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 :

America's Test Kitchen, Inc. v. Kimball, 2018 Mass. Super. LEXIS 91

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

Abuse of Process Counterclaims Survive Anti-SLAPP Motion to Dismiss

Plaintiff America's Test Kitchen Inc. ("ATK") sued Christopher Kimball ("Kimball"), William Thorndike, Jr. ("Thorndike"), and others, alleging that Kimball left his role at ATK and breached his fiduciary duty to ATK by competing with it and that Thorndike assisted him in breaching that duty. Thorndike brought counterclaims against ATK for abuse of process and violation of M.G.L. c. 93A, alleging that ATK sued Thorndike in order to harass, punish, and financially harm him for helping Kimball start a new business and in an attempt to obtain an unlawful competitive advantage against that new business.

ATK moved to dismiss Thorndike's counterclaims on the basis of the anti-SLAPP statute, G.L. c. 231, § 59H and for failure to state a claim. The court rejected ATK's anti-SLAPP argument, finding that Thorndike's counterclaims were not a "SLAPP" suit because "they were not brought primarily to chill legitimate petitioning activities by ATK but instead were brought to seek damages for injury Thorndike suffered as a result of allegedly unlawful conduct by ATK." The court further stated that it was convinced that Thorndike's "primary purpose in asserting his counterclaims is to seek and obtain compensation for injuries caused by ATK's alleged abuse of process and unfair trade practices."

The court also declined to dismiss the abuse of process counterclaim, holding that, while Thorndike's allegations that ATK brought suit against him in order to harass and punish him did not state a claim for abuse of process, his allegation that ATK brought a baseless lawsuit in order to make it harder for Kimball to compete did state a viable claim for both abuse of process and for a violation of Chapter 93A. ■

In re OvaScience, Inc. Stockholder Litig., 2018 Mass. Super. LEXIS 59

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

Plaintiff Permitted to Dismiss State Claims without Prejudice in Order to Proceed in Federal Court Following Unfavorable State Court Ruling

Plaintiffs filed a state court action against OvaScience, Inc., some of its officers and directors, and others (collectively, "Defendants") asserting claims under the federal Securities Act of 1933. The Superior Court denied Plaintiffs' motion to certify a class and allowed Defendants' motion for partial summary judgment, thereby leaving Plaintiff Westmoreland County Employee Retirement System ("Westmoreland") as the only remaining Plaintiff. Two weeks after this decision, Westmoreland filed a parallel federal action regarding the same subject matter. Westmoreland then moved to voluntarily dismiss its state court claims without prejudice in order to pursue them in the federal action.

Defendants opposed the motion for voluntary dismissal, arguing that: (1) Westmoreland was improperly seeking a "do-over" on a certification issue already decided by the state court; (2) Defendants will have to incur additional expenses to defend themselves against the same claims in the federal action; (3) the deadline for completing merits-based discovery had passed; and (4) Defendants had incurred substantial legal expenses in defending themselves in the state court action.

The court was not persuaded by any of Defendants' arguments and held that they would not be unfairly prejudiced by the dismissal. The court reasoned that the limited certification issues decided in the state court would not arise or have to be relitigated in the federal action due to differences between Massachusetts and federal law. The court noted that Defendants' "real reason" for opposing the motion for voluntary dismissal is that, in moving to federal court, they would lose a tactical advantage gained in the state court, but explained that a defendant's loss of the upper hand is no reason to deny a motion for voluntary dismissal.

The court also rejected the argument that incurring additional expenses was a basis for barring the dismissal and explained that, although the deadline for merits-based discovery may have passed in the state court, such discovery had never commenced due to the time spent on gateway issues. Finally, the court reasoned that the Defendants' work on the state action could be reused in the federal action. ■

Stone ex rel. Twin Coast Metrology, Inc. v. Remillard, 2018 Mass. Super. LEXIS 77

(May 1, 2018) (Salinger, J.).

Corporation Does Not Owe Fiduciary Duty to its Shareholders

Jason Remillard ("Remillard") and Eric Stone ("Stone") each own 50% of Twin Coast Metrology, Inc. ("TCM"), a closely-held corporation. Stone brought suit against Remillard, and Remillard counterclaimed for, among other things, breach of fiduciary duty by both Stone and TCM and access to corporate records. Stone moved to dismiss those counterclaims.

