O'Connor Carnathan and Mack LLC

SESSION WATCH

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Summarizing opinions from Jan. 1, 2021 through Mar. 31, 2021

FEATURED DECISION:

Umnv 205-207 Newbury, LLC v. Caffe Nero Ams., Inc.,

2021 Mass. Super. LEXIS 12 (Feb. 8, 2021) (Salinger, J.).

Café Discharged from Obligation to Pay Rent During COVID-19 Shutdown

In June 2017, Plaintiff UMNV 205-207 Newbury, LLC ("UMNV"), as landlord, and Defendant Caffé Nero Americas Inc. ("Caffé Nero"), as tenant, entered into a fifteen-year lease of space on Newbury Street. The lease provided that Caffé Nero could only use the leased premises for the operation of a café. In March 2020, Governor Baker, in response to the COVID-19 pandemic, barred restaurants, including Caffé Nero, from permitting on-premises consumption of food or beverages. Caffé Nero wrote to UMNV asking it to waive all rent while the business was required to be closed. UMNV refused to do so and instead informed Caffé Nero that it was in default for nonpayment of rent. UMNV then brought a summary process eviction action and an action to recover unpaid rent and other costs.

The court denied UMNV's motion for summary judgment in the action to recover rent and instead granted partial summary judgment in Caffé Nero's favor. The court held that the legal doctrine of frustration of purpose discharged Caffé Nero's obligation to pay rent between March 24 and June 22, 2020 because the entire purpose of the lease was frustrated while Governor Baker's orders barred indoor food and drink service. The court stated that it could not be disputed that Caffé Nero's continued ability to operate a café was a basic assumption underlying the lease, and there was no evidence that the parties contemplated the risk of a shutdown due to a global pandemic. Therefore, UMNV's notice asserting breach of the lease was invalid.

The court also disagreed with UMNV's contention that a force majeure clause in the lease barred Caffé Nero's argument. The court explained that the force majeure clause addressed the risk that performance may become impossible but did not address the distinct risk that the main purpose of the lease may be frustrated without rendering performance technically impossible. Similarly, the court found that a provision of the lease stating that Caffé Nero's obligations were "separate and independent covenants" did not obligate Caffé Nero to pay rent. The court stated that the independent covenants provision addressed Caffé Nero's obligation to pay rent in the event UMNV breached its obligations, not the doctrine of frustration of purpose. ■

Bertolino v. Fracassa,

2021 Mass. Super. LEXIS 3 & 26 (Jan. 27 & Feb. 26, 2021) (Salinger, J.).

Evidence that Defendant was Substantial Factor in Plaintiffs' Purchase of Securities Insufficient to Establish Liability Under G.L. c. 110A, § 410(a)(2)

Plaintiffs' complaint for violation of the Massachusetts Uniform Securities Act ("MUSA") alleged that plaintiff Leo P. Bertolino ("Bertolino") purchased Class A units in Kettle Black of MA, LLC ("Kettle Black"). Plaintiffs then sought leave to amend their complaint to indicate that Bertolino had assigned his shares to the Leo P. Bertolino Trust ("Trust") and was bringing suit in his capacity as Trustee of that Trust. Defendant Terence Fracassa ("Fracassa") argued that the amendment would be futile because Bertolino lost standing to bring a claim under MUSA when he assigned his shares to the Trust.

The court disagreed with Fracassa. Although a MUSA defendant is only liable to the person who bought the security from him, Bertolino had not sold his shares to anyone else – he simply held them in a different capacity. The court explained, "[t]here is no good reason why this self-imposed restriction in how Bertolino can use the shares . . . should deprive him of standing." The court noted the absence of any precedent holding that a buyer loses standing when he places securities in trust.

In a separate decision, the court allowed in part Fracassa's motion for summary judgment on Plaintiffs' claim that he violated MUSA. The court found that Fracassa was entitled to judgment against nineteen plaintiffs with respect to the § 410(a)(2) claim, as they had never had contact with Fracassa and could not prove that he actively participated in soliciting their purchases. The court explained that active solicitation under MUSA can take the form of personally soliciting an offer to purchase a security or directing that someone else solicit such an offer. However, evidence that Fracassa's participation was a "substantial factor" in Plaintiffs' purchase (including evidence that Fracassa played a central role in crafting the written information provided to potential investors) was not sufficient to show that he offered or sold a security.

