O'Connor Carnathan and Mack LLC

SESSION WATCH

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FEATURED DECISION:

Harrison v. Mass. Bay Transp. Auth.,

2020 Mass. Super. LEXIS 80 (June 18, 2020) (Salinger, J.).

Sovereign Immunity Bars Misclassification Claims Against MBTA

Plaintiffs Craig Harrison ("Harrison") and Barbara Ruchie ("Ruchie") (collectively, "Plaintiffs") provided information technology services to the Massachusetts Bay Transportation Authority ("MBTA"). They alleged a violation of the independent contractor statute, G.L. c. 149, § 148B, claiming they were misclassified as independent contractors and deprived of benefits available to MBTA employees. In the alternative, Plaintiffs sought to recover under an unjust enrichment theory, and Harrison also asserted a statutory retaliation claim.

The court allowed the MBTA's motion to dismiss. The court held that the statutory claims were barred by the doctrine of sovereign immunity. The court explained that it was "well established" that the MBTA shares the Commonwealth's sovereign immunity, generally speaking, and nothing in the independent contractor statute nor the MBTA's enabling act clearly and unequivocally waived that immunity for misclassification claims.

The court rejected Plaintiffs' argument that § 148B, as a broad remedial statute, implicitly waived the MBTA's sovereign immunity, stating that "the mere passage of a remedial statute that protects workers or citizens in general is not enough to waive sovereign immunity."

The court was also not persuaded that language in the MBTA's enabling statute stating that it may "sue and be sued" operated as a Legislative waiver of sovereign immunity with respect to any claim brought against the MBTA. Such an interpretation would be counter to case law from the Supreme Judicial Court holding that the MBTA would not be subject to tort liability without a clear waiver of sovereign immunity as to tort claims.

Sovereign immunity did not, however, bar the unjust enrichment claim, as that claim was quasi-contractual in nature and "the Commonwealth long ago waived its sovereign immunity against actions brought to enforce obligations it assumed through contracts." Nevertheless, the court dismissed that equitable claim under Mass. R. Civ. P. 12(b)(6), on the grounds that the parties' rights and obligations were defined by valid contracts. ■

VBenx Corp. v. Finnegan,

2020 Mass. Super. LEXIS 61 (Apr. 9, 2020) (Kaplan, J.).

Delaware Corporation Entitled to Interest on Recouped Funds Advanced to Director in Defense of Claim

Plaintiff VBenx Corporation ("VBenx"), a Delaware corporation, moved for repayment of funds that it advanced to J. Brent Finnegan ("Finnegan"), a former director and officer of VBenx, for the defense of counterclaims asserted against him. After trial, a jury returned a verdict against Finnegan, which was affirmed on appeal. Finnegan passed away, and both his Estate and his widow (the beneficiary of the Estate) opposed VBenx's motion to recoup the advanced funds, arguing, among other things, that: (1) the Estate was entitled to retain the majority of fees advanced because Finnegan was successful in defeating a majority of the damages sought by VBenx; and (2) there is no right to interest on any fees recovered.

With respect to the first argument, Finnegan's widow argued that VBenx was not entitled to recover fees associated with dismissal of a conspiracy count and exclusion of VBenx's damages expert's lost profit testimony. The court disagreed, as the conduct underlying the conspiracy claim occurred after Finnegan ceased being an officer and director of VBenx, and "[c]laims premised on actions undertaken after he was no longer a corporate official are not covered claims." Similarly, the damages expert had based her analysis on conduct occurring after Finnegan was no longer an officer or director. In addition, the court stated that it was unaware of any Delaware case in which the court apportioned legal fees between covered and uncovered claims based on the difference between the amount of damages sought and the amount actually awarded.

