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Session Watch

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Summarizing opinions from Oct. 1, 2020 through Dec. 31, 2020

FEATURED DECISION:

TSI South Stations, Inc. v. 695 Atl. Ave. Co., LLC,

2020 Mass. Super. LEXIS 167 (Nov. 6, 2020) (Sanders, J.).

Commercial Landlord Not Required to Negotiate Rent Deferral During COVID-19 Shutdown

Plaintiffs TSI South Stations, Inc. and TSI South Stations, LLC (collectively, "TSI") were tenants under a lease with defendant 695 Atlantic Avenue Company, LLC ("695 Atlantic"). TSI operated a gym at the premises. When the COVID-19 pandemic hit, the governor ordered the closure of fitness facilities like the one TSI operated. TSI failed to pay its rent, and 695 Atlantic sent TSI a notice of default, followed by a notice of termination. Following the notice of termination, TSI contacted 695 Atlantic and proposed a rent deferral based on the financial impact of the pandemic and the government closure. 695 Atlantic proceeded with terminating the lease and declined to negotiate with TSI.

TSI brought suit alleging that 695 Atlantic improperly terminated the lease. TSI sought a declaration that 695 Atlantic had no legitimate grounds for termination and brought claims for breach of the implied covenant of good faith and fair dealing and violation of Chapter 93A. TSI alleged that 695 Atlantic had acted in bad faith by ignoring TSI's attempts to negotiate rent deferrals and allegedly using the COVID-19 crisis to gain negotiating leverage over TSI.

695 Atlantic moved to dismiss, arguing that the lease was properly terminated pursuant to its unambiguous terms.

The court allowed the motion to dismiss because 695 Atlantic was entitled to terminate the lease once TSI failed to pay rent and failed to cure the nonpayment after notice. The court stated that there was nothing in the lease requiring 695 Atlantic to agree to a rent deferral, "nor does its refusal to forego rent because TSI found itself financially strapped breach any covenant of good faith and fair dealing or violate 93A . . . [t]hat it became economically unfeasible for one party as a result of events beyond either party's control does not require the other to relinquish its contractual rights . . . or negotiate some different agreement more favorable to the other party." The court further explained that there can be no Chapter 93A violation where one party has done no more than what a contract permits. The COVID-19 pandemic did not mean that 695 Atlantic was required to relinquish its rights under the lease, particularly where the lease was between corporate entities operating in a commercial context. ■

Thomas F. Welch & Assocs. v. Feldman,

2020 Mass. Super. LEXIS 157 (Oct. 8, 2020) (Davis, J.).

Contracting Party Had No Duty to Disclose Risk of Non-Payment

Plaintiffs Thomas F. Welch & Associates, Inc. and Tourse & Associates P.C. brought suit against Defendants Barry E. Feldman ("Feldman"), Feldco Development Corp. ("Feldco Development"), Feldco Boston, LLC ("Feldco Boston") (collectively, the "Feldman Defendants"), and P-3 Partners, LLC ("P-3"). Plaintiffs sought payment of certain consulting fees alleged to be owed under agreements with P-3. P-3 had been created for the purpose of redeveloping certain vacant land. Plaintiffs alleged that the Feldman Defendants were involved in the development project. None of the Feldman Defendants, however, was a party to Plaintiffs' agreements with P-3. At one point, the agreements were amended to include a personal guarantee by Feldman that would take effect only upon satisfaction of certain contractual conditions.

Plaintiffs asserted a claim against all Defendants for violation of Chapter 93A, based on Plaintiffs' allegation that Defendants failed to disclose that no payments would be made until P-3 received construction funding. Plaintiffs also asserted a reach and apply claim and a claim for unjust enrichment. Defendants moved to dismiss these claims.

The court allowed the motion. With respect to the Chapter 93A claim, the court found that the claim was directly contrary to the express terms of the written agreements with P-3. The court stated that the amendments to those agreements made it clear that Plaintiffs were fully aware of the risk that P-3 might not obtain financing and that such failure would make it difficult for P-3 to honor its commitments to Plaintiffs. The court further found that the amendments spelled out the circumstances that would have to occur for Feldman to be personally liable and stated, "[i]t is not unfair or deceptive for the Feldman Defendants to hold Plaintiffs to the express terms of their own agreements." The court also held that Defendants did not have a duty to disclose the risk that P-3 might be unable to pay, as that risk is "obvious and inherent in essentially all contracts."