The court dismissed the fiduciary duty claim against TCM on the grounds that a corporation does not owe a fiduciary duty to its shareholders. The court denied the motion with respect to the claims against Stone, noting that the facts alleged in the counterclaims plausibly suggested that Stone attempted to freeze out Remillard.

The court further held that Remillard's request to "review" instead of "inspect and copy" the corporate records was not fatal to that claim, explaining that the statute "does not require the incantation of particular magic words." The court also stated that whether Remillard already had the documents he requested did not provide a basis for denying his records request. ■

Valchuis v. Saul Ewing, LLP, 2018 Mass. Super. LEXIS 61

(Apr. 25, 2018) (Salinger, J.).

Malpractice Claims Against Law Firms That Failed to Discover Title Defect Survive Motion to Dismiss

Plaintiffs had retained Defendant law firms to assist with conveying certain commercial property into a trust. The Plaintiffs' first law firm, Lourie & Cutler, PC, had prepared the deed for the property transfer but in so doing failed to discover that the Plaintiffs were not the record title holders of the property, thereby rendering the deed ineffective. The second law firm, Saul Ewing, LLP, later assisted Plaintiffs in partitioning the property and relied on the defective deed, which had been executed and recorded, as the source of record title as to the property. The Plaintiffs were the successful bidders for the property, at a bid of $1.575 million. When the court in the partition proceeding learned that the underlying deed was void, it nullified that auction and ordered that the property go through a new auction. At the second sale, Plaintiffs had to pay $2.010 million to acquire the property.

Plaintiffs asserted legal malpractice claims against both law firms and individual attorneys and sought damages comprised of legal fees to counsel to address the deed problems and the additional $515,000 that they had to spend to acquire the property at the second auction. The Defendants moved to dismiss and for judgment on the pleadings, arguing that: (1) the statute of limitations had run; (2) Plaintiffs' damages were brought about by a series of superseding causes, including the failure of subsequent counsel and the Partition Commissioner to discover the title defect before the first auction; and (3) they could not be held liable for Plaintiffs' own decision to place a higher bid at the second auction.

The court rejected all of Defendants' arguments and denied the motions. The Court held that the Defendants had not shown that Plaintiffs knew or should have known that there was a title defect and that they had been injured any earlier than August of 2015, thereby making the action filed in September of 2017 timely. As to the issue of superseding causes, the court held that whether the alleged superseding causes were reasonably foreseeable could not be resolved on a motion to dismiss. Finally, as to damages, the court held that the Plaintiffs may be able to recover the extra money they paid at the second auction, "if Plaintiffs can show that it was reasonably foreseeable, at the time of Defendants' negligence, that Plaintiffs may choose to bid on the [p]roperty." The court also noted that the additional attorneys' fees and costs incurred by Plaintiffs as a result of Defendants' negligence would be recoverable even if the higher purchase price were not. ■

Erb v. Javaras, 2018 Mass. Super. LEXIS 84

(June 13, 2018) (Salinger, J.).

Written Release Obtained in the Absence of Full Disclosure by Fiduciary May Not Bar Claims

In October of 2014, Plaintiffs brought claims for breach of fiduciary duty, fraud, negligence, and violation of Chapter 93A against Defendants James Javaras and his insurance agencies ("Defendants"), alleging that they misled Plaintiffs into repeatedly buying unsuitable and unnecessary life insurance policies. Defendants moved for summary judgment on the grounds that all of the claims were time barred and that Plaintiffs released their claims. The court denied the motion.

The court rejected the statute of limitations argument due to disputed issues of fact and held that the breach of fiduciary duty claim was tolled until the Plaintiffs had actual knowledge of the unsuitability of the insurance policies, explaining: "That is because a fiduciary would have a legal duty to disclose that these financial products were unsuitable, and under Massachusetts law the failure to make

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that disclosure would constitute fraudulent concealment." Plaintiffs had presented evidence that they did not have actual knowledge of unsuitability until sometime in 2013, which made their claims timely.

The Court also held that a jury would have to make findings determinative of the issue of the effect of the release on Plaintiffs' claims. The court explained that a release may be set aside where it is obtained "without a full disclosure of the relevant facts by one who is under a duty to reveal them." Therefore, Javaras could not invoke the release "if the jury were to find that [Javaras] owed Plaintiff[s] a fiduciary duty, had recommended that Plaintiffs purchase unsuitable insurance policies, and failed to disclose that fact before the release was executed."