With respect to entitlement to interest, the court noted that it could not find any Delaware case addressing the issue. Nevertheless, the court found that VBenx was entitled to interest, stating that the Delaware Chancery Court has explained that "advancement is an extension of credit that should give rise to no net loss on the part of the corporation, if the person to whom funds were advanced is ultimately found not to be entitled to indemnification." ■

Ramey v. Beta Bionics, Inc.,

2020 Mass. Super. LEXIS 108 (June 15, 2020) (Green, J.).

Contract Claim Based on Initially Vague Promise of Future Equity Stake Survived Dismissal

Plaintiff Kirk Ramey ("Ramey") alleged that he was hired as a Senior Research Scientist in Boston University's Biomedical Engineering Department to lead design efforts on an infusion pump known as the "Bionic Pancreas" ("BP"). Ramey alleged that, at the outset of his relationship with BU, Defendant Edward Damiano, an Associate Professor of Biomedical Engineering, informed Ramey that an equity stake in the eventual commercialization of the BP would be a key component of Ramey's compensation and that Ramey would get exclusive distribution rights to the BP outside of the United States. Ramey alleged that Damiano reiterated this promise in subsequent discussions – eventually promising a 5% stake – and also promised that Ramey would receive a share of licensing royalties. Ramey alleged that after Beta Bionics, Inc. ("Beta Bionics") was incorporated, Damiano tried to convince Ramey to accept less equity. Ramey subsequently brought suit alleging that he was wrongfully denied an equity interest in Beta Bionics and distribution rights and royalties. Defendants moved to dismiss.

The court dismissed Ramey's Chapter 93A claim on the basis that the dispute is intra-enterprise in nature. The court stated that Ramey had not alleged any facts to support his allegation

Continued on page 3

Continued from page 2

that the Defendants entered into sham negotiations to form a joint venture with him.

The court declined to dismiss the breach of contract claim. Although Ramey's allegations regarding the initial promise lacked specificity as to the terms of that promise, his allegations regarding the terms agreed to in subsequent communications (such as the 5% stake) were more specific. The court did, however, dismiss the contract claim against Beta Bionics because it did not exist at the time of the alleged promise. Ramey had not alleged that Beta Bionics took any actions sufficient to bind it to a contract.

The court also declined to dismiss the fraud claims against Damiano and BU. Ramey's allegations that he forewent the possibility of other employment or business endeavors in reliance on Defendants' representations were sufficient to show that he suffered harm. Ramey's fiduciary duty claim also survived dismissal, as the court found he had adequately pled an oral joint venture agreement.

The court rejected Defendants' argument that Ramey could not allege unjust enrichment where he had been compensated for his services under his agreements with BU. The court noted that Ramey had alleged that the BU agreements did not define all of Defendants' obligations and he conferred a benefit on Defendants over and above what he was paid from BU. ■

Crashfund, LLC v. FaZe Clan, Inc.,

2020 Mass. Super. LEXIS 81 (June 8, 2020) (Salinger, J.).

Successor Corporation in De Facto Merger May Be Liable for Contractual Claims against Original Corporation

Plaintiffs invested in Wanderset LLC ("Wanderset") and, in exchange, received the right to obtain Wanderset stock if there were a change in control of Wanderset. Plaintiffs allege such a change occurred when Wanderset functionally merged into FaZe Clan, Inc. ("FaZe"), that other Wanderset shareholders were allowed to replace Wanderset stock with FaZe stock, and that Plaintiffs were denied any chance to obtain FaZe stock proportional to their Wanderset investment. Plaintiffs alleged that the FaZe transaction was deliberately structured in a way to avoid Plaintiffs' acquisition of Wanderset stock. Plaintiffs alleged that FaZe was liable for, among other claims, breach of contract, breach of the implied covenant, and an equitable accounting. Plaintiffs also asserted claims against FaZe's president, Gregory Selkoe ("Selkoe"), and chief legal officer, Philip Gordon ("Gordon"), including a claim for tortious interference. The Defendants moved to dismiss.

The court rejected Plaintiffs' argument that the de facto merger gave them a right to obtain FaZe stock, as the unambiguous language of Plaintiffs' contract made it clear that Plaintiffs only had a conditional right to obtain Wanderset stock, not FaZe stock. Nor did the contract give Plaintiffs a right to convert their rights against Wanderset into rights against FaZe, and Plaintiffs did not have any contract with FaZe. However, the court declined to dismiss the contract claim to the extent it was based on a theory that FaZe had successor liability for Wanderset's alleged breach.

The court also found that Plaintiffs had stated a viable claim for breach of the implied covenant against Wanderset (for which FaZe may have successor liability). The court noted that Plaintiffs need not allege that Wanderset acted in bad faith. The implied covenant required that Wanderset's discretion to transfer its business to FaZe be exercised in good faith and not in a manner that unfairly deprived Plaintiffs of their contractual rights.

