduct, including by denying relief to the party who engaged in fraud. In addition, the court stated that "[i]t is well established that one must have behaved equitably in order to obtain equitable remedies, such as injunctive relief." ■

Kushner v. Wallace, 2018 Mass. Super. LEXIS 13

(Jan. 29, 2018) (Salinger, J.).

Fiduciary Duty Claim Based on Diversion of Income from LLC is Derivative

Plaintiff Evan M. Kushner ("Kushner") brought suit against Defendants Wallace Capital, LLC ("Wallace Capital"), Wallace Lending Corporation ("Wallace Lending"), and Robert Wallace ("Wallace"). Upon Defendants' motion, the Court dismissed a claim against Wallace and Wallace Lending for breach of a promissory note payable only by Wallace Capital. The court held that Kushner's "conclusory allegation" that Wallace and Wallace Lending guaranteed repayment of the note was not sufficient to state a claim against those two Defendants.

The court also agreed that some of Kushner's claim for breach of fiduciary duty should be dismissed because it was not brought derivatively. Specifically, any claim that income was diverted from Wallace Capital must be brought as a derivative claim. However, a claim of an alleged failure to distribute Kushner's full share of profits and a claim of failure to repay Kushner under a promissory note were direct claims.

The court also denied Kushner's request for leave to file an amended complaint that was 40 pages long, with 236 paragraphs. The court explained that Kushner's proposed complaint would violate the requirement in Rule 8(a) that a complaint set forth a short and plain statement of a plaintiff's claims. The court also stated that Kushner had not identified any good reason for amendment and had acknowledged that amendment would not make any substantive changes to the legal theories asserted against the Defendants. ■

America's Test Kitchen v. Kimball, 2018 Mass. Super. LEXIS 45

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

Work Product Doctrine Protects Communications with Public Relations Firm

Plaintiff America's Test Kitchen ("ATK") brought suit against multiple defendants based on its allegations that the defendants developed a competing business. Before the court were cross-motions to compel production of documents withheld as privileged and/or protected by the work product doctrine.

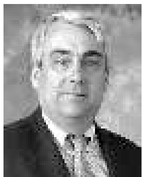
The court first compelled production of communications with a corporate advisor who the defendants had not shown was the "functional equivalent" of an employee who could share in communications about legal advice without waiving the privilege. The mere fact that this advisor directed the defendants to a particular law firm did not mean that his communications regarding that legal representation were privileged. The defendants had not established that they needed to gather information from the advisor in order to obtain legal advice, that they had some need to share legal advice with the advisor, or that the advisor was a necessary agent in seeking or implementing legal advice.

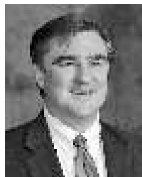
The court also found that the common interest doctrine did not apply to communications with an individual who was not represented by separate counsel. However, the court found that work product protection was not waived when protected documents were shared with this individual because "only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection." The individual in question was "closely aligned with, and highly unlikely to become adverse to" the other defendants.

The court declined to compel production of communications between the individual defendants and not involving an attorney, explaining, "[w]here two clients are represented by the same lawyer, they may speak in confidence among themselves regarding what advice to seek from their lawyer or regarding what to do based on their lawyer's legal advice." Similarly, the court found that email communications between ATK's board members regarding legal advice were privileged even if no attorney was copied on the email.

Finally, the court declined to compel production of communications between plaintiffs and two public relations firms that were hired to deal with matters arising from or related to the lawsuit. The court stated: "[i]t does not matter whether the disputed communications . . . contain or reveal any opinions of legal counsel or whether they were created to assist with the litigation itself, as distinguished from more general public relations efforts. So long as the documents were created because of the threat of litigation . . . they fall within the scope of the work product doctrine." ■

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.

O'Malley v. Burr, 2018 Mass. Super. LEXIS 44

(Mar. 22, 2018) (Salinger, J.).

Limitations Period Not Equitably Tolled While Plaintiff Pursued Other Party

Plaintiff Eugene O'Malley ("O'Malley") was awarded treble damages, interest, and attorneys' fees and costs against Adel A. Hamadi Al Tamimi ("Tamimi") based on Tamimi's breach of contract. O'Malley alleged that he was unable to collect on that judgment and subsequently brought suit against two attorneys who represented Tamimi, Stephen Burr ("Burr") and Lawrence Kulig ("Kulig"), as well as their law firm, Eckert Seamans Cherin & Mellot, LLC ("Eckert"). O'Malley asserted that the funds originally owed to him were in Eckert's IOLTA account and Defendants permitted Tamimi to transfer the funds out of that account. O'Malley brought claims for fraud, fraudulent concealment, intentional infliction of emotional distress, and violation of Chapter 93A.

