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 :

Lockley v. Studentcity.com, Inc., 2018 Mass. Super. LEXIS 552

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

Wage Act Claims Based on Foreign Employment Dismissed

Plaintiff brought a putative class action against Studentcity.com, Inc. ("Student City") alleging violations of the Massachusetts Wage Act, Massachusetts independent contractor statute, and the Fair Labor Standards Act ("FLSA"). Student City offers spring break travel packages to college students, in which students agree to work as staff members at certain resort locations abroad. Defendants moved to dismiss the complaint on the grounds that the FLSA and Wage Act cannot apply to services rendered exclusively overseas. Because the plaintiff essentially conceded that the FLSA cannot be applied to services performed abroad, the primary question was whether the Wage Act applied.

The court concluded that the Wage Act did not apply, noting a general presumption against the international extra-territorial application of domestic laws in the absence of clear legislative intent to regulate conduct abroad. Because there is no appellate decision on point, the court also reviewed cases addressing the Wage Act's application to services performed in another state. These cases use choice of law principles to determine whether there is a sufficient connection to Massachusetts to apply Massachusetts law.

The court determined that the requisite connection to Massachusetts was lacking in this case. The Plaintiff resided in Colorado, signed her agreement with Student City in Colorado, flew from Florida to the Bahamas, and performed all of her work in the Bahamas. There was no allegation that the Plaintiff "ever stepped foot in Massachusetts." The court also stated that the application of Massachusetts law to employment that occurs entirely within the Bahamas would "intrude on the domestic affairs of that foreign country." The fact that Student City had its principle place of business in Massachusetts and its officers resided in Massachusetts was "not enough" to justify application of the Wage Act. Therefore, the court allowed the motion to dismiss. ■

Boston Redevelopment Auth. v. Boston Private Bank & Trust Co., 2018 Mass. Super. LEXIS 550 *(Nov. 6, 2018) (Davis, J.).*

Claim Alleging Breach of Foreclosing Bank's Power of Sale Survived Dismissal

Elizabeth Gastevich ("Gastevich") acquired a condominium in Charlestown, Massachusetts (the "Property") under an affordable housing program administered by the Boston Redevelopment Authority ("BRA"). The deed issued to Gastevich contained a clause giving the BRA the right to purchase the Property upon receipt of notice of an impending foreclosure ("Option Clause"). After Gastevich died, her estate failed to make required mortgage payments on the Property, and the mortgage holder, Boston Private Bank and Trust Company (the "Bank"), notified the BRA of its intention to foreclose. The BRA made no effort to purchase the Property and a public foreclosure was held, although an auction sale did not proceed because the third-party high bidder, Mikhail Starikov ("Starikov"), decided not to go through with the sale. The Bank then deeded the Property to itself and, two weeks later, conveyed the Property to Defendant Janet Blake ("Blake"), whom the BRA alleged to be Starikov's straw.

The BRA brought suit against the Bank and Blake seeking to void the sale of the Property and asserting a number of claims. Defendants both moved to dismiss, arguing that the BRA was precluded from seeking to enforce the Option Clause because it failed to exercise its option when it first had the chance.

The court denied the Bank's motion to dismiss the BRA's claim that the Bank breached its power of sale under G.L. c. 183, § 21 and G.L. c. 244, § 14 by conveying the Property to itself without a public auction. The court first held that the BRA had standing to challenge the sale because the BRA was a junior holder of an "encumbrance" to whom the Bank owed a duty of good faith and reasonable care. The court stated that if, as the BRA alleged, the Bank conspired to take title in its own name in order to eradicate the Option Clause, then the Bank may have violated its duty of care, which could invalidate an otherwise lawful sale. The court also stated that there was a plausible basis for concluding that the Bank's foreclosure process was unlawfully tainted by its decision to convey the Property to itself instead of offering it to the second highest bidder at auction or conducting another auction.

The court also declined to dismiss the BRA's unjust enrichment claim, rejecting Defendants' argument that they received no benefit from the Bank's sale of the Property to Blake. The court noted that the Bank may have enjoyed a higher sale price for the Property – and Blake may enjoy a higher resale price in the future – once the Property was free of the Option Clause.