The court did, however, dismiss the intentional interference claim against Selkoe and Gordon because the allegations did not plausibly suggest that either individual acted with "actual malice." The allegation that Selkoe and Gordon were motivated by a desire to prevent dilution of their own interests in Wanderset did not rise to the level of "actual malice."

Finally, the court rejected Plaintiffs' claim for an equitable accounting against FaZe, as Plaintiffs had not alleged that they were in a fiduciary relationship with that entity. ■

MAP Installed Bldg. Prods. of Seekonk, LLC v. Ivie,

2020 Mass. Super. LEXIS 72 (Apr. 17, 2020) (Green, J.).

At-Will Employee Permitted to Prepare to Compete with Employer and Solicit Co-Employees

Plaintiff MAP Installed Building Products of Seekonk, LLC ("MAP") brought suit against its former employee, Defendant Michael Ivie ("Ivie"), for, among other claims, breach of fiduciary duty and misappropriation of trade secrets. MAP alleged that Ivie, a Production Manager, informed MAP employees that MAP was closing and then solicited them to work for his new business. Ivie filed counterclaims based on his allegations that MAP, among other things, subjected him to a hostile work environment, resulting in a constructive discharge. The parties cross-moved for summary judgment.

The court found that MAP failed to show that Ivie, as a Production Manager, occupied a position of trust and confidence with MAP. The fact that Ivie performed managerial tasks was insufficient. Rather, Ivie, as an employee at will, was permitted to prepare to compete with MAP. The court explained that, "[m]erely getting ready to compete, soliciting co-employees terminable at will to join you, developing business plans, making arrangements, and being less than truthful about those plans with one's employer is not a violation of an at-will employee's duty to his employer."

With respect to the constructive discharge claim, the court found that there was insufficient evidence in the record that Ivie's working conditions were so intolerable that he felt compelled to resign. To the contrary, there was evidence that Ivie had planned to start his own business for some time before his resignation. Ambiguous and isolated remarks did not demonstrate a pattern of religious bias against Ivie. ■

Baranofsky v. Rousselot Peabody, Inc.,

2020 Mass. Super. LEXIS 93 (May 29, 2020) (Salinger, J.).

Defendant's Emission of Noxious Odors that Invaded Plaintiffs' Property Stated a Claim for Private Nuisance and Trespass

Plaintiffs brought suit against Rousselot Peabody, Inc. ("Rousselot"), which runs a gelatin manufacturing facility near Plaintiffs' homes, alleging that the plant frequently exudes noxious odors that make the Plaintiffs sick and interfere with their use and enjoyment of their properties. Plaintiffs asserted claims on behalf of themselves and a proposed class of owners of residential property within one mile of the plant. Rousselot moved to dismiss.

The court first found that Plaintiffs had stated a viable claim for private nuisance, noting that common law nuisances frequently arise from offensive smells. Plaintiffs were not prevented from bringing this claim merely because they alleged that the odors harmed many people. In addition, Rousselot was not immune from a nuisance claim simply because it argued that it operated the plant pursuant to a permit. The court explained that the permit may not protect Rousselot if it did not fully comply with it, if Rousselot operated the plant negligently and unnecessarily disturbed Plaintiffs' right of quiet enjoyment, or if the permit authorized certain activities but did not allow Rousselot to discharge foul odors. Plaintiffs alleged that Rousselot had repeatedly violated its permit and a properly-run plant would not emit a smell.

The court also found that Plaintiffs' nuisance claim was not barred by the fact that none of the Plaintiffs lived directly adjacent to the plant: "[t]here can be a private nuisance that harms a non-abutting property."

The court also rejected Rousselot's argument that Plaintiffs' nuisance claim should fail because Plaintiffs seek only economic damages. The court explained that a plaintiff bringing a nuisance claim does not need to allege physical damage to

Continued on page 5

Continued from page 4

property – interference with the use or enjoyment of property is a sufficient injury. The court also rejected the economic loss argument in the context of Plaintiffs' negligence claim because "the parties had no relationship and thus Plaintiffs had no opportunity to bargain with Rousselot to allocate the risk of possible harm."

