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.

March 2018

Volume 14
Number 4

Summarizing opinions from Oct 1, 2017 through Dec. 31, 2017

FEATURED DECISION:

Butts v. Freedman, 2017 Mass. Super. LEXIS 194

(Oct. 26, 2017) (Sanders, J.).

LLC's Operating Agreement Insufficient to Eliminate Fiduciary Duties Among Members

In 1999, Plaintiff Mark Butts ("Butts" or "Plaintiff") and Defendant Arnold Freedman ("Freedman") formed a limited liability company called Boston Equity Advisors, LLC ("BEA"), which provided advice on matters of corporate finance. In July of 2012, Freedman and another BEA employee, Oded Ben-Joseph ("Ben-Joseph"), left BEA and joined a BEA competitor, Outcome Capital, LLC. Plaintiff subsequently brought suit against Freedman and Ben-Joseph, alleging breach of contract and breach of fiduciary duties. Defendants moved for summary judgment, which the Court denied due to the existence of disputed facts.

The Court rejected the Defendants' argument that they did not owe a fiduciary duty to BEA or Plaintiff because BEA's Operating Agreement expressly eliminated the existence of any fiduciary duties. They relied on a provision in the Operating Agreement stating that BEA "is not intended to be a general partnership, limited partnership or joint venture, and no Member shall be considered to be a partner or joint venture of any other Member for any purposes other than foreign, domestic, federal and provincial local income tax purposes, and this Agreement shall not be construed to suggest otherwise."

Although the Court agreed that a contract may limit or eliminate fiduciary duties, it explained that a contract must do so "clearly and expressly." In this case, the Court held that the language in BEA's Operating Agreement was insufficient to eliminate Defendants' fiduciary duties because it was not "a clear and unequivocal elimination of one member's fiduciary responsibility to another." ■

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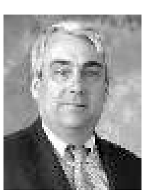
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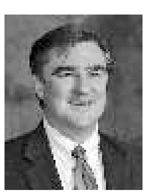
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Beninati v. Borghi, 2017 Mass. Super. LEXIS 206

(Oct. 5, 2017) (Sanders, J.).

Attorneys' Fees Incurred During Pre-Litigation Settlement Discussions Excluded from Chapter 93A Fee Award

In a prior decision in this case, the court determined that defendant Harold Dixon ("Dixon") violated Chapter 93A. The court also determined that defendant Steven Borghi ("Borghi"), a shareholder of plaintiff WOW New England ("WOW"), should not be able to benefit from the Chapter 93A damages award and therefore reduced the damages to WOW accordingly. Dixon requested that the court similarly reduce the attorneys' fees awarded to WOW under Chapter 93A. Dixon also requested that the court exclude from the attorneys' fees award approximately $170,000 incurred before the litigation began.

The court declined to reduce the award of attorneys' fees because "the amount of attorneys fees that are assessed in connection with a Chapter 93A finding does not turn on the defendant's culpability. Rather, the focus of the inquiry is on the reasonableness of the fee request." Therefore, the court found that reducing the fee award would have the effect of penalizing WOW and that any benefit realized by Borghi would not be the same as the "windfall" he would have received had the damages award not been reduced.

The court did, however, exclude the $170,000 in pre-litigation fees, which related to extensive settlement discussions between the parties. The court stated that it was "aware of no authority that permits the award of fees incurred before the litigation began and that do not bear directly on its preparation." ■

Malebranche v. Colonial Auto. Grp., Inc., 2017 Mass. Super. LEXIS 176

(Oct. 19, 2017) (Sanders, J.).

Wage Act Claims Allowed to Proceed Against Subsidiary That Allegedly Assisted Parent Company in Managing and Controlling Business

Plaintiffs brought a putative class action against a family of automotive dealerships and their parent company, Colonial Automotive Group, Inc. ("CAG"), alleging that Defendants failed to pay car sales employees compensation due under the Massachusetts Wage Act. Plaintiffs worked at different dealerships under the CAG umbrella and sold cars on behalf of CAG and its dealerships. Defendants CAG and one of the automotive dealerships, Gordon Chevrolet, Inc. ("Gordon"), moved to dismiss on the basis that the complaint failed to allege facts showing that either of them employed Plaintiffs within the meaning of the Wage Act.