Finally, the court rejected Javaras' argument that he was entitled to summary judgment as to a policy because there was no allegation that the policy had not performed as advertised. The court stated that an insurance broker may be held liable if he or she recommends the purchase of an inappropriate policy, reasoning that "[i]t is no defense to assert that [Plaintiff] . . . got what he paid for." ■

Abrano v. Abrano, 2018 Mass. Super. LEXIS 108

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

Post-Judgment Request that Majority Shareholder Reimburse Corporation for Advanced Legal Fees Must Be Brought Derivatively

Before the court were numerous post-judgment motions following a jury trial of claims brought between members and former members of a closely held corporation, Lymol Medical Corporation ("Lymol"). The jury had found that Lymol's majority shareholder, Kim Abrano ("Kim"), had breached her fiduciary duty to the minority shareholders, Bryan Abrano ("Bryan") and Bridget Rodrigue ("Bridget"), by terminating them without any legitimate business purpose and had violated the Wage Act by retaliating against Bryan and Bridget for asserting a Wage Act claim. Kim had been indemnified by Lymol for her attorneys' fees incurred in connection with the case but agreed to reimburse Lymol if it were determined that she had not acted in good faith.

Bryan and Bridget sought a court order requiring Kim to reimburse Lymol for the attorneys' fees she incurred, arguing that the jury necessarily must have found Kim did not act in good faith. Although the court agreed with this latter argument, it held that it did not have the authority to grant the request, explaining that any harm suffered was suffered by Lymol, yet Bryan and Bridget – individually – were seeking the court order. The court did, however, order Kim to provide an accounting of the legal fees advanced by Lymol, essentially paving the way for Bryan and Bridget to bring a derivative claim for recoupment of fees.

The court also denied Bryan and Bridget's request for additional equitable relief following the jury verdict, such as a court order removing Kim from the Board and as an officer, requiring Lymol to adopt certain by-laws, and requiring Lymol to obtain directors and officers insurance. The court stated that Bryan and Bridget had been "amply compensated" on their direct claims and "cannot use a victory . . . as the vehicle for relief aimed at restructuring the company."

Finally, the court allowed Bridget, Bryan, and another plaintiff to recover fees and costs from Kim under the Wage Act. The court rejected Kim's argument that the fees were incurred in connection with non-Wage Act claims and defenses, stating that "[a] prevailing party's entitlement to fees does not require that those fees be incurred exclusively on the claim that gives rise to the entitlement." The court pointed out that counsel had made an attempt to exclude time spent on wholly unrelated claims and there was substantial overlap between the Wage Act claims and other claims. ■

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Norton v. Donovan, 2018 Mass. Super. LEXIS 69

(Apr. 23, 2018) (Kaplan, J.).

Plaintiff's Counsel's Brief Involvement with LLC at Time of Formation Did Not Support Disqualification in Subsequent Suit Between Managers

Plaintiff Michael Norton ("Norton") brought suit against Defendant Gregg Donovan ("Donovan") to resolve a dispute relating to the operation of MGJ 621 East First Street, LLC ("First St."), a company managed by both parties. Donovan moved to disqualify Norton's attorney, James O'Connell ("O'Connell"), and his firm Posternak Blankstein, & Lund, alleging that O'Connell's representation violated Rules 1.7 and 1.9 of the Massachusetts Rules of Professional Conduct (conflict of interest rules). O'Connell had represented Norton for many years prior to First St.'s formation. There was evidence that O'Connell had also attended a single meeting with Norton and Donovan in 2011, around the time of First St.'s formation, and that First St. paid the fees associated with that meeting.

The court denied Donovan's motion. The court began by noting that O'Connell did not currently represent either Donovan or First St., and Donovan failed to demonstrate the existence of a prior attorney-client relationship between himself and O'Connell. The fact that O'Connell's services to Norton may have had the effect of also being valuable to Donovan was insufficient to establish an attorney-client relationship with Donovan.

In addition, the fact that Donovan may have been consulted concerning an unspecified issue associated with First St. nearly six years prior to the current litigation did not make that consultation substantially related to the litigation. Nor had Donovan suggested that O'Connell had learned confidential information about Donovan during the 2011 meeting.