Finally, the court found that Plaintiffs had adequately stated a claim for trespass because Plaintiffs alleged that Rousselot caused substances to enter Plaintiffs' properties without permission. The court noted that molecules that produce a foul odor constitute "physical things" for purposes of a trespass claim. The court rejected Rousselot's argument that trespass requires some type of permanent encroachment or physical damage to property. ■

Crotty v. Continuum Energy Techs.,

2020 Mass. Super. LEXIS 95 (May 12, 2020) (Salinger, J.).

Counterclaims Alleging Complaint Constituted Tortious Interference Dismissed Under anti-SLAPP Statute

Continuum Energy Technologies ("CET") sued Thomas J. Crotty ("Crotty") for fraud. That suit was dismissed, with sanctions for bringing a claim that lacked a legal basis. Crotty then brought suit against CET and its principal, John Preston ("Preston"), alleging that, in the prior fraud case, defendants engaged in malicious prosecution, abuse of process, and civil conspiracy. Crotty also alleged that several CET investors, including Michael Porter ("Porter"), were part of the conspiracy. CET and Preston asserted counterclaims, alleging that factual allegations in Crotty's complaint constituted tortious interference with contractual and advantageous business relations because they attacked Preston's professional reputation and business ethics. Crotty moved to dismiss the counterclaims, and Porter moved to dismiss the civil conspiracy claim against him.

The court allowed Crotty's motion to dismiss on two grounds. First, the court found that Crotty was entitled to dismissal under the anti-SLAPP statute. The counterclaims were based solely on Crotty's filing his complaint, which is "quintessential petitioning activity." In addition, CET and Preston had not shown that the complaint lacked any factual support or legal basis because Crotty had identified specific evidence to support his allegations. The court rejected CET and Preston's argument that many of the factual allegations were unnecessary and aimed at attacking Preston's character, stating, "[c]laims are not devoid of merit merely because they could have been stated differently."

CET and Preston were also unable to prove that their counterclaims were not brought primarily to chill petitioning activity because (1) they asserted counterclaims in the very action they claimed constituted tortious interference; (2) they had not shown that there was any reasonable possibility that they would prevail on their counterclaims; and (3) Preston deliberately asserted baseless claims against Crotty in a prior action in order to gain an unfair advantage.

Further, even if the claims were not subject to dismissal under the anti-SLAPP statute, the court found that they failed to state a claim. The counterclaim for interference with advantageous business relations was barred by the litigation privilege and the counterclaim for interference with contractual relations failed because Preston and CET did not allege breach of any contract, only that the lawsuit may scare off CET investors.

Finally, the court denied Porter's motion to dismiss because the allegations that Porter provided additional funds to CET with the understanding that at least part of those funds would be used to pursue baseless litigation were sufficient to state a claim for civil conspiracy. The fact that some allegations were made on information and belief did not require dismissal, nor was there any requirement that the civil conspiracy claim be pled with particularity. ■

CommCan, Inc. v. Baker,

2020 Mass. Super. LEXIS 70 (Apr. 16, 2020) (Salinger, J.).

Coronavirus Closure Order May Be Enforced Against Adult-Use Marijuana Establishments

This case involved a challenge to Governor Baker's determination that, for purposes of the coronavirus-related closure of businesses, liquor stores and medical marijuana treatment centers were deemed "essential" and permitted to remain open but adult-use marijuana establishments were not. Plaintiffs alleged that it was arbitrary to allow sales of medical marijuana and alcohol but not sales of non-medical marijuana and that such a distinction violated constitutional guarantees of equal protection. Plaintiffs sought a preliminary injunction to bar enforcement of Governor Baker's order against them.

The court rejected Governor Baker's argument that the court did not have jurisdiction to hear the case, explaining that executive orders issued by the Governor may be challenged on the grounds that they are unconstitutional or otherwise unlawful. The fact that the orders in question were issued under the Governor's broad emergency powers did not insulate them from judicial review.