The court denied the motion to dismiss. The court began its analysis by noting that employment status under the Wage Act is ordinarily a question of fact that can rarely be decided on a motion to dismiss. The court then referred to two tests for determining whether a defendant employed a plaintiff for purposes of the Wage Act: (1) a statutory test focusing on whether the plaintiff provided services to the defendant; and (2) a common-law test, under which a defendant may be considered a joint employer of a plaintiff where it "retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."

The court held that the complaint satisfied these two tests. With respect to CAG, the complaint alleged that CAG received the sales services of Plaintiffs and that it controlled and managed the business operations and employment matters for all of the dealerships. With respect to Gordon, although a "closer call," the court relied on the fact that the complaint referenced documents identifying Plaintiffs' employment with Gordon and alleged that Gordon "assists CAG as its agent in its management and control of the business and employment matters for the dealerships." ■

Lubin & Meyer, P.C. v. Manning, 2017 Mass. Super. LEXIS 223

(Dec. 20, 2017) (Sanders, J.).

Abuse of Process Counterclaim Against Law Firm Allowed to Proceed

Plaintiff law firm, Lubin & Meyer, P.C. ("Lubin & Meyer"), brought suit against a former associate, defendant John Manning ("Manning"), alleging that he breached his fiduciary duties to the firm and made false representations. At the time of Manning's termination, he entered into a referral fee agreement with Lubin & Meyer confirming that Manning was entitled to payment on two cases he claimed to have generated while at the firm. Lubin & Meyer alleged that it subsequently discovered that Manning had not, in fact, caused one of those clients to retain Lubin & Meyer. Lubin & Meyer also alleged that Manning had misled certain clients about the status of their cases. Lubin & Meyer took the position that this conduct caused Manning to forfeit his rights under the referral fee agreement.

Manning counterclaimed for, among other claims, defamation, invasion of privacy, intentional infliction of emotional distress, abuse of process, and violation of Chapter 93A. Lubin & Meyer moved to dismiss these claims, which the court allowed except with respect to the abuse of process claim.

The court explained that the defamation claim must be dismissed because it was based on statements contained in Lubin & Meyer's complaint, which statements are absolutely privileged and cannot serve as the basis for a defamation claim. The court also held that the Chapter 93A claim must be dismissed because it arose from the employment relationship.

However, the court allowed the abuse of process claim to proceed. Manning alleged that Lubin & Meyer filed their action in order to embarrass and humiliate him and to induce him into giving up his rights under the referral fee agreement. In support, Manning argued that the complaint contained statements about Manning's behavior that went beyond what was necessary to state a claim and that Lubin & Meyer chose to serve the complaint on Manning at his current employer, despite knowing his residential address. The court found these allegations sufficient to state a claim for abuse of process. ■

In re OvaScience, Inc. Stockholder Litig., 2017 Mass. Super. LEXIS 231

(Nov. 21, 2017) (Sanders, J.).

Plaintiffs Who Purchased Shares from Online Brokers Lacked Standing Under Securities Act

Plaintiffs were investors who purchased stock in the defendant, OvaScience, Inc. ("OvaScience"). Plaintiffs brought a putative class action alleging violations of the Securities Act of 1933 based on alleged false statements and material omissions contained in a prospectus. In addition to OvaScience, the plaintiffs also named certain of OvaScience's directors and officers as defendants, as well as three investment banks who served as the underwriters. The defendants moved for summary judgment against certain individual plaintiffs, which the court allowed.

The court found that the plaintiffs had no reasonable expectation of proving that they had standing to sue under the Securities Act. The court explained that, to have standing to bring a claim under Section 11 of the Securities Act, plaintiffs must have purchased shares in the offering in question or be able to trace their shares to that offering. The plaintiffs had not made such a showing in this case. With respect to a claim under Section 12, plaintiffs must have purchased stock directly from a "seller." Here, the plaintiffs purchased their shares from two online brokers and not directly from any of the defendants or as a result of defendants' solicitations; therefore, there was no standing under Section 12, either. ■

Accutrax, LLC v. Finnegan Henderson Farabow Garrett & Dunner, LLP, 2017 Mass. Super. LEXIS 240 *(Dec. 18, 2017) (Leibensperger, J.).*

LLC Not Named as Client in Engagement Letter May Sue Law Firm for Malpractice

Three joint venturers approached a law firm, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan" or "Defendant"), for assistance with forming a company, through which the partners hoped to patent and market a razor utility knife. The partners told Finnegan that they planned to form a limited liability company called "Contractor Trusted, LLC." Accordingly, Finnegan's engagement letter stated that its client was Contractor Trusted, LLC and not any individual officer, director, shareholder, or employee of that entity. The partners, however, never formed an entity named Contractor Trusted, LLC; instead, they formed an entity called Accutrax, LLC ("Accutrax"). According to Accutrax, Finnegan then performed legal services and prosecuted a patent application on behalf of one of the partners, Kildevaeld, individually.