The court dismissed the unjust enrichment claim because Plaintiffs' rights were governed by a written contract. In addition, Plaintiffs could not recover from the Feldman Defendants under an unjust enrichment theory, as they intended to look to P-3 for payment in the first instance. ■

Vervaine Corp. v. Strathmore Ins. Co.,

2020 Mass. Super. LEXIS 187 (Dec. 21, 2020) (Sanders, J.).

No Coverage for Business Losses Sustained by Restaurants as a Result of COVID-19 Pandemic Under Policy Provisions Requiring Physical Loss

Plaintiffs own and operate three restaurants in the Boston area. As a result of the COVID-19 pandemic, Plaintiffs were forced to limit use of their restaurants to takeout and delivery and consequently suffered a loss of business income. Plaintiffs filed a claim for coverage of their losses with their insurer, defendant Strathmore Insurance Company, Inc. ("Strathmore"). Strathmore denied coverage, and Plaintiffs then brought suit against Strathmore and their insurance agent, Commercial Insurance Agency, Inc. ("Commercial").

Plaintiffs' coverage claim was based on two policy provisions: (1) a provision providing coverage for loss of business income sustained during a suspension of operations, where the suspension was caused by a direct physical loss of or damage to property; and (2) a provision providing coverage for loss of business income caused by action of a civil authority prohibiting access to the premises, where the covered cause of loss caused damage to property within a mile of the

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premises. Strathmore moved to dismiss, and Commercial moved for judgment on the pleadings. The court allowed both motions, finding that Plaintiffs' business losses were not covered under the policies.

With respect to the first policy provision, the court explained that the word "physical" must be given its plain meaning, and the phrase "direct physical loss" cannot be construed to cover loss in the absence of physical damage to the insured's property. The court noted that other courts around the country had reached the same conclusion in the context of the COVID-19 pandemic. Plaintiffs had not alleged that the restaurant premises had been physically damaged. The court also rejected Plaintiffs' argument that the virus constitutes an imminent threat to their premises that could amount to physical loss, stating "a risk that a dangerous condition might result cannot itself constitute a direct physical loss."

The court also found that the Civil Authority provision did not apply because Plaintiffs and their customers were not prohibited from accessing their restaurants – rather, the scope of use was limited. In addition, Plaintiffs had failed to allege damage to any property within a mile of the restaurants. ■

White Winston Select Asset Funds, LLC v. Larkburger, Inc.,

2020 Mass. Super. LEXIS 166 (Nov. 16, 2020) (Sanders, J.).

Court Considers "Race to the Courthouse" in Forum Non Conveniens Analysis

Plaintiff White Winston Select Asset Funds, LLC ("White Winston"), a Delaware company based in Boston, served as a lender to entities operating restaurants in Colorado, Kansas and Missouri (the "Lark Defendants"). Defendants Sysco USA I, Inc. and Sysco, Kansas City (collectively "Sysco") entered into an agreement to supply the Lark Defendants with food and restaurant supplies. The contracts between Sysco and the Lark Defendants contained Colorado choice of law and forum selection clauses.

The Lark Defendants defaulted on their loan agreement with White Winston and fell behind in payments to Sysco. When Sysco requested that future payments be in cash, the Lark Defendants urged Sysco to contact White Winston. White Winston proposed to advance funds so that the Lark Defendants could pay Sysco in cash, and Sysco agreed. Sysco then made deliveries to the Lark Defendants, and White Winston paid Sysco.

A dispute arose regarding the sufficiency of those payments, and White Winston brought suit. Four of the five counts in the complaint were against the Lark Defendants, and the fifth sought a declaratory judgment against Sysco. The day after White Winston brought suit in Massachusetts, Sysco brought suit against White Winston in Colorado. Sysco moved to dismiss the Massachusetts action for lack of personal jurisdiction, or in the alternative, under the doctrine of *forum non conveniens*.