The court dismissed the BRA's claim under G.L. c. 244, § 35B, explaining that that statutory provision was enacted to protect homeowners facing foreclosure and could not be invoked by the BRA. The court also dismissed the BRA's claim to quiet title because the BRA held neither title nor possession at the time of suit and therefore lacked standing to bring such a claim. ■

Hickman v. Riverside Park Enters., 2018 Mass. Super. LEXIS 549

(Nov. 7, 2018) (Sanders, J.).

Individual Inquiries Regarding Amount of Damages Did Not Preclude Class Certification

Plaintiffs brought a putative class action against Riverside Park Enterprises, Inc., doing business as Six Flags New England ("Six Flags"), alleging that Six Flags violated the Massachusetts Wage Act by not paying seasonal employees overtime wages or for meal breaks. With respect to meal breaks, Plaintiffs alleged that the failure to pay for meal breaks violated the Wage Act because Six Flags restricted where employees could take those breaks. Six Flags denied having any such policy. Plaintiffs sought to certify two classes of employees – one pertaining to the overtime violation and one pertaining to nonpayment of meal breaks.

The court first rejected Plaintiffs' argument that the class certification requirements should be less rigorous when the class claims involve violations of the Wage Act. The court then declined to certify a class regarding the meal breaks on the grounds that Six Flags' liability turned on individual inquiries as to what each employee was told regarding where he or she could take meal breaks. The court did agree to certify a class with respect to the overtime claims, however, and stated that class certification should not be denied simply because "individual inquiries may be ultimately necessary to determine the amount of damages each member of the class is entitled to receive." ■

Pellegrini v. Northeastern Univ., 2018 Mass. Super. LEXIS 276

(Oct. 16, 2018) (Davis, J.).

Motion for Relief from Judgment Denied Where Plaintiff Failed to File Rule 56(f) Request to Defer Summary Judgment

Plaintiff professor brought suit against his university employer and one of the co-authors of an academic article that called into question one of Plaintiff's academic theories. Plaintiff alleged that publication of the article caused him damages. The Massachusetts Appeals Court affirmed the Superior Court's grant of summary judgment in favor of Defendants based on Plaintiff's failure to offer any admissible evidence of damages.

Plaintiff moved for relief under Mass. R. Civ. P. 60(b), arguing that the court erred in granting summary judgment due to lack of damages where the court had previously delayed discovery on damages until after summary judgment. Plaintiff also alleged that Defendant's counsel engaged in fraudulent conduct by failing to inform the court or Appeals Court of the delay in damages discovery.

The court denied the Rule 60(b) motion. The court first explained that it was not convinced that any "mistake" had been made in connection with the summary judgment decision because a plaintiff is expected to possess at least some evidence of his or her own damages without the need for discovery. Moreover, even if a mistake had occurred, Plaintiff could have corrected that mistake by filing a Rule 56(f) request to defer consideration of summary judgment, but he did not do so.

In addition, Plaintiff failed to demonstrate any misconduct on the part of Defendants' counsel because the fact that discovery had been phased was no secret to the court. Finally, the court noted that Plaintiff himself had also failed to raise the issue of phased discovery in his response to the summary judgment motion and therefore, his culpability for fraud was "no greater, and no less than Defendants'." ■

Element Prods. v. Editbar, LLC, 2018 Mass. Super. LEXIS 540

(Nov. 29, 2018) (Davis, J.).

Parties May Not Contractually Limit Liability for Intentional or Reckless Breach of Fiduciary Duty

Plaintiff Element Productions, Inc. ("Element") brought suit against its former employee, defendant Mark Hankey ("Hankey"), based on allegations that Hankey secretly assisted defendant Editbar, LLC ("Editbar") in forming a competing video production business. Prior to trial, Hankey brought motions in limine seeking to preclude Element from recovering any consequential or punitive damages from him at trial based on a damages limitation provision in Hankey's employment agreement with Element, which stated that neither party was "entitled to any special, incidental, punitive, multiple or consequential damages." Hankey argued that this limitation applied to Element's breach of loyalty as well as contract claim. Element argued that it could recover such damages on its breach of loyalty claim because Massachusetts prohibits a party from contractually shielding itself from liability for gross negligence or reckless or intentional conduct.