At some point after Accutrax was formed, Finnegan took the position that it represented Kildevaeld and not Accutrax. Accutrax brought a legal malpractice action against Finnegan, alleging that Finnegan breached its fiduciary duty to Accutrax by assisting Kildevaeld individually. Finnegan moved to dismiss on the ground that Accutrax was not the firm's client.

The court denied Finnegan's motion to dismiss, holding that Accutrax had pled sufficient facts to support the inference that it became a client of Finnegan's. The court began its analysis by stating that whether a later-formed corporation may sue or be sued under a contract executed before the corporation was formed "depends upon the reasonable expectations and intent of the parties." In this case, the court explained that the engagement letter demonstrated that Finnegan expected an LLC to be formed that would be its client, and the LLC that was formed was "perfectly in line with Finnegan's expectations. The mere fact that the anticipated name ... was changed to Accutrax, LLC ... is immaterial to the parties' expectations and intent at the time of contract. There was no change in the parties' obligations and no increase in burden or standard of care to Finnegan." ■

ABCD Holdings, LLC v. Hannon, 2017 Mass. Super. LEXIS 195 *(Oct. 20, 2017) (Sanders, J.).*

Plaintiff Permitted to Attach Real Property Held in Name of Defendant's Girlfriend

Plaintiff sought to collect on a personal guaranty executed by Defendant Patrick Hannon ("Hannon") and moved to attach real property held in the name of Hannon's girlfriend. Plaintiff also asserted a claim against Hannon's girlfriend under the Uniform Fraudulent Transfer Act ("UFTA"), G.L. c. 109A, § 2. Plaintiff had moved for a real estate attachment on two prior occasions, but both requests had been denied.

Plaintiff's third request, however, was successful, and the court allowed the motion for attachment. The court explained that Plaintiff's third request was supported by additional information showing that Hannon made a substantial payment toward the purchase price of the property and that funds used to renovate the property following the purchase were drawn from an entity wholly owned by Hannon. The court found that there was a reasonable likelihood that Plaintiff would prevail on its UFTA claim because the evidence before the court supported a finding that Hannon transferred money to his girlfriend and that the purpose of that transfer was to place the money "out of reach of creditors, including the plaintiff." ■

Ginsberg v. Ginsberg, 2017 Mass. Super. LEXIS 239

(Dec. 14, 2017) (Leibensperger, J.).

Defendant Not Entitled to Dismissal Based on No Contest Clause in Trust

Plaintiff Faye S. Ginsberg ("Faye") brought suit against her brother, Bruce C. Ginsberg ("Bruce"), alleging that Bruce manipulated their mother's donative intent prior to her death through undue influence and fraud. Bruce, and other defendants affiliated with him, moved to dismiss for lack of standing, arguing that Faye's suit violated a "no contest" provision in the relevant trust. The court denied Bruce's motion.

The court first found that, although the "no contest" clause was contained in a trust and not a will, it was still enforceable. However, the court found that the validity of the clause could not be decided on a motion to dismiss because "[i]f Faye proves the trust instrument was procured by fraud, the entire instrument falls, including the no contest provision."

The court also rejected Bruce's argument that Faye's claims were untimely. Faye argued that, where an alleged wrongdoer is a fiduciary, as was Bruce as trustee to her, the applicable limitations period is tolled until she had actual knowledge of the facts. Faye alleged that, at the time of her mother's death, she was unaware of the changes to her mother's estate plan and her mother's gifts to Bruce during her lifetime and did not learn of these facts until at least eight months later. The court held that dismissal was inappropriate because "the question of when a plaintiff has sufficient information to conclude that she had actual knowledge of her cause of action is a fact-bound one." ■

Boston Sci. Corp. v. Takahashi, 2017 Mass. Super. LEXIS 227

(Dec. 5, 2017) (Sanders, J.).

