

*Summarizing
opinions from
July 1, 2020
through
Sept. 30, 2020*

FEATURED DECISION :

Univ. of Mass. v. Phio Pharms. Corp.,

2020 Mass. Super. LEXIS 133 (Sept. 24, 2020) (Davis, J.).

Plaintiffs University of Massachusetts (“UMass”) and Anastasia Khvorova (“Khvorova”), a research scientist and UMass faculty member, have multiple patent applications pending.

Khvorova’s former employer, defendant Phio Pharmaceuticals Corporation (“Phio”), claims that the technology in the patent applications belongs to it. Plaintiffs brought suit seeking a declaration regarding rights in the patents. Phio asserted various counterclaims, including intentional interference, violation of Chapter 93A, declaratory judgment, and slander of title, and UMass moved to dismiss those counterclaims on the grounds of sovereign immunity.

The court allowed the motion in part. With respect to the tort counterclaims, the court found that the intentional interference and slander of title claims were barred by sovereign immunity because intentional torts are excluded

**Sovereign
Immunity Barred
Chapter 93A
Claim**

from the sovereign immunity waiver in the Massachusetts Tort Claims Act. The court rejected Phio’s argument that sovereign immunity did not apply because the torts arose out of a contractual context.

The court also declined Phio’s invitation to judicially abrogate UMass’ sovereign immunity as to these claims.

With respect to the Chapter 93A counterclaim, the court first determined that UMass qualifies as a “person” under G.L. c. 93A, § 11. The court then concluded that UMass could assert the defense of sovereign immunity in response to this claim. Chapter 93A contains no express waiver of sovereign immunity, nor was there a basis for the court to find a sovereign immunity waiver by implication.

Sovereign immunity did not, however, bar Phio’s declaratory judgment counterclaim because that claim was simply a mirror image of UMass’ own declaratory judgment claim. ■

Jff Cecilia Llc v. Weiner Ventures,

2020 Mass. Super. LEXIS 105 (July 30, 2020) (Salinger, J.).

**LLC Members
May Be Liable for
Torts in Which
They Personally
Participated**

John Fish (“Fish”) and Stephen Weiner (“Weiner”) formed ADG Scotia Holdings LLC (“ADG”) to develop a large real estate project. ADG’s members were an LLC controlled by Fish called JFF Cecilia LLC (“JFF Cecilia”) and an LLC controlled by Weiner called Weiner Ventures LLC (“Weiner Ventures”).

After the project stalled, Fish’s companies, JFF Cecilia and Suffolk Construction (“Suffolk”), sued Weiner, his son, and Weiner Ventures. Plaintiffs alleged that Defendants took steps to interfere with completion of the financing and MassDOT approvals for the project in an attempt to extract a better deal from Fish. Defendants moved to dismiss.

The court allowed the motion in part. The court rejected Defendants’ argument that the claims should be dismissed because the contention that they deliberately undermined the project was an “unbelievable fiction” and “not plausible.” The court explained that an argument that factual allegations are untrue, unbelievable, and implausible is not a basis for dismissal under Mass. R. Civ. P. 12(b)(6): “[a] court cannot dismiss claims because it thinks the plaintiff’s factual allegations are unbelievable.”

The court also rejected the individual Defendants’ contention that G.L. c. 156C, § 22 protected them from being sued personally for misrepresentation, intentional interference, and violation of Chapter 93A. The court stated that Plaintiffs were not trying to shift liability from Weiner Ventures to the individual Defendants, but, rather, had claimed that the individuals personally committed unlawful acts. The court explained that corporate officers – and members and managers of limited liability companies – are personally liable for tortious activity in which they participated, even if they were acting on behalf of the corporation. Plaintiffs could not, however, sue the

individuals for breach of the Operating Agreement because they were not parties to that contract. Similarly, the individual Defendants could not be sued for grossly negligent performance of duties owed under the Operating Agreement.