Finally, the court stated that it is very wary of disqualifying a party's attorney: "courts generally disfavor motions to disqualify and consider disqualification a drastic measure that should not be employed unless absolutely necessary." The court stated that a motion to disqualify should only be granted if the attorney's participation in the case "taints" the legal system. ■

Parker v. EnerNOC, Inc., 2018 Mass. Super. LEXIS 97

(June 4, 2018) (Salinger, J.).

Damages Awarded for Future Commissions Lost Due to Retaliatory Conduct Not Subject to Trebling Under Wage Act

A jury awarded compensatory and punitive damages to Plaintiff Francoise Parker ("Parker") based on its finding that Defendant EnerNOC, Inc. ("EnerNOC") breached its contract with Parker and violated the Wage Act by failing to pay her earned commissions. The jury also found that EnerNOC retaliated against Parker when she complained about those unpaid commissions. EnerNOC moved for judgment notwithstanding the verdict and remittitur of the punitive damages award, and Parker sought an award of reasonable attorneys' fees.

The court denied EnerNOC's motion and disagreed that the punitive damages award of $240,000 was excessive. The court stated that the jury could have found that EnerNOC engaged in repeated and escalating retaliation against Parker. The court also noted that the amount of punitive damages was less than the amount of compensatory damages and did not believe the award was excessive simply because it was 24 times the $10,000 maximum civil penalty.

The court held that Parker was entitled to collect reasonable attorneys' fees pursuant to the Wage Act but reduced the number of attorney

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hours. The Court held that certain work was "redundant and unnecessary," such as where one lawyer was reviewing work done by two other lawyers who could have handled the case on their own. The Court, however, found that hourly rates between $300 and $495 were reasonable. Even though the plaintiff had provided no evidentiary support for those rates, the court based its finding "on its own experience in reviewing many other requests for attorneys fees."

Finally, the court held that, although Parker was entitled to have the amount of owed sales commissions trebled, she was not entitled to trebling of the damages awarded for retaliation because they were based on future earnings and, therefore, were not yet "due and payable." ■

Freid v. In Good Health, Inc., 2018 Mass. Super. LEXIS 72

(Apr. 18, 2018) (Kaplan, J.).

Conditional Promise of Future Equitable Interest in Company Found Enforceable

Defendant Andrea L. Noble ("Andrea") and her son, defendant David B. Noble ("David"), formed a non-profit corporation called In Good Health, Inc. ("IGH") for the purpose of obtaining a license to operate a medical marijuana dispensary. Andrea's brother, plaintiff Gerald Freid ("Freid"), agreed to loan IGH money based on Defendants' promise that, if legislation were enacted in the future which permitted medical marijuana dispensaries to operate as for-profit entities, he would receive a 25% interest in IGH. After such legislation was enacted, IGH converted to a for-profit entity but Andrea informed Freid that he would never own an interest in it. Freid brought suit, alleging numerous claims. Defendants moved to dismiss, which motion the court allowed in part and denied in part.

The court declined to dismiss the breach of contract claims against Andrea and David and rejected their argument that the parties' agreement was too vague and uncertain to be enforceable. The court did, however, dismiss the breach of contract claim against IGH because IGH was not a party to the agreement between Andrea, David, and Freid. The court stated, "IGH could not turn itself into a for-profit entity or promise ownership interests to anyone, only its promoters could do that."

The court also dismissed the fraud and negligent misrepresentation claims with leave to replead because there were no factual allegations which stated that, at the time of the agreement, Andrea and David had an undisclosed, existing intent not to give Freid an ownership interest; rather, subsequent events led to friction between the parties. ■

Palacio v. Job Done, LLC, 2018 Mass. Super. LEXIS 82

(June 14, 2018) (Salinger, J.).

Work Site Employer May Be Liable for Staffing Agency's Violation of G.L. c. 149, § 159C

Plaintiff class members were employed by Defendant Job Done, LLC ("Job Done"), a staffing agency, to do work for Defendant Fulfillment America, Inc. ("FA"). Plaintiffs brought suit against Job Done and FA based on transportation charges assessed by Job Done, which Plaintiffs claimed violated G.L. c. 149, § 159C. FA moved for summary judgment, arguing that it could not be held liable because (1) it had not charged any transportation fees to Plaintiffs and (2) the lead Plaintiff's claims were barred by a release she signed in connection with settlement of a prior class action against FA.