Forum Non Conveniens Defense Denied Where Defendants Agreed to Litigate in Massachusetts

Plaintiff Boston Scientific Corporation ("Boston Scientific") brought suit against three of its former employees and their current employer, the Nuvectra Corporation ("Nuvectra"). Boston Scientific alleged that the defendants misappropriated confidential information and violated a nonsolicitation clause in the individual defendants' employment agreement. Defendants moved to dismiss on the grounds of *forum non conveniens,* arguing that, at all relevant times, the former employees worked and resided in California.

The court denied the motion to dismiss, noting that there is a strong presumption in favor of a plaintiff's choice of forum. The court also pointed out that the employment agreements in question designated Massachusetts as an appropriate forum and required Massachusetts law to be applied to the dispute. There was no evidence that the employment contracts were contracts of adhesion. The court stated that, "[i]n this age of electronic discovery and videotaped depositions, travel to collect information before trial is not as necessary so that the burden of litigating in Massachusetts will not be particularly onerous."

The court was also not persuaded by defendants' argument that applying Massachusetts law would be contrary to a fundamental policy of California, which prohibits the enforcement of noncompetition agreements. The court explained that the case was really about misappropriation of confidential information and alleged poaching of employees, not enforcement of a non-competition agreement, and stated that there was no direct attempt to prevent the individual defendants from working for Nuvectra. ■

Schiefer v. Bain Capital, LP, 2017 Mass. Super. LEXIS 210

(Nov. 8, 2017) (Sanders, J.).

Pre-Judgment Interest Calculated as of Each Date Defendant Failed to Pay Overtime Wages

One of the plaintiffs in a class action alleging a failure to pay overtime wages accepted the defendant's Rule 68 offer of judgment, but the parties disagreed about how to calculate pre-judgment interest. The plaintiff argued that because a breach of contract occurred at the end of each pay period when the defendant failed to compensate her for overtime, pre-judgment interested should be calculated from each of those dates. The defendant argued that because the case involved multiple breaches of contract, the plaintiff was precluded from obtaining prejudgment interest that predated the commencement of the action.

The court agreed with the plaintiff and awarded pre-judgment interest according to her calculations. The court explained that the defendant breached its obligation to pay overtime compensation each time the plaintiff received a paycheck and that "the award of interest is to compensate her for her loss of that money at that point in time when she experienced the loss." ■

Christensen v. Cox, 2017 Mass. Super. LEXIS 220

(Nov. 20, 2017) (Leibensperger, J.).

Plaintiffs' Failure to Read Document Before Signing Did Not Preclude Fiduciary Duty Claim Against Individual Who Allegedly Misrepresented Content of Document

Plaintiffs Dr. Clayton M. Christensen, Matthew Q. Christensen, Disruptive Innovation GP, LLC ("Disruptive Innovation"), and Rose Park Advisors, LLC ("Rose Park") (collectively, "Plaintiffs") brought suit against Defendant Shawn E. Cox ("Cox"), one of Rose Park's former employees. Cox is a certified public accountant whom the Christensens trusted to carry out the daily operations of Rose Park and Disruptive Innovation. Plaintiffs alleged that Cox instructed a junior attorney at the law firm representing Disruptive Innovation to amend Disruptive Innovation's LLC Agreement to add himself as a Member, despite not being authorized to do so. Plaintiffs alleged that Cox then obtained the Christensens' signature on the revised Operating Agreement by representing that the new document simply removed another individual as a member. The Christensens did not read the document before signing it. Sometime thereafter, Cox asserted he was a Member of Disruptive Inovation. The Plaintiffs brought claims for declaratory judgment, unilateral mistake, breach of fiduciary duty, breach of contract, violation of G.L. c. 272, § 99(Q), and violation of G.L. c. 214, § 1B. Cox moved to dismiss all claims.

The court declined to dismiss the claims for declaratory judgment and breach of fiduciary duty, rejecting Cox's argument that the fiduciary duty claim should be dismissed because the Christensens had a duty to read the document before signing. The court explained that, as a fiduciary, Cox was obligated to disclose all material facts to the Christensens regardless of whether they could have discovered the facts by reading the documents.