The court allowed the motions in limine in part. The court first explained that "the applicability and effectiveness of a contractual provision that purports to limit a fiduciary's liability . . . turns not on whether the limitation provision purports to cut off all liability, but rather on whether the fiduciary is guilty of breaches of trust committed either in bad faith or intentionally or with reckless indifference to the interest of the beneficiaries." The court therefore concluded that Element's ability to recover consequential or punitive damages would depend on whether Element could prove that Hankey acted in bad faith, intentionally, or with reckless indifference to Element's interests. The court noted that "this test places a high burden of proof on Element, but not necessarily an insurmountable one." ■

In re Tokai Pharms. Secs. Litig., 2018 Mass. Super. LEXIS 771

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

Motion to Strike Class Allegations Prior to Discovery Deemed Premature

Plaintiffs brought a putative class action alleging violations of the Securities Act of 1933 and sought to certify a nationwide class. Defendants moved to strike the class allegations on the grounds that the court cannot, consistent with due process, exercise personal jurisdiction over absent class members who are not residents of Massachusetts.

The court denied the motion to strike. The court first emphasized that such motions are generally disfavored because they ask a court to preemptively terminate the class aspects of a case before plaintiffs have had an opportunity to engage in discovery on questions related to class certification. The court stated that such motions "should be allowed only rarely and then only where it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis . . . class definitional issues are not properly addressed on such a motion." The court held that plaintiffs should be given an opportunity to review Tokai records to determine the contours of the class.

The court also stated that the legal issue raised by defendants regarding jurisdiction was "far from clear cut," particularly in the circumstances of this case, where failing to certify a class would mean that absent class members would be barred from asserting their own claims due to expiration of the statute of limitations. The court opted to "proceed with caution and not decide these issues in the absence of any discovery." ■

Renova Partners, LLC v. Singer, 2018 Mass. Super. LEXIS 543

(Nov. 5, 2018) (Sanders, J.).

No Personal Jurisdiction Over Corporation for Tortious Conduct Occurring Prior to Corporate Formation

Renova Partners LLC ("Renova") brought suit against its former employee, Michael Singer ("Singer"), and Greenlight Development Partners, LLC ("Greenlight"), alleging that Singer usurped a $1.32 million business opportunity from Renova. Renova is in the business of restoring and redeveloping environmentally-impaired land. During Singer's employment with Renova, he learned about a development opportunity in New Jersey. Renova alleged that Singer decided to pursue that opportunity for himself and sent a proposal to the owner of the land at issue on behalf of Greenlight. Singer subsequently registered Greenlight as a Connecticut corporation with its place of business in Connecticut.

Greenlight moved to dismiss for lack of personal jurisdiction. The court allowed the motion. Greenlight has no business relationship with Massachusetts and owns no real estate or bank accounts in Massachusetts. The court also found no jurisdiction under G.L. c. 223A, § 3(c) because the tortious conduct alleged – the usurpation of the development opportunity – was committed only by Singer prior to incorporating Greenlight. The court stated that "there is no precedent for the proposition that a court can exercise jurisdiction over a foreign business corporation based solely on the prior in-state dealings of one of its members before the corporation itself was even formed." ■

Greico v. Williams, 2018 Mass. Super. LEXIS 609

(Dec. 17, 2018) (Salinger, J.).

Counterclaims Dismissed as Sanction for Spoliation

Defendant John Williams ("Williams") sought leave, prior to trial, to withdraw his admissions that certain exhibits to Plaintiff Charles Grieco's ("Grieco") complaint were true and accurate copies of certain agreements. Williams argued that these exhibits were only preliminary drafts and the final versions listed an LLC, not himself, as a party. Grieco requested that the court sanction Williams for spoliating evidence based on Williams' destruction of certain financial records through permanent redactions prior to providing them to his counsel.

The court denied Williams' request to withdraw the admissions because he had failed to justify withdrawal of the admissions, stating that "there is no reason to believe that [the admissions] were inadvertent and mistaken." Williams had repeatedly asserted throughout the litigation that he personally entered into the agreements at issue. Williams also failed to present evidence that the alleged LLC existed at the time of execution of the agreements or that it was created thereafter. The court took judicial notice that no such LLC appeared in the Massachusetts corporate database. The court also found that withdrawal of the admissions would cause unfair prejudice to Grieco because it would force Grieco to suddenly muster evidence that Williams was a party individually and try to prove an alternative veil piercing claim.