Nevertheless, the court denied the motion for preliminary injunction based on its finding that plaintiffs had "little chance" of succeeding on the merits. The court noted that, when faced with a serious threat of disease, "the Commonwealth has broad power to restrain personal liberty and the use of private property in order to protect public health." The court went on to explain that the constitutional claim was governed by the "rational basis" test because the right to pursue one's business is not a fundamental right, and it was reasonable for Governor Baker to be concerned that the relatively few adult-use marijuana establishments in Massachusetts would attract high volumes of customers, including people traveling from out of state. The court further stated that Governor Baker was not legally required to ensure that his emergency orders imposed the smallest possible economic burden on adult-use marijuana establishments: "Equal protection does not demand that a State employ less burdensome alternatives if those are available." ■

Blakeslee Prestress, Inc. v. Liberty Mut. Fire Ins. Co.,

2020 Mass. Super. LEXIS 91 (May 27, 2020) (Green, J.).

Handwritten Edit to Settlement Agreement Enforced against Party Claiming not to Have Seen It

Lawrence O'Leary, an employee of plaintiff Blakeslee Prestress, Inc. ("Blakeslee"), died following injuries sustained in a construction accident. O'Leary's estate brought a wrongful death action against the general contractor, Turner Construction Co. ("Turner"), who, in turn, filed a third-party claim against Blakeslee, its subcontractor. Turner and Blakeslee were both insured by Liberty Mutual Fire Ins. Co. ("Liberty").

Following mediation, the parties in the O'Leary case agreed to settle. The mediator typed up a settlement memorandum and presented it to the parties' counsel for signature. Counsel for Turner made a handwritten edit indicating that the settlement was intended to resolve any and all claims against Liberty. Blakeslee's counsel signed the document but did not recall seeing the handwritten edit. The mediator distributed fully executed copies of the settlement memorandum, with the handwritten edit, to all parties and no party objected.

Blakeslee subsequently sued Liberty, seeking indemnification. Liberty counterclaimed and alleged that Blakeslee had breached the settlement memorandum by refusing to execute a release of all claims against Liberty. The court bifurcated the issues so that the enforceability of the settlement would be resolved first.

Continued on page 7

Continued from page 6

Liberty moved for summary judgment. The court found that the settlement memorandum was complete and specific enough to be enforced and that its terms compelled Blakeslee to execute a release of all claims against Liberty. The fact that the parties contemplated that the memorandum would be memorialized in a more polished document did not preclude enforcement. The court further disagreed with Blakeslee's argument that the handwritten notation was ambiguous.

The court also rejected Blakeslee's argument that the settlement memorandum was subject to reformation because it and Turner were mistaken regarding the application of the settlement to Liberty. Blakeslee had failed to create an issue of fact as to a mutual mistake because it had failed to show that the language of the agreement did not reflect the intent of all parties, as Turner's counsel inserted the edit for the purpose of resolving claims against Liberty. There was also no evidence of a unilateral mistake because there was no evidence that Blakeslee's counsel even saw the edit, much less communicated his understanding of it to the other parties. Nor was there evidence that any party tried to conceal the edit from Blakeslee. ■

Veolia N. Am., Inc. v. Great Am. E&S Ins. Co.,

2020 Mass. Super. LEXIS 103 (May 20, 2020) (Salinger, J.).

Excess Insurer Could Not Assert Claim for Equitable Contribution against Primary Insurer

Plaintiff performed work for a potash mine in Canada and a water treatment facility in Flint, Michigan. Plaintiff subsequently brought suit against Defendant Great American E&S Insurance Company ("Great American"), Plaintiff's excess insurer, alleging that Plaintiff had exhausted its primary insurance coverage provided by Illinois Union Insurance Company and ACE INA Insurance (collectively, "Chubb") and, therefore, Great American was obligated to pay additional defense costs and potential liability. Great American, in turn, denied that Chubb had exhausted its coverage and refused to pay anything to Plaintiff. Great American brought third-party claims against Chubb and sought a declaration to establish Chubb and Great American's respective coverage obligations. Chubb moved to dismiss.

The court allowed Chubb's motion to dismiss, holding that Great American could not assert a third-party claim because third-party claims may only be asserted "in situations of indemnity or possible contribution," and Great American's third-party complaint did not allege facts plausibly suggesting that Chubb is or could be liable to Great American for contribution or indemnification.

Great American did not have a viable claim for contribution because "contribution . . . is only available where the concurrent policies insure . . . the same risks," and, as Plaintiff's excess insurer, Great American covered different risks than Chubb because its coverage was not triggered until Chubb exhausted its policy limits. The court noted that Great American had not cited any legal authority suggesting that an excess insurer may bring a claim for equitable contribution against a primary insurer.