The court dismissed all of the claims as barred by the statutes of limitations. The court held that the limitations period began to run when O'Malley filed his complaint because, based on his allegations, O'Malley knew that Burr had lied to him about the reasons for non-payment under the contract and knew that he had been injured by the non-payment. The court stated that it did not matter "whether O'Malley realized he had claims against these Defendants or had discovered facts supporting every element of each possible claim . . . Nor does it matter whether O'Malley realized he would not be able to recover in full from Tamimi."

The court rejected O'Malley's argument that the statutes of limitations were tolled based on Defendants' alleged fraudulent concealment, explaining that absent a fiduciary or other special duty, a failure to disclose will not toll the statute of limitations. In this case, Defendants did not represent O'Malley and, therefore, "had no duty to disclose to him facts that their client chose not to share."

The court also rejected O'Malley's argument that the statutes of limitations should be equitably tolled during the time that he was trying to recover from Tamimi. The court stated that the proper course of action would have been for O'Malley to have filed a timely complaint against Defendants and then moved to have that action stayed while he pursued separate claims against Tamimi. ■

C Co. v. Hackel, 2018 Mass. Super. LEXIS 30

(Jan. 5, 2018) (Salinger, J.).

Communications Containing Tax Law Advice from Accountant Not Privileged

Plaintiff The C Company filed a motion in limine seeking an order that certain communications between Defendants' attorneys and accountants were not protected by the attorney-client privilege. The court allowed the motion, finding that it was apparent from the communications that the accountant's participation was not necessary for effective communication between the attorney and his clients, and "no part of" the communications involved the seeking or rendering of legal advice by the attorney. Rather, the defendant was seeking tax law advice from the accountant.

The mere fact that the accountant's advice assisted the attorney in drafting a given document did not mean the advice was protected by the attorney-client privilege. The court explained as follows: "[t]he Court recognizes that [the accountant's] tax advice was in part legal advice about how to minimize tax exposure and the state and federal tax codes. But that does not make the communications privileged. To the contrary, the attorney-client privilege does not apply where the accountant provides additional legal advice about complying with the tax code even where doing so would assist the attorney in advising the client." ■

Barton & Assocs. v. Matarese, 2018 Mass. Super. LEXIS 47

(Feb. 28, 2018) (Kaplan, J.).

Court Declines to Modify 13-Year-Old Injunction

In 2005, the Court entered a final judgment, based upon a settlement reached by the parties, which contained, among other elements, a permanent injunction precluding Medicus Staffing, LLC ("Medicus") from hiring anyone previously employed by Barton & Associates, Inc. ("Barton"). At the time, Medicus had approximately 9 employees, and Barton had approximately 8 employees. By 2018, Medicus had approximately 250 employees, and Barton had between 500 and 1,000 employees.

Medicus filed a motion under Mass. R. Civ. P. 60(b)(5), seeking relief from the permanent injunction. The court denied the motion. The court first stated that there is substantially more federal case law regarding the standards that should be applied in determining when a permanent injunction should be modified than there is in Massachusetts. Therefore, the court relied on federal case law stating that, in considering whether a decree arising out of commercial litigation between two private parties should be modified, a court should look to factors such as "the circumstances leading to the decree (including the nature of a party's wrongdoing), the quantum of hardship on the burdened party, the duration of the burden thus far and the prospect of its continuing, and the benefited party's need for a continuation of the decree."

The court stated that it was not able to assess the parties' respective wrongdoing. Although the obvious changed circumstance was the increase in the size of the parties' businesses, this increased size indicated that the existence of the injunction had not "been an obstacle to [Medicus'] growth and success." The court also stated that, while it was not convinced that Barton had a substantial need for the continued enforcement of the injunction, "the question before the court is not whether it would enter the injunctive relief today in a contested litigation between the parties, but rather whether Medicus should be relieved of a term of the agreement that it negotiated in 2005 . . . Neither the commercial success of the parties in the intervening years, nor changes in the market place, have been so dramatic to warrant a modification of the injunction that Medicus agreed would be permanent in 2005." ■

Mooney v. Diversified Bus. Communs., 2018 Mass. Super. LEXIS 33

(Feb. 2, 2018) (Salinger, J.).