With respect to Grieco's spoliation motion, the court found that Williams acted willfully and in bad faith when he destroyed the financial records. The court held that dismissal of Williams' counterclaims was an appropriate sanction for such spoliation: "A party who deliberately destroys important relevant evidence should not be allowed to press counterclaims that would arguably be undercut by the missing evidence." The court also permitted an adverse inference instruction regarding the spoliation. ■

McGilloway v. Safety Ins. Co., 2018 Mass. Super. LEXIS 273

(Oct. 1, 2018) (Sanders, J.).

Allegations Raising Novel Issue of Insurance Law Survived Dismissal

Plaintiffs were in separate motor vehicle accidents with individuals insured by Defendant Safety Insurance Company ("Safety"). Safety determined that its insureds were liable and paid Plaintiffs for the assessed damage. Safety did not pay Plaintiffs any amount representing the inherent diminution in value of their vehicles. Plaintiffs then brought a putative class action against Safety, alleging that Safety breached its obligations under the applicable insurance policies and violated Chapter 93A and Chapter 176D when it failed to compensate Plaintiffs for the diminished value of their vehicles.

The court denied Safety's motion to dismiss. The case raised the "novel issue" of whether an insurer must pay an insured an additional amount to compensate a claimant for the fact "that a fully repaired vehicle is worth less in the resale market than a comparable vehicle that has not suffered such damage." The court concluded that, because of the absence of precedent addressing the issue, it was important that the court "not rule on these issues prematurely" and resolve them only once a more complete factual record had been developed. ■

Shepherd Kaplan Krochuk, LLC v. Borzilleri, 2018 Mass. Super. LEXIS 777

(Dec. 4, 2018) (Davis, J.).

No Fiduciary Duty Between Hedge Fund Manager and Fund Investor Absent Personalized Relationship

Plaintiff Shepherd Kaplan Krochuk, LLC ("SKK"), a wealth and asset management firm, brought suit against its former employee, defendant John M. Borzilleri, M.D. ("Borzilleri"). Borzilleri was the portfolio manager of a private hedge fund called SKK Health Care, L.P. (the "Fund"). During his employment, Borzilleri had brought two federal lawsuits under the False Claims Act against several large pharmaceutical companies, which were initially filed under seal. SKK was unaware of the lawsuits until they were unsealed three years later. Borzilleri claims that he was subsequently terminated in retaliation for filing the lawsuits and asserted ten counterclaims against SKK, including, among other claims, that SKK breached a fiduciary duty to Borzilleri as an investor in the Fund. SKK filed a motion to dismiss the counterclaims under Rule 12(b)(6) and under the anti-SLAPP statute.

The court partially allowed the Rule 12(b)(6) motion. It dismissed a count seeking injunctive relief because an injunction "is not a stand-alone cause of action." It also dismissed the fiduciary duty claim on the grounds that SKK did not owe a fiduciary duty to Borzilleri. Although there was no Massachusetts appellate decision on point, the court referred to federal cases recognizing that a hedge fund manager does not have a fiduciary relationship with a fund investor unless the manager has a personalized relationship with that particular investor. The court also dismissed a claim for breach of the "common law duty of loyalty" to Borzilleri as an employee because "Massachusetts law holds that an employer does not owe a duty of loyalty to its employees." A defamation counterclaim was also dismissed where it was based solely on the allegations in SKK's complaint and was therefore subject to the litigation privilege.

The court denied SKK's anti-SLAPP motion to dismiss because it found that Borzilleri had credibly asserted that the primary purpose of the counterclaim was not to interfere with SKK's petition rights but to seek damages for personal harm. ■

Bertolino v. Fracassa, 2018 Mass. Super. LEXIS 772

(Dec. 28, 2018) (Sanders, J.).

Defendant Waived Right to Compel Arbitration After Unsuccessfully Moving to Dismiss

Plaintiffs, investors in a Delaware limited liability company called Kettle Black of MA, LLC ("Kettle Black"), alleged that Defendants made misrepresentations in connection with assisting in selling membership units to Plaintiffs, thereby violating the Massachusetts Uniform Securities Act. One of the defendants, Frederick McDonald, moved to compel arbitration of the claims against him, relying on language in the Offering Memorandum and in Kettle Black's Operating Agreement.

The court denied the motion. First, the court explained that the Plaintiffs did not expressly agree to arbitrate their dispute. The Offering Memorandum was not a contract but rather a summary of the investment opportunity, and the arbitration provision in the Operating Agreement was inapplicable to Plaintiffs' claims, as Plaintiffs were not alleging any breach of the Operating Agreement. Therefore, there was no contractual basis for compelling arbitration.