The court found that the allegation that Weiner Ventures withheld discretionary approvals to apply pressure on JFF Cecilia to agree to substantial financial concessions stated a claim for breach of the implied covenant of good faith and fair dealing. The court also declined to dismiss the fraud claim. The court explained that “JFF Cecilia does not have to allege that it took action in reliance on a false statement . . . [i]t can instead bring a claim for intentional misrepresentation on the theory that Defendants deliberately breached a duty to disclose material information” and the omission “caused JFF Cecilia to refrain from taking some action.”

With respect to the tortious interference claim, Defendants were not entitled to the heightened “actual malice” standard because the allegations plausibly suggested that the Weiners were acting adverse to ADG’s business interests.

The court further found that Suffolk’s Chapter 93A claim was not barred by the intra-enterprise exception. Although Fish controlled both Suffolk and JFF Cecilia, Suffolk was a legally separate entity. The court did, however, dismiss the gross negligence claim against Weiner Ventures because it was barred by the economic loss rule, which “applies to tort claims for negligent performance of contractual duties.”

Finally, the court rejected Defendants’ argument that the declaratory judgment claim should be dismissed for failure to specify the relief sought: “[t]here is no requirement under G.L. c. 231A that a plaintiff specify in their complaint what form of declaratory relief they are seeking.” ■

Fasciani v. DiMaggio,

2020 Mass. Super. LEXIS 135 (Aug. 31, 2020) (Davis, J.).

Plaintiff Diane Fasciani (“Fasciani”) holds multiple outstanding judgments against her former husband, John DiMaggio (“DiMaggio”), issued by New Jersey courts following the DiMaggios’ divorce. Fasciani subsequently brought suit against DiMaggio and defendant Joao Miranda (“Miranda”) seeking to impose a resulting trust on \$97,500 in proceeds from the sale of certain real property. Fasciani alleged that DiMaggio financed Miranda’s purchase of the property and thereby obtained a beneficial interest that could be reached by way of resulting trust and applied to satisfy the outstanding judgments. Fasciani also alleged that any transfer of the property or proceeds was fraudulent. Fasciani and DiMaggio cross-moved for summary judgment. DiMaggio argued that Fasciani’s claims were time-barred and barred by res judicata based on an alleged prior decision of the New Jersey court that DiMaggio did not engage in any fraudulent transfers.

Judicial Estoppel Applied Based on Prior Nondisclosure in Bankruptcy Proceeding

The court allowed Fasciani’s motion and denied DiMaggio’s motion. The court explained that Fasciani’s claims were in the nature of a common-law creditor’s bill, which could be maintained even where a fraudulent transfer claim is unavailable. Therefore, DiMaggio’s argument that Fasciani’s claims were time-barred was “dead on arrival.”

The claims were also not barred by res judicata because the creditor’s bill claims required “no proof of any fraudulent intent” on DiMaggio’s part.

The court found that, when DiMaggio loaned \$75,000 to Miranda to purchase the property, he obtained an equitable interest in that property that could be reached by a creditor’s bill. The court held that DiMaggio was judicially estopped from making the argument that he had forgiven that loan prior to the sale of the property because he had not disclosed any such forgiveness on his bankruptcy schedules. The court explained that application of the doctrine of judicial estoppel was appropriate because it ensured that DiMaggio did not “play fast and loose with the courts.” ■

Giul, LLC v. Shenghuo Med., LLC,

2020 Mass. Super. LEXIS 125 (Aug. 7, 2020) (Salinger, J.).

Plaintiff GIUL, LLC (“GIUL”) alleged that it loaned \$64,000 to defendant Shenghuo Medical, LLC (“Shenghuo”), and Shenghuo agreed to repay that amount, with interest, and grant GIUL an equity interest in Shenghuo. GIUL alleged that Shenghuo granted the equity interest but failed to repay the loan. GIUL brought suit against Shenghuo and four of its members, including defendant Mark S. Pearlstein (“Pearlstein”). GIUL alleged that Shenghuo violated the Massachusetts Uniform Securities Act (“MUSA”) by making a false promise in order to

Individual May Be Liable under MUSA as “Control Person” Despite Lack of Involvement in False Statement

sell a security. GIUL alleged that Pearlstein was personally liable because he exercised control over Shenghuo. Pearlstein moved for judgment on the pleadings. GIUL moved to amend its complaint to add claims under MUSA and Chapter 93A against Guided Therapeutics, Inc. (“GTI”).