The claim for unilateral mistake, however, was dismissed because, under Delaware law, rescission is permitted where the mistake occurred regardless of the exercise of ordinary care, and the Christensens did not exercise ordinary care when they failed to read or review the Operating Agreement before signing. The court also dismissed Plaintiffs' breach of contract claim, which was based on an employee handbook, because the handbook contained language expressly stating that it did not create a binding contract.

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Finally, the court dismissed the statutory wiretapping claim without prejudice to amending the complaint. As written, the complaint failed to allege that Cox made the alleged recording while in Massachusetts. The court also dismissed the invasion of privacy claim based on the alleged recording, explaining that § 99 provides an exclusive remedy for unlawful recording of telephone calls. The court stated that "legally recording a telephone conversation is not an invasion of privacy." ■

Turner v. Cheffers, 2017 Mass. Super. LEXIS 228

(Dec. 18, 2017) (Sanders, J.).

Claims for Diversion of Corporate Assets and Opportunities Required to Be Brought Derivatively Under Nevada Law

Plaintiff Edward S. Turner ("Turner"), a minority shareholder of a closely-held Nevada corporation, IVES Group, Inc. ("IVES"), brought individual claims against two directors and shareholders of IVES (collectively, "Defendants"). Turner alleged that Defendants diverted certain corporate assets and opportunities to themselves and removed him from both the Board of Directors and his employment in retaliation for his efforts to improve IVES' corporate governance procedures. Defendants moved for summary judgment on the claims based on diversion of corporate opportunities and assets, arguing that these claims should have been brought derivatively under Nevada law.

The court allowed the motion. The court began its analysis by explaining that, under Nevada law, the test for whether a claim is derivative or direct involves two questions: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or remedy? In this case, the court found that the diversion claims were derivative in nature because any harm from such conduct was suffered directly by IVES and only secondarily by shareholders. The court was unwilling to allow the claims to proceed directly under an equitable exception, recognized by some jurisdictions, in circumstances where a shareholder wrongdoer may unjustly benefit from an award. The court stated that it was unclear whether Nevada law recognized such an exception. ■

Fratea v. Unitrends, Inc., 2017 Mass. Super. LEXIS 230

(Dec. 13, 2017) (Sanders, J.).

Wage Act Claim Dismissed Based on Release of Claims

Plaintiff Michael Fratea ("Fratea" or "Plaintiff") brought suit against his former employer, defendant Unitrends, for alleged failure to pay overtime compensation. On the last day of Fratea's employment, he had executed a separation agreement containing a release of all claims. The court allowed defendants' motion to dismiss the complaint based on this release.

The court found that the release made specific reference to the Wage Act and that it advised Fratea to consult an attorney because of the nature of the rights he was relinquishing. The release also gave Fratea two weeks to decide whether to accept the release as proposed, and there was no allegation in the complaint that the release was a contract of adhesion or Fratea was coerced into signing it. The court did not find it necessary for the release to specifically refer to overtime compensation, the right to treble damages, or the right to pursue class relief. ■

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Petrucci v. Esdaille, 2017 Mass. Super. LEXIS 209

(Nov. 13, 2017) (Sanders, J.).

Intra-Corporate Exception to Chapter 93A Liability Barred Suit Against New LLC Formed By Defendants Following an Alleged Freeze-Out

Plaintiff Daniel Petrucci ("Petrucci" or "Plaintiff") and Defendants Charles Esdaille ("Esdaille") and Christopher Hayes ("Hayes") each owned 30% of a limited liability company called Market Maker Solutions, LLC ("MMS"), with Defendant Duncan McIntyre ("McIntyre") owning the remainder. Petrucci brought suit alleging that the individual defendants froze him out of MMS by falsely telling him that MMS was worthless and that they then transferred MMS' assets to a new entity, which ultimately became Defendant Altenex, LLC ("Altenex"). Altenex moved to dismiss Petrucci's Chapter 93A claim against it.

The court allowed the motion to dismiss based on the fact that the claim involved an intra-corporate dispute. The court rejected Petrucci's argument that the intra-corporate exception to Chapter 93A liability did not apply because Altenex is a separate and distinct entity. The court explained that the wrongdoing alleged in the complaint was based entirely on the conduct of the individual Defendants at a time when they were members of MMS and that the "formation of Altenex was a direct result of this wrongful conduct ... Altenex consisted only of the individual defendants and was the product of their wrongdoing, not a separate entity that conspired with the defendants." ■