The court allowed Sysco's motion. The court found that Sysco had minimal contacts with Massachusetts. Sysco did not have an office in Massachusetts and did not sell supplies to Massachusetts restaurants. In addition, the court found that Sysco had not engaged in the kind of voluntary and intentional contacts with Massachusetts that justified an exercise of personal jurisdiction, where Sysco was introduced to White Winston by a Lark representative. Furthermore, it was questionable whether the claim against Sysco arose out of a connection to Massachusetts. The claim arose from the contractual relationship between Sysco and the Lark Defendants and thereby related to activity occurring entirely outside of the Commonwealth.

The court also found dismissal appropriate under the doctrine of *forum non conveniens*. Many of the witnesses and documents were likely to be in Colorado, and the Lark Defendants had agreed to litigate any dispute they had with Sysco arising from the deliveries in Colorado. The court also considered the timing of the filing of the lawsuit. The court stated that White Winston had "raced to the courthouse" as a "preemptive strike" once it learned of Sysco's intention to bring suit. The court further stated that a declaratory judgment claim is a form of relief extended to a party to determine rights and obligations before they are repudiated, "not to give one party a strategic advantage . . . [t]his type of gamesmanship should not be rewarded." ■

Kettle Black of MA, LLC v. Commonwealth Pain Mgmt. Connection, LLC,

2020 Mass. Super. LEXIS 173 (Nov. 24, 2020) (Sanders, J.).

Court, Not Arbitrator, Has Authority to Decide Question of Waiver of Right to Arbitrate

Plaintiff Kettle Black of MA, LLC ("Kettle Black") and Defendant Commonwealth Pain Management Connection, LLC ("CPMC") are entities formed as part of a business venture to operate registered medical marijuana dispensaries. Kettle Black's investors sued CPMC's principals. One of those principals, Terrence Fracassa ("Fracassa"), brought a third party claim for conversion against Kettle Black itself. Fracassa brought that claim derivatively on behalf of CPMC. After the court dismissed the claim against Kettle Black, CPMC served Kettle Black with a demand for arbitration. The arbitration claims all stem from the same transfer that gave rise to the conversion claim. Kettle Black then initiated a new lawsuit against CPMC, seeking a declaration with respect to CPMC's right to arbitrate.

CPMC moved to dismiss, alleging that the declaratory action was an improper attempt to interfere with the arbitration. Kettle Black moved for summary judgment, arguing that Fracassa's conduct in the separate litigation waived CPMC's right to arbitration.

The court agreed with Kettle Black. The court first decided that it, not the arbitrator, had the authority to decide the issue of waiver. The court explained, "[t]his makes particular sense where the issue of waiver arises from the party's litigation conduct: the court is in a better position than an arbitrator to determine if a party, as a result of its participation in prior judicial proceedings, has given up its right to proceed in another forum." The court rejected CPMC's argument that the parties had shifted the waiver issue to the arbitrator when they agreed to arbitrate under AAA rules, which rules provide that arbitrators decide "questions of arbitrability." The court held that such language generally incorporating AAA rules without specifically mentioning waiver by litigation conduct was insufficient.

The court went on to conclude that CPMC had waived its arbitration right. The court rejected CPMC's argument that Fracassa's litigation conduct should not be attributed to it, noting that Fracassa is one of two managers of CPMC, is its largest shareholder, and is in a position to fairly and adequately represent its interests. CPMC had never objected to Fracassa asserting a claim on its behalf nor asserted that such claim should be arbitrated. The court explained that arbitration is intended to provide parties with an efficient forum to resolve disputes and is not a tool to allow one party a "second bite of the apple." ■

Bertolino v. Fracassa,

2020 Mass. Super. LEXIS 168 (Oct. 27, 2020) (Sanders, J.).

No Right to Jury Trial on MUSA Claim Seeking Rescission

Plaintiffs sought to rescind their investment in Kettle Black of MA, LLC ("Kettle Black") on the grounds that defendants Terence Fracassa ("Fracassa") and Frederick McDonald violated the Massachusetts Uniform Securities Act ("MUSA"). Fracassa asserted counterclaims and a third-party complaint. The court severed the MUSA claim and took under advisement whether plaintiffs were entitled to a jury on that claim.