The court also noted that it seemed "unfair" for McDonald to pursue an arbitration claim after having brought – and lost – a motion to dismiss. Because McDonald deliberately chose not to pursue arbitration early in the case, the court held that he must "live with that choice." ■

Greene v. Sandell, 2018 Mass. Super. LEXIS 779

(Dec. 18, 2018) (Davis, J.).

Foreign Plaintiff's Commencement of Massachusetts Action Constituted Consent to Personal Jurisdiction with Respect to Related Counterclaim

Plaintiff author, Bette Greene ("Greene"), brought suit in 2018 against her former literary manager and agent, Denise Sandell ("Sandell"), alleging that Sandell used the parties' company, Greene & Sandell, LLC (the "LLC"), to siphon off certain book royalties and that Sandell failed to repay a personal loan to Greene. Sandell counterclaimed, alleging that Greene breached her fiduciary duties to the LLC and committed a breach of bailment by refusing to return certain personal property Sandell kept at a property Greene owned in Puerto Rico. Greene then moved to dismiss the counterclaim on the grounds that the fiduciary duty claim was time-barred and that the court lacked personal jurisdiction over Greene, who lives in Florida, with respect to the non-compulsory breach of bailment counterclaim.

The court partially allowed the motion to dismiss the fiduciary duty counterclaim because the allegations established that Sandell had actual knowledge of a breach and consequent harm no later than May of 2013. However, because Sandell's fiduciary duty claim was compulsory, in that it arose out of the transaction or subject matter at issue in the complaint, it could still be pursued pursuant to G.L. c. 260, § 36, even if untimely, "but only to the extent of . . . Greene's claims against her."

The court denied the motion to dismiss the breach of bailment counterclaim because "[b]y commencing this action in Massachusetts Superior Court, [Greene] consented to personal jurisdiction in this forum with respect to all claims arising from the same transaction or nucleus of operative facts." The court found the breach of bailment counterclaim to be part of a series of connected transactions for jurisdictional purposes because its core was the breakdown in the parties' relationship that caused Sandell to flee Puerto Rico without her personal property. ■

Acacia Communs., Inc. v. ViaSat, Inc., 2018 Mass. Super. LEXIS 254

(Oct. 15, 2018) (Davis, J.).

No Claim Splitting Where Events Underlying Second Action Transpired After Commencement of First Action

Plaintiff Acacia Communications, Inc. ("Acacia") brought suit in July of 2017 against Defendant ViaSat, Inc. ("ViaSat") alleging that ViaSat defamed it by making statements that Acacia had misappropriated ViaSat's trade secrets. ViaSat counterclaimed based on Acacia's alleged misappropriation. ViaSat had previously commenced an action in California also alleging that Acacia had misappropriated its trade secrets; however, the misappropriation alleged in the California suit predated the subsequent alleged misappropriation at issue in the Massachusetts counterclaims. Acacia moved to dismiss the Massachusetts counterclaims on the grounds that ViaSat had engaged in improper claim splitting.

The court denied Acacia's motion, explaining that a dismissal based on claim-splitting is appropriate where all of the operative facts relied on to support the second action transpired prior to commencement of the first action. As the events that gave rise to ViaSat's Massachusetts counterclaims occurred more than one year after ViaSat commenced the California action, ViaSat had not engaged in claim splitting. ■

Vertical Biometrics, LLC v. Plex Research, Inc., 2018 Mass. Super. LEXIS 776

(Dec. 28, 2018) (Davis, J.).

Shareholder's Breach of Fiduciary Duty Claims Against Corporate Counsel Dismissed

Plaintiff, Alex Sukharevsky ("Sukharevsky"), the founder and former Chief Technology Officer of defendant Plex Research, Inc. ("Plex"), a Delaware corporation, brought suit against multiple defendants based on allegations that Sukharevsky was fraudulently induced into assigning certain intellectual property rights to Plex and then wrongfully terminated from Plex. Defendants moved to dismiss Sukharevsky's complaint, which asserted counts on behalf of Sukarevsky and two of his companies, Vertical Biometrics, LLC ("Vertical") and Lhasa, LLC ("Lhasa").