Great American also had no claim for indemnification because the third-party complaint did not allege facts suggesting that there was any circumstance under which Chubb could be liable to Great American. The court noted that "things would be different" if Great American had already paid some of Plaintiff's defense costs, as it may have an indemnification claim if it later proved that Chubb should have paid those costs.

The court held that the lack of a viable contribution or indemnification claim doomed the third-party declaratory judgment claim. In addition, Great American had failed to demonstrate the existence of an actual controversy with Chubb, as the underlying litigation involved a dispute between Great American and Plaintiff. ■

CWB Retail Ltd. P'ship v. lululemon USA, Inc.,

2020 Mass. Super. LEXIS 83 (June 1, 2020) (Salinger, J.).

Sending Default Notice Under Lease to Wrong Address Did Not Preclude Lease Termination Where there was Evidence of Actual Receipt

Plaintiff CWB Retail Limited Partnership ("CWB") brought a summary process action seeking to evict lululemon USA, Inc. ("lululemon") from commercial retail space in Boston. CWB alleged that it provided three notices of default based on lululemon storing goods in a manner restricting access to an emergency exit. CWB sent the notices to lululemon's old address but failed to send them to a new address specified in a lease amendment. The notices were also e-mailed and delivered to the store manager in-hand. Lululemon moved to dismiss, arguing that CWB sent the notices of default to the wrong place, the default notices failed to specify the code provision allegedly violated, and the default was not serious enough to warrant forfeiture of the lease.

The court denied the motion. With respect to lululemon's argument that the notices were sent to the wrong address, the court explained that sending the notices to the particular address specified in the lease was not a condition precedent to termination: "[a]ctual notice would suffice even if the notice was sent to the wrong place." The language of the lease also made clear that notice to lululemon was effective if actually received; therefore, sending a notice to the wrong address was of no import if it was forwarded to the right place. The court further stated, "[i]f a contract specifies that notice must be provided by registered or certified mail, any notice that is actually received will be effective even if it was instead sent or delivered in some other way."

The court also rejected lululemon's argument that the notices of default were inadequate for failure to explicitly identify the law or ordinance violated. The court held that the notice was sufficient as long as it adequately informed lululemon of the nature of the alleged breach, such that it had the information needed to cure the problem.

Finally, the court found that the issue of whether the nature of the breach justified forfeiture could not be resolved on the pleadings because it could not determine from the complaint and the default notices whether the breach was insignificant or accidental. ■

Hershey v. Mount Vernon Partners, LLC,

2020 Mass. Super. LEXIS 97 (June 26, 2020) (Green, J.).

Wiretap Claim Based on Presence of Nest Cameras Dismissed

Plaintiff Brett Hershey ("Hershey") became interested in Maison Vernon, a condominium development. Defendants Mount Vernon Partners, LLC ("Mount Vernon") and Chevron Partners, LLC ("Chevron Partners") developed Maison Vernon. Defendant Chevron Builders, LLC ("Chevron Builders") was the general contractor. Defendant Marcel D. Safar ("Safar") managed all three entities. Hershey brought suit against Mount Vernon, Chevron Partners, Chevron Builders, and Safar, and Defendants counterclaimed. Defendants then moved to dismiss all of the claims against Safar, and Hershey moved to dismiss certain counts of the counterclaim.

Hershey alleged that Safar made representations that induced Hershey to purchase a unit and that, after execution of a purchase and sale agreement, Defendants repeatedly promised to complete construction of the unit but failed to do so. Hershey alleged that Defendants "coerced" him into closing by misleading him about the status of the project. Hershey eventually notified Defendants that he would take over completion of the unit.

Continued on page 9

Continued from page 8

Hershey's professionals discovered numerous defects in the construction of the unit.

Defendants' counterclaims alleged that Hershey requested that Defendants perform significant additional work, that such additional work delayed completion, and that Hershey failed to pay for that additional work. Defendants further alleged that Hershey installed Nest audiovisual cameras that recorded Defendants without their consent.

The court dismissed Defendants' wiretap claim on the grounds that Defendants failed to allege facts plausibly suggesting that the audio recordings were secret. Defendants did not allege that they were unaware of the Nest camera. The court explained that the presence of a recording device commonly known to record audio in plain view is evidence from which to infer actual knowledge of the recording. The court also dismissed Defendants' tortious interference claim because there were no allegations that Hershey knowingly interfered with any business relationship between Defendants and any other unit owner.