The court concluded that the MUSA claim sounded in equity and no jury right attached. The court noted the absence of any Massachusetts appellate case directly addressing the right to trial by jury under MUSA. In addition, the court recognized that MUSA provides a remedy "at law or in equity." However, the court explained that the fact that a statute "provides for alternative relief which would be regarded as a legal remedy triable to a jury should not change

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the analysis as to whether the claim that plaintiff does pursue carries with it the constitutional right to demand a jury." In this case, plaintiffs sought rescission, the remedy of rescission is equitable in nature and, therefore, plaintiffs' claim did not trigger Article 15 of the Massachusetts Declaration of Rights.

Finally, the court rejected defendants' argument that certain plaintiffs lacked standing to bring their claims under MUSA because they had transferred the securities to trusts remaining within plaintiffs' exclusive control. The court explained that, where plaintiffs retained control over the securities, "even though they own the securities in a different capacity, they may still be entitled to recover as a buyer." ■

Crotty v. Continuum Energy Techs., LLC,

2020 Mass. Super. LEXIS 178 & 179 (Oct. 27 and Nov. 23, 2020) (Salinger and Sanders, J.).

Plaintiff Entitled to Judgment on Malicious Prosecution Claim Based on Preclusive Effect of Prior Sanctions Decision

In a prior decision, the court dismissed, under the anti-SLAPP statute, counterclaims asserted against Thomas J. Crotty ("Crotty") by Continuum Energy Technologies, LLC ("CET") and John T. Preston ("Preston"). Crotty then moved to recover $56,793.60 in attorneys' fees incurred in responding to the counterclaims. The court found that Crotty had not justified payment at the hourly rates sought (ranging from $500 to $1,080 per hour) and reduced his award to $35,670. The court explained that, in assessing the reasonableness of an hourly rate, the relevant question is what rates clients actually pay for comparable work in the local market for legal services. In other words, "the standard of reasonableness depends not on what the attorney usually charges but, rather, on what his services were objectively worth."

In a separate decision, the court addressed Crotty's motion for summary judgment as to his claims for malicious prosecution and abuse of process. Crotty's claims were based on a prior action brought against him by CET ("Prior Action"). The court previously dismissed the Prior Action and sanctioned CET pursuant to G.L. c. 231, § 6F. Crotty alleged that the sanctions decision in the Prior Action entitled him to judgment on his current claims pursuant to the doctrine of issue preclusion.

The court agreed that Crotty was entitled to judgment on the malicious prosecution claim. In its prior § 6F decision, the court found that the Prior Action was wholly frivolous and not commenced in good faith and that Preston knew the lawsuit was not meritorious. Such findings supported all of the elements of malicious prosecution. Crotty's entitlement to assert issue preclusion against Preston, who was not a party to the Prior Action, turned on the court's finding that Preston was in privity with CET. The court was not persuaded by Preston's argument that his participation in the Prior Action was done only as a CET employee and not in his personal capacity. The court explained that CET is a close corporation, Preston was CET's sole manager, CET has no board of directors, Preston conferred with attorneys about bringing suit and reviewed the complaint before it was filed, and CET designated Preston as its Rule 30(b)(6) witness.

The court also determined that application of issue preclusion was fair, noting that fairness is the "decisive consideration" for offensive use of that doctrine. The court rejected Defendants' argument that the current action afforded Preston the opportunity to assert an advice of counsel defense that he could not have asserted in the Prior Action, explaining that CET could have asserted such a defense.