The court dismissed the claims against Pearlstein for breach of fiduciary duty and constructive trust.

It denied Pearlstein’s request to dismiss the MUSA and Chapter 93A claims, however. With respect to MUSA, the court first found that the complaint

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adequately alleged a MUSA violation based on the allegation that Shenghuo never intended to repay GIUL. The court explained that GIUL need not allege that the fraud was committed at the precise time it paid the \$64,000. The court then found that Pearlstein could be liable as a “control person,” even though he did not personally make the alleged false promise, because GIUL alleged that, as a managing member of Shenghuo, he exercised the power to control that entity. As to Chapter 93A, the court rejected Pearlstein’s argument regarding the intra-enterprise exception because the allegedly deceptive conduct occurred prior to GIUL becoming a member of Shenghuo. The court explained that “[c]laims regarding efforts to convince someone to invest in an LLC are not part of an ‘intra-enterprise’ dispute.”

The court denied the motion to amend as futile because the allegations did not plausibly suggest that GTI had or exercised any control over Shenghuo. The court rejected a theory of control based on overlapping ownership between GTI and Shenghuo, stating, “the mere fact of common management and shareholders among separate corporate entities is insufficient to establish or allege an agency or other relationship in which one corporation controls the other.” The court further stated that “an exercise of control by GTI shareholders is not an exercise of control by GTI.” Further, although a principal may be liable for its agent’s violation of MUSA, there was no allegation plausibly suggesting that any of the defendants had acted as GTI’s agent. ■

Harrison v. Mass. Bay Transp. Auth.,

2020 Mass. Super. LEXIS 121 (Aug. 20, 2020) (Salinger, J.).

In a prior decision, the court dismissed several claims brought by plaintiffs on the grounds that they were barred by the Commonwealth’s sovereign immunity. Plaintiffs filed a motion for reconsideration or, in the alternative, asked the court to report its prior ruling to the Appeals Court.

The court denied both requests because they were based on a new legal argument that plaintiffs failed to raise in their opposition to the motion to dismiss. The court stated that “Plaintiffs are not entitled to bring the motion to dismiss back to life by proffering this new argument after the Court issued its decision.” The court further noted that, when opposing a motion to dismiss, “[t]here is no option to file a memorandum in opposition, wait to see whether the judge is convinced, and if need be assert entirely new arguments in support of a motion for reconsideration.” The court stated that Superior Court civil sessions would quickly become unmanageable if that practice were permitted. In

Plaintiffs Could Not Raise New Arguments on Motion for Reconsideration

addition, with respect to the request for reconsideration, plaintiffs had not identified any new circumstances that would justify revisiting the court’s prior ruling.

The court also declined to report its decision to the Appeals Court pursuant to Mass. R. Civ. P. 64(a), which authorizes a trial court to

report an interlocutory order to the Appeals Court for immediate review. The court was not convinced by Plaintiffs’ contention that the prior decision would have sweeping impact, explaining that the prior decision bound only the two named plaintiffs and “[n]o other judge need follow it or pay any attention to it.” In addition, even if the prior decision did have a broader impact, that was not a basis for reporting it under Rule 64(a). The court explained that such a report is reserved for novel and difficult issues likely to be material in the ultimate determination of the case. ■

Wright v. Balise Motor Sales Co.,

2020 Mass. Super. LEXIS 115 (July 31, 2020) (Sanders, J.).

Plaintiff salespeople brought a class action against Defendant Balise Motor Sales Company (“Balise”) alleging that Balise’s method of paying overtime violated the Massachusetts Overtime Statute, as construed by the Massachusetts Supreme Judicial Court in *Sullivan v. Sleepy’s, LLC*. In connection with a settlement, Plaintiffs’ counsel sought to recover \$1.466 million in attorneys’ fees – one-third of the total settlement. Plaintiffs’ counsel encouraged the court to follow a “Percentage of the Fund” approach to calculating attorneys’ fees. The court declined to do so and, instead, applied a lodestar approach.