The court also dismissed Hershey's promissory estoppel claim against Safar because the promise at issue was covered by a written contract and Safar was not a party to that contract. The court denied Safar's motion to dismiss with respect to misrepresentation, Chapter 93A, and negligence claims, based on Safar's personal conduct and participation in the management or supervision of the construction. ■

Martinez v. Burlington Motor Sports, Inc.,

2020 Mass. Super. LEXIS 99 & 92 (May 18 and June 18, 2020) (Green, J.).

Plaintiff Not Permitted to Enjoin Defendants from Engaging in Settlement Negotiations in Related Case

Plaintiff Stephen Martinez ("Martinez") brought a putative class action against defendant Burlington Motor Sports, Inc. ("Burlington"), an auto dealership, and the individuals that controlled it. Martinez alleged that Defendants violated the Massachusetts Wage Act and Overtime Law by failing to pay separate and additional overtime wages. Following the filing of Martinez's action, another individual, Alfred Flores ("Flores"), filed a separate action against another of Defendants' dealerships and asserted similar claims. Flores' counsel subsequently contacted Martinez and informed him that he had reached a settlement and invited Martinez's counsel to join the settlement. Martinez responded that Martinez was the only one who could engage in settlement discussions on behalf of the class because he had filed his action first.

Martinez brought an emergency motion seeking to enjoin the Defendants from taking any further action on the proposed settlement in Flores' case. Martinez argued that the proposed class settlement in the Flores case was inadequate and Defendants had cherry-picked the least prepared class plaintiff and negotiated a sweetheart deal.

The court denied the motion. The court stated that Martinez had been invited to participate in the settlement and pointed out that no settlement agreement had yet been executed. Therefore, the motion was premature. In addition, Martinez had not demonstrated that he or his class would suffer irreparable harm if his requested relief was not granted, as any settlement agreement in the Flores action would have to be approved by the court and, if it covered any claims in Martinez's case, he would receive notice and have an opportunity to object. Therefore, Martinez would have an adequate remedy at law.

In a separate decision, the court allowed Martinez's motion for summary judgment as to liability on his claims and denied Defendants' motion to dismiss the claims. The court found the case governed by *Sullivan v. Sleepy's, LLC*, 482 Mass. 227 (2019). Defendants had failed to make separate overtime payments to Martinez as required by *Sleepy's*. ■

Dolan v. DiMare,

2020 Mass. Super. LEXIS 88 (June 15, 2020) (Salinger, J.).

Shareholder's Decision Not to Sue All Alleged Wrongdoers Did Not Disqualify him from Serving as Derivative Plaintiff

Plaintiff Charles Dolan ("Dolan") brought direct and derivative claims against his cousin Paul J. DiMare ("DiMare"), alleging that DiMare engaged in misconduct with respect to three closely-held companies. Dolan also asserted claims against David Dryer ("Dryer"), the outside general counsel for those companies. DiMare and Dryer moved to dismiss.

The court first rejected DiMare's argument that Dolan could not assert derivative claims without making demand on the board of directors and because he was not an adequate representative of the other shareholders. Dolan was trustee of a trust that owned shares in the parent corporation, which was incorporated in Delaware, a state that does not have a universal demand requirement. Under Delaware law, a shareholder of a parent corporation may bring suit derivatively to enforce the claims of a wholly-owned subsidiary. The shareholder does not need to prove independent standing to sue derivatively on behalf of the subsidiary. The court found that Dolan had adequately pleaded demand futility because he had alleged the existence of close personal ties between DiMare and at least half of the board, thereby creating a reasonable doubt that those directors could have impartially decided whether to sue DiMare.

With respect to adequacy of representation, the court explained that it was DiMare's burden to show that Dolan was unqualified; Dolan did not need to prove that he was a proper representative of the other shareholders. To disqualify Dolan, DiMare would need to show that a "serious conflict" exists, such that Dolan could not be expected to act in the interests of others because doing so would harm his own interests. The court found that Dolan should not be disqualified simply because he had chosen to sue DiMare and not also Dolan's brother, who DiMare alleged was the true bad actor. The court explained, "[n]othing in Rule 23.1 bars derivative actions that seek to adjudicate claims against some but not all corporate officials who are suspected, by someone, of breaching their fiduciary duty." The court also found that the existence of a "discordant relation" between a derivative plaintiff and a defendant does not support disqualification either.