Crotty was not entitled to judgment as to the abuse of process claim, however, as the § 6F decision did not establish that the Prior Action was brought in order to obtain some collateral advantage not involved in the proceeding itself. Instead, the court had previously found that the purpose was to force Crotty to defend meritless claims and thereby extract money from him. ■

Chambers v. Tufts Associated HMO, Inc.,

2020 Mass. Super. LEXIS 177 (Oct. 22, 2020) (Sanders, J.).

Plaintiff Permitted to Expand Class Beyond Definition Contained in Complaint

Plaintiff brought a putative class action alleging that Tufts Associated Health Maintenance Organization, Inc. ("Tufts") misled purchasers of health insurance with respect to the deductible they would have to pay. The court allowed Tufts' motion for summary judgment as to certain claims, leaving only the Chapter 93A claim in the case. Plaintiff moved to certify a class consisting of all Massachusetts residents who purchased a similar insurance plan as Plaintiff, which class was broader than the class as originally described in the complaint. The new proposed class no longer excluded those who purchased insurance through their employer. The new proposed class also encompassed individuals who did not actually suffer any out-of-pocket loss, on the theory that such individuals were harmed by purchasing a policy less valuable than what Tufts represented. Tufts objected to this expansion of the class definition on the grounds that such individuals would have no cognizable injury under Chapter 93A.

The court first explained that there is nothing per se impermissible about expanding a class definition contained in a complaint. In deciding whether to approve an expanded definition, courts consider whether a defendant would be prejudiced by the change. The court agreed that the subset of purchasers who did not incur out-of-pocket losses should not be included in the class but otherwise allowed class certification.

The court was not persuaded by Tufts' assertion that it had been prejudiced by the addition of class members who purchased insurance through their employers. The court explained that any prejudice to Tufts from lack of discovery could be remedied by allowing additional discovery. The court also rejected Tufts' argument regarding ERISA preemption, as plaintiffs were not challenging the terms of the plans but, rather, the allegedly deceptive manner in which they were marketed.

Finally, the court rejected Tufts' argument that individual issues predominated because each class member would have to prove that he relied on the allegedly deceptive document. The court explained that a plaintiff need not prove reliance on a misrepresentation to prevail on a Chapter 93A claim, so long as the plaintiff can show that his loss was reasonably foreseeable and causally connected to the deception. ■

Adem v. M11 Motors, LLC,

2020 Mass. Super. LEXIS 190 (Dec. 9, 2020) (Sanders, J.).

Failure to Identify Witness in Response to Interrogatories Did Not Preclude Inclusion of Witness' Affidavit in Summary Judgment Record

Plaintiff Omar Adem ("Adem") sold cars for defendant M11 Motors, LLC ("M11") on a commission basis. Adem's paychecks did not identify any payments made for overtime. Adem brought a putative class action alleging that M11 violated the Massachusetts Overtime Statute. Adem relied on the Massachusetts Supreme Judicial Court's decision in *Sullivan v. Sleepy's, LLC,* 482 Mass. 227 (2019), which held that employers are required to make separate payments for overtime and may not use commissions to satisfy their overtime payment obligations. Adem sought class certification, and both parties moved for summary judgment.

The court denied the motions for summary judgment on the grounds that there were genuine issues of material fact as to whether Adem actually worked overtime. The parties had submitted conflicting affidavits on that issue, and the court could not weigh the credibility of the affiants on summary judgment. The court

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rejected Adem's argument that the court should strike M11's affidavits because M11 had not identified the affiants as persons with knowledge of the case in response to interrogatories. The court stated that, "[l]ate identification of key witnesses . . . does not mean . . . that this Court must ignore evidence in the summary judgment record simply because the plaintiff was not aware of it before filing his summary judgment motion." The court also noted that the plaintiff has an obligation to develop a factual record, and Adem had done very little discovery in the case.

The court also rejected Adem's argument that the court should infer that he worked overtime because M11 failed to keep time records of the hours worked. The court recognized that both federal and state law require employers to keep accurate records of hours worked and explained, "[a]n employer should not be able to benefit from a failure to maintain accurate records and then to use its own deficiencies in record keeping to insist that the plaintiff employee bears the burden on this issue." The court explained, however, that the remedy was not to ignore the defendant's evidence of hours worked; rather, the court should take a burden shifting approach. If a plaintiff presents some evidence that he has in fact performed uncompensated work, the court may draw reasonable inferences in his favor without requiring him to prove the precise amount due. The burden then shifts to the employer to come forward with evidence rebutting that inference. The court found that M11 had presented such evidence, thereby precluding summary judgment.