The court denied the motion and construed the language of § 159C

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to mean that, where workers are jointly employed by a staffing agency and a work site employer, the two joint employers will be liable for any unlawful fee charged by either of them to transport workers to or from the work site. The court stated that FA's liability depended on how much control it exercised over where and how the employees did their jobs. The court held that a reasonable jury could infer that Job Done was acting directly or indirectly in FA's interest when it transported employees to and from FA's facility.

The court also rejected FA's argument with respect to the release, noting that the release was not a general release and that the prior action was based on a failure to pay overtime wages and did not encompass claims regarding unlawful transportation fees. ■

Lowinger v. Solid Biosciences, Inc., 2018 Mass. Super. LEXIS 95

(June 22, 2018) (Kaplan, J.).

Litigation Stayed in Favor of Federal Suit where State Court Plaintiff Sought to Certify a Nationwide Class

Plaintiff Robert Lowinger ("Lowinger") alleged that he purchased shares of the defendant Solid Biosciences, Inc. ("SBI") and that the registration statement and prospectus contained material misstatements and omissions. He brought suit on behalf of a putative class of similarly situated purchasers. The day before Lowinger filed his suit, a very similar putative class action was filed in Massachusetts federal court. Defendants moved to stay Lowinger's suit in favor of the federal case.

The court allowed the motion to stay, reasoning that Lowinger brought suit on behalf of all purchasers of SBI shares, which purchasers were located nationwide. Because due process does not allow Massachusetts state courts to certify a nationwide class due to the lack of an opt out provision in Mass. R. Civ. P. 23, and because it was unclear whether there were enough Massachusetts residents to warrant class treatment, the court did not see a "workable alternative to a stay of this litigation." ■

Commonwealth Ins. Partners, LLC v. Estate of Boucher, 2018 Mass. Super. LEXIS 88 *(June 15, 2018) (Salinger, J.).*

Statute of Limitations Not Tolled while Harm Continued or While Plaintiffs Attempted to Settle Dispute

Plaintiffs brought suit against Defendant Mark Boucher ("Boucher"), alleging that they went into business with him to acquire and operate small retail insurance agencies and that Boucher usurped an opportunity to acquire several agencies. Boucher's estate moved to dismiss the claims on the ground that they were not brought within one year of his death.

The court allowed the motion to dismiss and rejected Plaintiffs' assertion that each renewal of an insurance policy sold by an agency acquired by Boucher gave rise to a new claim. The court explained that, "[w]here allegedly unlawful conduct has occurred and not been repeated, the mere fact that resulting injury or harm continues to accrue does not restart the statute of limitations."

The court also rejected Plaintiffs' attempt to invoke the safety valve of G.L. c. 190B, § 3-803(e), which permits an untimely claim where "justice and equity" require it and where the failure to bring the claim was not due to carelessness or lack of diligence. The court stated that Plaintiffs' decision to hold off on bringing suit while they engaged in settlement discussions did not justify their failure to file timely claims. ■

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Curran v. Berkshire Hills Bancorp, 2018 Mass. Super. LEXIS 85

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

Massachusetts Court May Hear Claims Regarding Vermont Trust

Plaintiffs, beneficiaries of a Trust registered in Vermont, brought suit in Massachusetts against the Trustee, Berkshire Bank ("Berkshire"), seeking monetary compensation for alleged mismanagement of the Trust. Berkshire moved to dismiss for lack of subject matter jurisdiction and forum non conveniens based on the fact that the case involved a Vermont trust.

The court rejected the Defendant's subject matter jurisdiction argument, holding that although a Massachusetts court will typically not intervene in the administration of a trust registered in another state, Plaintiffs' claims did not seek to involve the court in the ongoing administration of the Trust. Rather, Plaintiffs sought compensation for damages caused during Berkshire's past administration of the Trust. The court noted that this was not a case where a Vermont court was already exercising jurisdiction over trust assets, such that a Massachusetts court, as a matter of interstate comity, should decline to exercise simultaneous jurisdiction over those same assets. Instead, Plaintiffs were asserting "in personam claims against the Trustee, not quasi in rem claims regarding the Trust assets."

The court also declined to dismiss the case under the doctrine of forum non conveniens, holding that Defendant had not met its burden of proving that the balance of concerns were strongly in favor of forcing Plaintiffs to litigate the case "somewhere other than the venue of their choice." The court did, however, order that any deposition of a witness who lives or works in Berkshire County be taken in that county. ■