The court explained that Massachusetts courts follow a lodestar approach regardless of whether

Court Rejects Percentage of Fund Approach to Calculating Attorneys’ Fee Award in Class Action Settlement

fees are awarded pursuant to a statute or are taken out of a common fund. A court may, however, enhance the lodestar amount in recognition of the contingent nature of a case. In this case, the court noted that the result obtained was a good one because each plaintiff was likely to receive more than the amount of unpaid wages. In addition, had counsel not taken the case, it was unlikely that plaintiffs would have obtained relief, as the amounts per person were too small to justify retaining counsel individually. On the other hand, once *Sleepy’s* was decided, “victory for plaintiffs was substantially assured.” The court applied a lodestar multiplier of 3 and concluded that \$750,000 was an appropriate award of attorneys’ fees. ■

Clean Harbors Envtl. Servs. v. Sheppard,

2020 Mass. Super. LEXIS 140 (Sept. 14, 2020) (Sanders, J.).

Plaintiff Clean Harbors Environmental Services, Inc. (“Clean Harbors”) brought suit against its former employee, defendant Kevin Sheppard (“Sheppard”), alleging that Sheppard breached his duty of loyalty to the company. Sheppard moved for summary judgment and argued, among other things, that Clean Harbors had asserted “speculative and flawed damages.” The court denied the motion.

The court explained that, “[s]o long as there is some factual support in the summary judgment record showing that the Clean Harbors did suffer some compensable harm because of the defendant’s conduct . . . this Court need not

Court Declines to Rule on Propriety of Certain Type of Damages on Summary Judgment

determine at this point in the case precisely what types of damages are recoverable.” The court distinguished a scenario where there was no evidence that would support damages under any theory. The court also noted that, if Clean Harbors proved that Sheppard breached his fiduciary obligations to the company, “then the burden of proof shifts to Sheppard to show that there was no causal connection between that breach and any loss to the plaintiff.” Furthermore, a trusted employee who uses his position in a company for personal gain can be compelled to pay his employer for any secret profit or benefit the employee received as a result of such business activities. ■

Hassan v. Hassan,

2020 Mass. Super. LEXIS 112 (July 23, 2020) (Sanders, J.).

Plaintiff Tarek Ali Hassan (“Tarek”) alleged that he has an interest in certain trusts and corporations controlled by his uncle, defendant Hicham Ali Hassan (“Hicham”), as a result of a Settlement Agreement entered into in 2000. In 2016, Hicham’s attorney attempted to persuade Tarek to nullify the Settlement Agreement and revoke his interest in the trusts and corporations, but Tarek declined to do so. Tarek brought suit in February of 2020 and asserted contract and tort claims. Hicham counterclaimed, alleging that, while working for Hicham’s business, Tarek had redirected goods intended for that business and sold them for his own benefit. Hicham moved for judgment on the pleadings on statute of limitations grounds. Tarek moved to dismiss the counterclaims, also on statute of limitations grounds. The court denied Hicham’s motion and

Party May Not Avoid Statute of Limitations for Legal Claim By Pleading Alternative Equitable Claim

allowed Tarek’s motion.

The court rejected Hicham’s contention that Tarek’s contract-based claims accrued on the date that the Settlement Agreement was executed. The court explained, “a claim for breach of contract accrues not upon the date that the contract was formed but at that point in time when the breach is alleged to have occurred.” The first indication that Hicham did not intend to honor the Settlement Agreement came in 2019 and, therefore, Tarek’s claims were not time-barred.