The court also declined to permit class certification because it had not been established that the class members worked overtime. Therefore, the court could not say that Adem would be able to establish liability on a class-wide basis. Further, even if there were evidence of a company policy to have salespeople work overtime, Adem would not be an adequate class representative given the evidence that he did not work overtime himself. The court stated, "[w]here the named plaintiff's own case on liability is so vulnerable, class certification is not appropriate." ■

Pioneer Mun. High Income Advantage Trust v. RBC Capital Mkts., LLC,

2020 Mass. Super. LEXIS 170 (Oct. 22, 2020) (Sanders, J.).

Court Had Personal Jurisdiction Over Nonresident Defendant who Solicited Business from MA Plaintiff Over E-mail

Plaintiffs, various mutual funds and investment companies based in Massachusetts, alleged that defendant RBC Capital Markets, LLC ("RBC") violated the Massachusetts Uniform Securities Act ("MUSA") in connection with the sale of bonds to plaintiffs. RBC is a Minnesota company doing business in New York. RBC employees did not travel to Massachusetts to market the bonds. However, RBC employees did send multiple e-mails to plaintiffs in Massachusetts containing information about the bonds. RBC moved to dismiss for lack of personal jurisdiction and failure to state a claim. In the alternative, RBC sought dismissal on the ground of forum non conveniens.

The court denied the motion. The court first found that it had jurisdiction over RBC pursuant to Section 3(a) of the Massachusetts long-arm statute and that the exercise of jurisdiction was constitutional. The court explained that, with respect to determining whether a defendant transacted business in Massachusetts, courts have found that "anything but the most incidental commercial contact" is sufficient to satisfy the statute. A nonresident's communications with a Massachusetts plaintiff in order to solicit the plaintiff's business constitutes transacting business. The court noted that the e-mails RBC sent into Massachusetts included links to the offering documents that plaintiffs alleged contained misrepresentations and omissions.

The court rejected RBC's alternative request for dismissal on forum non conveniens grounds. The court explained that its discretion should "rarely be exercised to disturb the plaintiff's choice of forum," and the balance of private and public concerns did not favor an alternative forum. ■

Bradley v. Bradford & Bigelow, Inc.,

2020 Mass. Super. LEXIS 165 (Nov. 13, 2020) (Davis, J.).

Court Enjoins Enforcement of Non-Competition Agreement Entered into Prior to Significant Employee Promotion

Defendant Bradford & Bigelow, Inc. ("Bradford"), a book printer, hired Plaintiff Robert W. Bradley ("Bradley") as an Account Manager in 2014 and required him to enter into a Confidentiality Agreement. That Agreement did not include any non-compete or non-solicitation provisions. In 2015, Bradford promoted Bradley, and Bradley executed a new Agreement that prohibited disclosure of trade secrets and contained non-competition and non-solicitation clauses. In 2017, Bradford again promoted Bradley, this time to a position that came with a substantial pay increase and additional responsibilities. Bradley was not asked to sign a new employment agreement at that time.

Bradford subsequently terminated Bradley, and a dispute arose with respect to the applicability of the 2015 Agreement. Bradley filed suit seeking a judicial declaration that the 2015 Agreement is void and unenforceable. Bradley also moved for a preliminary injunction barring Bradford from enforcing the 2015 Agreement during the pendency of the litigation.

The court allowed the motion for a preliminary injunction, finding that Bradley had demonstrated a high likelihood of success on the merits. The court explained that, where there are material changes in the relationship between an employer and an employee, the terms and conditions of the parties' old arrangement that are not expressly incorporated into the new arrangement become inoperative. The court further found that Bradley had satisfied the irreparable harm and balance of harms elements, noting that an employee's loss of his means of support in his chosen field can constitute irreparable harm. ■