The court first allowed dismissal of claims brought by Vertical and Lhasa on the basis that those entities lacked standing, as they were not parties to any of the agreements at issue and did not hold a possessory interest in any of the intellectual property assigned by Sukharevsky. The court held that any injuries Vertical or Lhasa may suffer in the future as a result of Defendants' conduct were too speculative to confer standing. The court also dismissed a claim for judicial dissolution under G.L. c. 156D because Plex is a Delaware corporation. The court also dismissed fraud claims against certain defendants based on failure to plead with particularity, noting that the recitation of a single example of fraudulent conduct in one paragraph of the complaint was insufficient.

The court allowed Sukharevsky's fiduciary duty claim to proceed against certain officers and/or directors of Plex because his allegations that those defendants "conspired to wrongfully strip him of his intellectual property and force him from [Plex] are sufficient to support a claim for breach of fiduciary duty" under Delaware law. However, the court dismissed the breach of fiduciary duty claim against Gunderson Dettmer, Plex's legal counsel, finding that Sukharevsky had not pled allegations supporting the existence of an attorney-client relationship between himself and Gunderson, nor had he alleged that he had reposed trust and

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confidence in Gunderson for his own personal benefit. A Chapter 93A claim against Gunderson was dismissed for the same reason. Finally, although the court dismissed a Chapter 93A claim against officers of Plex on intra-enterprise grounds, it declined to dismiss a Chapter 93A claim against a third party who was alleged to have "actively participated in the other defendants' purported efforts to remove [Sukharevsky] from [Plex] and take his intellectual property." ■

Turner Constr. Co. v. M.J. Flaherty Co., 2018 Mass. Super. LEXIS 778

(Dec. 10, 2018) (Davis, J.).

Plaintiff Not Entitled to Fees for Defending Against Weak Counterclaims

Plaintiff general contractor Turner Construction Company ("Turner") brought suit against an HVAC subcontractor, Defendant M.J. Flaherty Company ("Flaherty"), for breach of contract. Flaherty asserted counterclaims but, after several years of litigation, filed for bankruptcy. The bankruptcy trustee determined that Flaherty's counterclaims were not worth pursuing, and Flaherty agreed to file a Stipulation of Dismissal in the Superior Court. Turner then moved, pursuant to G.L. c. 231, § 6F, to recover the fees and costs incurred in defending against Flaherty's counterclaims.

The court denied Turner's motion for fees, explaining that the case was a "complex dispute," and that, even if Flaherty's counterclaims were weak and unlikely to succeed, the assertion of weak claims does not constitute a basis for fees under § 6F. The court also stated that it had serious doubts as to whether it could award fees under § 6F in light of paragraph 6 of that statute, which precludes a court from awarding fees where parties have settled the dispute. The court stated that the Stipulation of Dismissal "arguably qualifies as a 'settlement' for purposes of paragraph six." ■

Roth v. Grail Partners, LLC, 2018 Mass. Super. LEXIS 274

(Oct. 30, 2018) (Davis, J.).

Anti-SLAPP Motion to Dismiss Denied Where Claim was not Groundless

Plaintiff was an investor in Chalice Fund, L.P. ("Chalice Fund") and in its general partner, Grail Partners, LLC ("Grail"). Plaintiff subsequently brought suit against Grail and its managing partners for alleged breach of Chalice Fund's Limited Partnership Agreement. Defendants asserted a breach of contract counterclaim against Plaintiff alleging that his commencement of the action violated a settlement agreement between Plaintiff and Grail entered into in a prior California action. Plaintiff filed a special motion to dismiss that counterclaim pursuant to the Anti-SLAPP statute, arguing that because the settlement agreement did not apply, on its face, to his Massachusetts claims, the purpose of the counterclaim was to chill his right of petition.

The court denied the special motion to dismiss, finding that the inapplicability of the settlement to the Massachusetts claims was not as clear as Plaintiff suggested and the agreement was patently ambiguous as to its intended scope. Therefore, the court could not conclude as a matter of law that Defendants' counterclaim was wholly without merit. ■

Azara Healthcare, LLC v. Arcadia Sols., LLC, 2018 Mass. Super. LEXIS 774

(Dec. 11, 2018) (Sanders, J.).