The court also rejected DiMare's argument that the claims were time-barred, finding that the statute of limitations had been equitably tolled. In the context of a derivative action, the statute of limitations begins to run against the corporation when either disinterested directors or disinterested shareholders knew of the wrongful activity. DiMare failed to produce evidence that disinterested directors or shareholders knew the information at issue.

The court also found that Dolan had stated a freeze-out claim based on DiMare's alleged conduct barring the parent corporation from paying dividends. The court stated that a majority's decision not to pay dividends, when a company has lots of free cash, and when the majority then uses other mechanisms to distribute substantial funds to itself, is a "classic squeeze out situation."

The court did, however, reject Dolan's attempt to bar the use of assets of the subsidiaries to pay the legal fees incurred by the parent. The court stated, "[t]he parent corporation is entitled to use the resources of its direct and indirect wholly-owned subsidiaries to carry out any lawful purpose of the parent."

The court also rejected Dolan's challenge to DiMare's decision to retain counsel for the corporate defendants. DiMare, as the President of the corporations, had the power to retain counsel without board or stockholder approval.

Finally, the court allowed Dyer's motion to dismiss, as the facts alleged did not plausibly suggest that Dryer had actual knowledge of DiMare's alleged breach of fiduciary duty. ■

Mass. Port Auth. v. Turo, Inc.,

2020 Mass. Super. LEXIS 71 (Apr. 14, 2020) (Green, J.).

Motion to Strike Redundant Pleading Denied Due to Absence of Prejudice

Turo, Inc. ("Turo") operates an Internet-based car-sharing platform. RMG Motors LLC ("RMG") makes its cars available to rent on Turo's platform. Some of those cars were handed off at Logan Airport ("Logan"). All rental car companies operating at Logan are required to enter into Rental Car Agreements, pursuant to which they are required to pay certain fees. The Massachusetts Port Authority ("Massport") notified Turo that it was required to execute a Rental Car Agreement. Turo responded by denying that it was operating a rental car business at Logan. Following two cease and desist letters, Massport brought suit against Turo alleging, among other claims, regulatory violations and trespass. Four days later, it sent Turo a Chapter 93A demand letter. Turo asserted fourteen affirmative defenses in response, as well as five counterclaims seeking declaratory and injunctive relief.

Massport moved to strike Turo's counterclaims as redundant of the affirmative defenses or, in the alternative, to dismiss several of the counterclaims on ripeness grounds. Massport argued that those counterclaims were unfit for adjudication because they sought declarations related to fees that Massport claimed not to seek in its complaint and because they raised constitutional questions. The court denied the motion.

The court explained that mere redundancy is insufficient to support a motion to strike and that the movant must demonstrate prejudice. The court found that Turo's counterclaims did not merely restate its affirmative defenses and Massport had not addressed how it would be prejudiced by denial of its motion.

With respect to ripeness, the court found that Massport, through its various demand letters, had consistently contended that Turo owed fees, and Massport's unjust enrichment claim sought disgorgement of profits earned by Turo as a result of its failure to pay the fees. In addition, the fact that some of Turo's counterclaims raised constitutional questions did not mean they were unripe. ■

Washington-Hughes v. PALMco Power MA, LLC,

2020 Mass. Super. LEXIS 104 (June 5, 2020) (Green, J.).

Outside Salesmen Exemption Barred Claim Under G.L. c. 151, § 1A

Plaintiffs were former door-to-door salespersons of electricity for defendant Palmco Power MA, LLC ("PALMco"). Plaintiffs alleged that PALMco and other defendants violated G.L. c. 149, § 148, G.L. c. 151, § 1, and G.L. c. 151, § 1A. PALMco moved to dismiss.

The court allowed the motion as to the § 1A claim but otherwise denied it. The claim under § 1A was barred by the outside salesman exception. The court looked to the Fair Labor Standards Act for guidance in interpreting the term "outside salesman" because that term is not defined in Chapter 151 and there are no reported Massachusetts appellate cases interpreting the exemption. The court found that the plaintiffs were outside salesmen because their primary duty was to make sales and they were customarily and regularly away from PALMco's place of business when they performed that duty. ■

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