JRM Hauling & Recycling Servs. v. Newark Grp., Inc.,

2020 Mass. Super. LEXIS 183 (Dec. 22, 2020) (Davis, J.).

Plaintiff Precluded from Changing Damages Methodology on Eve of Trial

Defendant The Newark Group, Inc. ("Newark") committed to purchase loose paper collected by plaintiff JRM Hauling & Recycling Services, Inc. ("JRM"). Newark unilaterally terminated the parties' agreement two years early. JRM eventually transferred its excess paper to its sister company, who processed it and sold it at a profit. JRM brought suit against Newark for breach of contract, and Newark counterclaimed seeking indemnification under the parties' agreement. The court held a bench trial in 2017. JRM's calculation of damages included a reduction, in mitigation, for the profits its sister company generated from the sale of the excess paper. After trial, the court found that Newark had breached the agreement but that JRM had only suffered nominal damages. The Appeals Court vacated the determination that JRM had failed to prove damages and remanded.

During the second trial, JRM indicated, for the first time, that it intended to revise its damages claim to exclude the mitigation reduction for the sale of the excess paper. The court temporarily continued the trial to allow the parties to brief the issue of whether JRM could modify its damages claim at that stage of the proceedings.

The court determined that JRM could not change its position at this time, noting that its new position "represents a complete about-face . . . on

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the issue of mitigation." The court stated that JRM had failed to include anything in its pre-trial memorandum that would have indicated that the mitigation issue would be a part of the second trial; to the contrary, JRM identified the mitigation reduction as part of its claimed damages. The court explained that JRM's statements in the pre-trial memorandum are binding on it as stipulations of fact and "strict adherence by the parties to pre-trial orders is essential for efficient and effective judicial case management."

The court further stated that it would be "highly unfair" to Newark to allow JRM to dramatically alter its damages calculation after nearly five years of litigation. The court explained that there was no unfairness to JRM in this result, as it was free to continue litigating the same case it had presented all along and was simply "being held to its word." ■

SLP Enters., LLC v. Solarna, LLC,

2020 Mass. Super. LEXIS 186 (Dec. 3, 2020) (Davis, J.).

Issue of Whether Conduct Occurred Primarily in Massachusetts for Purposes of Chapter 93A Reserved for Trial

The parties entered into a settlement agreement in 2016 with respect to the use of certain marks in connection with the marketing of sunglasses ("Settlement Agreement"). Plaintiffs alleged that Defendants, Solarna, LLC ("Solarna") and others, intentionally violated the terms of that Settlement Agreement and fraudulently induced Plaintiffs to enter into it by falsely representing that they would cease using the marks. Plaintiffs also alleged that this conduct violated Chapter 93A. Both sides moved for summary judgment.

The court allowed Plaintiffs' motion for summary judgment as to their claim that Solarna breached the Settlement Agreement, as the undisputed facts established that Solarna had used the marks at issue in its marketing materials after signing the Settlement Agreement.

The court denied Plaintiffs' motion for summary judgment as to their claims for fraud and violation of Chapter 93A, explaining that issues of intent are rarely appropriate for resolution on summary judgment, and the question of Defendants' intent in entering into the Settlement Agreement was not clear. The court also declined to decide the question of whether Defendants' conduct occurred primarily and substantially in Massachusetts for purposes of Chapter 93A on the summary judgment record. The court noted the existence of evidence on both sides, including that the place of Defendants' conduct was in Florida but the situs of Plaintiffs' loss was in Massachusetts. ■

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Crosby Valve, LLC v. OneBeacon Am. Ins. Co.,

2020 Mass. Super. LEXIS 155 (Oct. 5, 2020) (Sanders, J.).

Court Issues Rare Allowance of Motion for Reconsideration

Crosby Valve, LLC ("Crosby Valve") was a defendant in asbestos-related litigation. Crosby Valve brought a separate suit seeking a declaration that it was entitled to insurance coverage for those claims pursuant to policies naming its direct predecessor as the insured. Following cross-motions for summary judgment, the court determined that Crosby Valve was not an "insured" under the policies. The insurers had argued, and the court agreed, that Crosby Valve had forfeited its right to coverage during a sale of its business. The court's decision relied on a 1999 agreement that assigned Crosby Valve's assets, including the policies, to another entity.