Contract Did Not Bar Implied Covenant Claim Where It Did Not Directly Address Conduct at Issue

Plaintiff Azara Healthcare, LLC ("Azara") and Defendant Arcadia Solutions, LLC ("Arcadia"), which both provide software to customers in the health care industry, were parties to a Licensing Agreement permitting them to use a common software code and delineating where each could compete. Azara brought suit claiming the restrictions on its activities were unenforceable, and Arcadia counterclaimed for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contractual relations. Arcadia claimed that Azara misled potential Arcadia customers regarding the terms of the Licensing Agreement by falsely telling customers that the Agreement prevented them from doing business with Arcadia. The counterclaim provided a specific example of a Michigan based customer. Azara moved to dismiss the counterclaims.

The court denied the motion to dismiss, finding that Arcadia's allegations were sufficient. The court rejected Azara's argument that the existence of the Licensing Agreement precluded the implied covenant claim, noting that the Licensing Agreement did not directly address the conduct at issue, which was the statements Azara allegedly made to potential customers. The court also declined to dismiss the breach of contract claim, as it turned on the interpretation of a particular provision of the Licensing Agreement that the court preferred to assess once it had a "complete factual record before it." ■

Fusion Trade, Inc. v. Amazon Corp., LLC, 2018 Mass. Super. LEXIS *555*

(Nov. 15, 2018) (Sanders, J.).

Parties Not Entitled to Return of Confidential Case File Prior to Providing Redacted Complaint

The complaint in this matter was provisionally impounded because it contained confidential business information. The parties subsequently filed a stipulation of dismissal and sought the return of all provisionally impounded documents, which effectively meant they sought a return of the entire case file.

Although the court found that the Uniform Rules of Impoundment permitted parties to secure the return of provisionally impounded documents, it explained that "something must remain in the public case file which will at the very least identify the parties and . . . describe their dispute . . . Litigation cannot be conducted entirely in secret: the public must at the very least be able to determine that there was a dispute between these two parties and that the case was subsequently dismissed by way of agreement." The court ordered that the parties could secure a return of the case documents once they filed a redacted complaint that could be kept in the public file. ■

Perfetti v. Perfetti, 2018 Mass. Super. LEXIS 544

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

Fiduciary Duty Claim Based on Freeze Out Allegations Not Derivative

Plaintiff Mark Perfetti ("Mark") held a minority interest in a closely held corporation, Ideal Instrument Company ("Ideal"), along with his three brothers, Christopher, John, and Renato ("Defendants"). Mark was also the beneficiary of a trust that acted as lessor of the property where Ideal was located. Mark brought suit against his brothers for breach of fiduciary duties owed to Mark and Ideal, as well as other claims, including a claim against Ideal on behalf of the Trust for back rent. The rent claim was based on an allegation that the Defendants conspired together to have Ideal pay less than a fair market rent to the Trust.

Defendants moved to dismiss, arguing that the claim for breach of fiduciary duties owed to Mark could only be brought derivatively because it essentially alleged excessive compensation or mismanagement of assets. The court disagreed and referenced Mark's allegations that Defendants had frozen him out of the business and acted unfairly and deceptively in connection with an offer to purchase his interest in Ideal. The court did dismiss the claim for back rent, however, finding that it was effectively part of the fiduciary duty claims. ■

Frequency Therapeutics, Inc. v. Weber, 2018 Mass. Super. LEXIS 553

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

Risk of Trade Secret Disclosure Supported Preliminary Injunction

Plaintiff Frequency Therapeutics, Inc. ("Frequency") brought suit against its former employee and Chief Medical Officer Peter Weber, M.D. ("Weber") and his new employer Decibel Therapeutics, Inc. ("Decibel"). Decibel and Frequency are competitors in the hearing loss field. Frequency alleged Weber breached noncompetition and nondisclosure agreements and misappropriated trade secrets. It also alleged tortious interference and Chapter 93A claims against Decibel.

The court allowed Frequency's request for a preliminary injunction. Weber's position at Frequency gave him access to a wide variety of confidential information that could benefit Decibel. The court also stated that no damages would adequately compensate Frequency for the injury that it would suffer if such confidential information were disclosed and referenced the general rule that "a breach of a non-competition agreement aimed at the protection of trade secrets will support a finding of irreparable harm." The court found that the harm to Weber in allowing the motion was minimal because he was able to earn a living as a surgeon and faculty member of Boston University Medical School. ■

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

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