Court Declines to Oversee LLC Appraisal Process

Defendant DBC Pri-Med, LLC ("Pri-Med"), a Delaware LLC, and its majority member, Defendant Diversified Business Communications ("Diversified"), moved for specific performance of an appraisal provision in the LLC agreement, which required the LLC members to select a mutually agreeable appraisal firm for valuation of shares. Plaintiffs, four minority owners of Pri-Med, refused to agree upon an appraisal firm unless there was judicial oversight of the appraisal process.

The court allowed Defendants' motion to compel, stating that it was not appropriate for it to appoint a special master and oversee the appraisal process because doing so would be inconsistent with the terms of the LLC agreement and Delaware law. Under Delaware law, where a contractual agreement to resolve valuation disputes through a final and binding valuation process has been invoked, it provides a mandatory form of arbitration that precludes recourse to the courts. The court explained that the only exception is where one party believes that an appraiser's final decision has been unfairly tainted in some way, such as if the appraiser were provided with false financial statements. ■

Anaesthesia Assocs. of Mass., PC v. Plexus Anesthesia Servs. of Mass., PC, 2018 Mass. Super. LEXIS 32 *(Feb. 20, 2018) (Salinger, J.).*

Non-Judgment Creditor Denied Preliminary Injunction Freezing Defendant's Assets

Plaintiff Anaesthesia Associates of Massachusetts, PC ("AAM") brought suit to recover $2 million for past anesthesia services. AAM requested a preliminary injunction preventing Defendant Plexus Anesthesia Services of Massachusetts, PC ("PASM") from transferring or encumbering its assets and making any payments except to its employees, attorneys, and for rent, utilities, and taxes.

The court denied the request for a preliminary injunction. First, the court found that AAM had not proven irreparable harm because its supporting assertions were made only "on information and belief." Second, the Court held that the relief AAM sought was "incredibly broad" because it sought to freeze all of PASM's assets. The court stated that this request was essentially a nonstatutory action to reach and apply, and the court could not exercise its general equity jurisdiction to grant such relief where the plaintiff was not yet a judgment creditor of PASM. The court noted that, although it has the power to enjoin the disposition of particular funds in which a plaintiff has a demonstrated equitable interest, "AAM only asserts a legal claim for damages, not an equitable claim in particular funds." ■

Mass. Bay Transp. Auth. v. Clear Channel Outdoor, 2018 Mass. Super. LEXIS 11 *(Jan. 31, 2018) (Salinger, J.)*; Mass. Bay Transp. Auth. v. Clear Channel Outdoor, Inc., 2018 Mass. Super. LEXIS 34 *(Feb. 23, 2018) (Salinger, J.).*

Defendant's Right of First Refusal Did Not Permit it to Dictate the Terms of Plaintiff's Offer

The Plaintiff, the Massachusetts Bay Transportation Authority ("MBTA"), had granted Defendant Clear Channel Outdoor, Inc. ("Clear Channel") a fifteen-year license to operate billboards on MBTA property. In advance of expiration of that license, the MBTA issued a request for responses by parties willing to enter into a six-month license once the Clear Channel license expired. A company called Outfront Media, LLC ("Outfront") agreed to enter into a six-month license, while Clear Channel refused to do so. The MBTA disqualified Clear Channel and expressed its intention to award the license to Outfront. The MBTA then brought a declaratory judgment action seeking a declaration that, among other things, its conduct was lawful.

Clear Channel filed an emergency motion seeking a temporary restraining order ("TRO") barring the MBTA from taking any steps to license its billboards or contract with Outfront. Clear Channel alleged that (1) the MBTA had violated a contractual obligation to afford Clear Channel a right to bid on a request that did not include commercially unreasonable terms; and (2) the MBTA had breached the parties' license agreement by refusing to give Clear Channel a chance to exercise its right of first refusal.