Crosby Valve filed a motion for reconsideration, which the court allowed. The court noted that it is ordinarily reluctant to reconsider prior rulings but that the impact of its earlier denial of coverage was "significant." The court found that its earlier decision had not placed enough emphasis on a provision of the 1999 agreement that imposed a condition on the assignment with respect to assets whose assignment required the consent of a third-party. The policies at issue contained anti-assignment clauses, and the insurers had not consented to the asset transfer.

The court reversed its prior determination that the insurers' retroactive consent was sufficient, as such a determination was inconsistent with the plain language of the 1999 agreement. The court stated that "insurers should not be permitted to decide, based on what best serves their own interests, whether they are going to waive the anti-assignment provision or attempt to enforce it." ■

Ginsberg v. Casey,

2020 Mass. Super. LEXIS 158 (Nov. 10, 2020) (Davis, J.).

Claims Alleging Malpractice and Breach of Fiduciary Duty Survived, But Claim for Interference with Inheritance Barred Due to Failure to Challenge Will in Probate Court

Plaintiff Faye Ginsberg ("Ginsberg") alleged that her personal attorneys committed legal malpractice and breached their fiduciary duties by assisting her estranged brother, Bruce, in diminishing certain family trusts of which Ginsberg is a beneficiary. Ginsberg also alleged that her attorneys assisted Bruce in misleading Ginsberg's late mother into rewriting her will to favor Bruce over Ginsberg. Defendants moved to dismiss.

The court denied the motion as to the legal malpractice and fiduciary duty claims. The court rejected Defendants' argument that the claims must fail because the only legal work they performed for Ginsberg was estate planning services in the 1980s and 1990s and such work was not deficient. The court explained that the claims were not based on the adequacy of such legal work but, rather, were based on allegations that Defendants violated their duty of loyalty to one client, Ginsberg, by assisting another client to her detriment. The court further stated that an attorney's breach of his duty of loyalty to a client can support a breach of fiduciary duty claim. Ginsberg had alleged that she utilized the Defendants to assist her in legal matters for over twenty years.

The court did, however, dismiss a claim that Defendants aided and abetted Bruce's interference with Ginsberg's expected inheritance from her mother. The court held that Ginsberg was obligated to assert any allegations of undue influence during the proceeding to probate her mother's will and that she had failed to do so. ■

Brennan v. Arthur D. Little, Inc.,

2020 Mass. Super. LEXIS 180 (Oct. 8, 2020) (Davis, J.).

Employee Could Not Sue Employer for Tortious Interference with Employee's Relationship with Corporate Client

Plaintiff John W. Brennan ("Brennan"), a former executive of defendant Arthur D. Little, Inc. ("ADL"), brought suit against ADL alleging, among other things, that ADL violated the Massachusetts Wage Act by failing to pay him over $1 million in earned bonus compensation, wrongfully terminated him for complaining about misclassification of employees, defamed him, and interfered with his advantageous business relationships. ADL moved for summary judgment as to those claims.

The court denied summary judgment as to the Wage Act claim, finding credible evidence in the record that ADL regarded Brennan's bonus as "earned." The court also denied summary judgment with respect to the wrongful termination claim. The court explained that summary judgment is often inappropriate in cases involving intent or motive, and Brennan had put forth credible evidence that ADL had commissioned an audit of Brennan's performance on a certain project with the undisclosed goal of trying to "blame" him. The court further denied summary judgment on the defamation claim, as certain statements by ADL regarding Brennan "reasonably could be considered defamatory by persons in the business consulting world." The court noted that summary judgment is inappropriate where a communication is susceptible of both a defamatory and non-defamatory meaning.

The court did, however, grant ADL's motion with respect to the tortious interference claim. One of the identified relationships was with ADL's corporate client, and "business relationships with the employer's customer belong to the employer, not the employee." Although Brennan had a preexisting relationship with the CEO of that corporate client, the CEO testified that his relationship was unaffected by ADL's conduct, thereby precluding Brennan from establishing harm. ■

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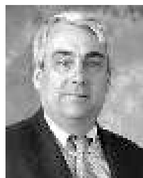
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