As to the counterclaims, they stated that Hicham learned of the alleged misappropriation of goods in 2016, more than three years before the action was filed. Hicham’s assertion of an unjust enrichment claim did not change the result. The court stated that the fact that Hicham was too late to assert his remedy at law did not mean that he could “make an end run around the statute of limitations by placing a different label on [that claim].” ■

Baldwin v. Connor,

2020 Mass. Super. LEXIS 141 (Sept. 16, 2020) (Sanders, J.).

Plaintiffs (the “Baldwins”), minority shareholders in two closely held corporations, brought suit against those companies, the majority shareholders of those companies (the “Connors”), and an attorney, Nicholas Kourtis (“Kourtis”), who advised certain of those individuals. The Baldwins alleged that Kourtis assisted the Connors in forcing the Baldwins out of the companies.

Following dismissal of certain claims against Kourtis, the Baldwins sought leave to file a second amended complaint which sought to revive the previously-dismissed claims and add new claims

Re-serving Motion Soon after Receipt of Opposition Violated Superior Court Rule 9A

against him. After defendants served their opposition to the motion for leave, plaintiffs withdrew the motion and served a new motion for leave. The court found this to be in violation of Superior Court Rule 9A(b)(2) because “to allow one party to redraft and re-serve a motion once it has received an opposition would permit the party to impose unnecessary costs upon the opposing party, who has to oppose the motion twice. It would also give an unfair advantage to the moving party who would in effect have an extra bite at the apple.”

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The court further noted that the evidence in this case “strongly suggests that plaintiffs are trying to draft their way around a decision by this Court that certain claims in the [complaint] were legally deficient.” The court pointed out that plaintiffs’ counsel had not mentioned, during briefing and argument on the motion to dismiss, that he had new facts to support the claims or intended to seek leave to amend. Instead, plaintiffs’ counsel asserted

the discovery of new facts only after receipt of the court’s adverse decision on the motion to dismiss.

The court further found that much of the proposed amendments would be futile. Plaintiffs’ new allegations consisted of conclusory statements concerning Kourtis’ motive and, “when stripped of the hyperbole,” were not substantially different from the allegations in the operative complaint. ■

Grasso v. Green Lady Dispensary, Inc.,

2020 Mass. Super. LEXIS 160 (Aug. 18, 2020) (Davis, J.).

Plaintiff Michael Grasso (“Grasso”) brought suit against his former employer, The Green Lady Dispensary, Inc. (“Green Lady”), and its principals. Grasso asserted various claims stemming from his assertion that Green Lady terminated him after he refused to participate in certain illegal conduct in which he alleged Defendants were engaging. Defendants moved to dismiss, and Grasso responded by amending his complaint to add a claim for abuse of process based on a criminal complaint for theft filed against him by certain of the Defendants. The Defendants then filed a SLAPP motion to dismiss the abuse of process claim.

The court allowed the SLAPP motion. The court began by explaining that the filing of a criminal complaint constitutes petitioning activity. Grasso had failed to meet his burden of showing that the filing of the criminal complaint was devoid of any factual or legal support, particularly

Plaintiff’s Acknowledgment that Petitioning Activity was Rooted in a Genuine Dispute Precluded Defense against SLAPP Motion

where allegations in Grasso’s complaint explicitly acknowledged the existence of a “genuine dispute” regarding the ownership of the personal property that was the subject of the theft complaint. The court stated, “Grasso’s admission that the parties have a ‘genuine dispute as to the ownership’ of these valuable items necessarily means the Criminal Complaint . . . was not ‘devoid of any reasonable factual support.’”

As for Defendants’ motion to dismiss, the court declined to dismiss Grasso’s Wage Act claim and his unjust enrichment claim as to certain defendants. It did dismiss the unjust enrichment claim as to individuals from whom Grasso had no expectation of payment. The court also dismissed Grasso’s intentional infliction of emotional distress claim, finding that the complaint did not identify conduct that was sufficiently extreme and outrageous. Conduct that was merely “legally unacceptable” was insufficient. ■



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