The court denied Clear Channel's motion. First, the court stated that Clear Channel had no contractual right to dictate to the MBTA what license terms it found acceptable and then require the MBTA to grant a license on those terms. The court noted that, although Clear Channel claimed that the terms were unreasonable, Outfront had agreed to perform under the terms set forth by the MBTA. With respect to Clear Channel's second argument, the court found that Clear Channel had not shown that it would suffer irreparable harm if the TRO did not issue. Clear Channel had made it clear that it did not intend to accept a six-month license. Therefore, even if the court issued an injunction requiring the MBTA to allow Clear Channel to exercise its right of first refusal, the outcome would be the same: Clear Channel would not accept the six-month license.

Continued on page 7

Continued from page 6

Clear Channel subsequently moved for a preliminary injunction barring the MBTA from proceeding with the new license to Outfront, and the MBTA moved for a preliminary injunction barring Clear Channel from interfering with any use of the billboards. The court denied Clear Channel's motion for many of the reasons which led it to deny the requested TRO. The court allowed the MBTA's motion, noting that the MBTA is required by statute to maximize its revenues from commercial advertising and that the MBTA had determined that the public interest would be best served by entering into a six-month license. The court stated that such a determination by a government entity should not be second-guessed by the court unless the determination was the result of illegal or arbitrary action. ■

Newton Presbyterian Church v. Smith, 2018 Mass. Super. LEXIS 35

(Feb. 12, 2018) (Salinger, J.).

Plaintiffs Who Prevailed on Summary Judgment Entitled to Preliminary Injunction Altering Status Quo

This case involved a dispute over use of property belonging to Plaintiff Newton Presbyterian Church ("NPC"). In January of 2017, a majority of NPC's members voted to break away from the Presbyterian Church and affiliate with the Evangelical Covenant Church. The Presbytery of Boston, the governing body for the Presbyterian Church in the Boston area, determined that the break-away individuals were no longer members of the NPC and had no power to take any action purporting to affect the possession or use of church property. Despite that determination, the break-away individuals continued to occupy and control use of NPC's property.

The NPC and the Presbytery of Boston brought suit seeking a declaration that the Presbytery's determination should be enforced. The court allowed Plaintiffs' motion for summary judgment, ruling that the break-away individuals were not entitled to use or control the property. The Plaintiffs then moved for a preliminary injunction ordering the Defendants to vacate the property.

The court allowed the motion, rejecting Defendants' argument that a preliminary injunction was improper because the summary judgment decision was unlikely to be upheld on appeal. The court stated that, contrary to Defendants' arguments, it was "quite likely" that Plaintiffs would prevail on appeal because it is "well-established" that where the highest authority in a church has resolved a dispute, the courts should not intervene other than to enforce the decision.

The court also rejected Defendants' argument that the court should not grant preliminary relief that would alter the status quo. The court stated that a preliminary injunction altering the status quo is permissible in Massachusetts, "even if it has the effect of temporarily granting the plaintiff all that it seeks as final relief. Such an injunction is appropriate where it is necessary to stop some party from causing irreparable harm by continuing to engage in unlawful conduct." ■

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

Charlie's Project LLC v. T2B LLC, 2018 Mass. Super. LEXIS 21

(Mar. 8, 2018) (Salinger, J.).

LLC Agreement's Arbitration Provision Did Not Extend to Claims Arising Under Interrelated Agreements

Plaintiff Anna Hernandez ("Hernandez") entered into several contracts with Defendant T2B LLC ("T2B"). The first two contracts concerned T2B's sale and distribution of clothing designed by Hernandez. Subsequent to entering into those two contracts, Hernandez became a member of T2B and executed an LLC Agreement which contained a mandatory arbitration provision.

Hernandez brought suit against T2B for, among other claims, allegedly breaching the first two contracts. T2B moved to dismiss on the grounds that Hernandez's claims were subject to the mandatory arbitration clause in the LLC Agreement. It also invoked a Delaware forum selection clause contained in the LLC Agreement.

The court denied the motion to dismiss, holding that Hernandez never agreed that disputes arising under the first two contracts would be decided by an arbitrator. The court explained that none of Hernandez's claims sought to enforce or arose from the LLC Agreement and the interrelated nature of the three contracts did not mean that claims arising under the first two contracts should be subject to arbitration.

Similarly, the court held that the forum selection clause in the LLC Agreement only applied to claims brought to enforce or arising under that Agreement. In addition, the court found the forum selection clause – which stated that the parties "consent[ed]" to the jurisdiction of the Delaware courts – to be permissive and not mandatory. ■