The court further found that Fracassa was entitled to judgment on the claim under § 410(b) because plaintiffs could not prove that he was acting under the control of Kettle Black. Evidence that Fracassa materially aided Kettle Black's sale of securities was not sufficient to establish that he was acting as Kettle Black's agent. ■

Commonwealth ex rel. Minarik v. Tresca Bros. Concrete, Sand & Gravel, Inc.,

2021 Mass. Super. LEXIS 5 (Jan. 25, 2021) (Salinger, J.).

Qui Tam Complaint Survived Dismissal under More "Flexible" Pleading Standard

Thomas Minarik and James Cicerone (collectively, "Plaintiffs"), former concrete delivery drivers for defendant Tresca Brothers Concrete, Sand and Gravel, Inc. ("Tresca"), brought a qui tam action under the Massachusetts False Claims Act ("FCA"). Plaintiffs alleged that Tresca delivered subpar concrete to public construction projects, failed to pay delivery drivers the prevailing wage, and made false claims seeking payment from the government without revealing such conduct. Tresca moved to dismiss.

The court denied Tresca's motion. The court first assessed whether the complaint pled fraud with particularity. The court explained that a "more flexible" pleading standard applies to qui tam cases alleging a defendant caused a third party to submit a false claim to the government. In such cases, a fraud claim survives where a plaintiff alleges details of a scheme to submit false claims "paired with reliable indicia that leads to a strong inference that claims were actually submitted by

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third parties." The court found that Plaintiffs' claim that Tresca caused general contractors to submit false claims on its behalf satisfied that standard.

The court went on to find that the FCA requires proof that a false claim was material and that Plaintiffs had adequately alleged that delivering subpar concrete is material because the Commonwealth and its political subdivisions would not have paid for subpar concrete had they known of it. The court rejected Tresca's argument that Plaintiffs were required to identify contract provisions making the age and water content of the concrete an express condition of payment.

Although Plaintiffs' complaint did not allege that Tresca had actual knowledge that the payments for its concrete would be made by a Massachusetts governmental entity, the court permitted Plaintiffs to amend the complaint. The court noted that Plaintiffs "need not allege or prove a specific intent to defraud."

Finally, the court rejected Tresca's argument that the prevailing wage portion of the complaint was barred by the existence of a prior pending lawsuit in which Plaintiffs and other drivers alleged that Tresca failed to comply with the prevailing wage act. The court first noted that the argument had been waived by not being included in Tresca's written memorandum. In any event, the court went on to find that Rule 12(b)(9) did not apply because the issues in the two actions were not identical, as the prior action sought damages on behalf of individual drivers, while the qui tam action sought separate damages on behalf of the Commonwealth and its political subdivisions. ■

Foodies Urban Mkt., LLC v. 1421 Wash. Assocs., LLC,

2021 Mass. Super. LEXIS 25 (Feb. 24, 2021) (Salinger, J.).

Lessee in "Substantial Compliance" with Lease Terms Entitled to Exercise Extension Option

Plaintiff Foodies Urban Mkt., LLC ("Foodies") leased real property from the Castellana Realty Trust ("Castellana"). The lease gave Foodies extension options, which had to be exercised by sending written notice by registered or certified mail. After Foodies exercised an option to extend its lease, Castellana sold the property to 1421 Washington Associates, LLC ("Washington Associates"), which then contended that Foodies' lease extension was not valid. Foodies sought a declaratory judgment that it validly exercised its option and asserted claims for breach of the covenant of quiet enjoyment and violation of Chapter 93A. Washington Associates asserted counterclaims, and both sides moved for summary judgment on the issue of the validity of the extension.

The court allowed Foodies' motion and denied Washington Associates' cross-motion, finding Foodies was not in default and made a valid exercise of its extension option. The court was unpersuaded by Washington Associates' reliance on a handwriting examiner's opinion that the Trustees did not sign the certified mail receipts. The court explained that the lease did not require the Trustees to personally sign for the extension notice and noted that "[i]t is not uncommon for someone other than the addressee to sign for certified mail." The court further explained that, since the record contained evidence that the Trustees actually received the notice, such notice would have been effective even if not delivered by certified mail, despite the lease provision requiring notice to be by that method.

The court also rejected Washington Associates' argument that Foodies materially breached its obligation to insure the property by not timely delivering proof of insurance to Castellana, as the lease required. The court explained that it was undisputed that Foodies did in fact insure the property, even during periods when it failed to document such insurance. Therefore, Foodies was in "substantial compliance" with the lease and had the right to exercise the extension option.

The court also declined to strike documentation Foodies included with its summary judgment briefing but had not produced during discovery. The court stated that Washington Associates had not shown that it asked Foodies to produce that documentation during discovery and had not shown that it suffered any unfair prejudice from first seeing that documentation during the summary judgment process. ■

Archer v. Grubhub, Inc.,

2021 Mass. Super. LEXIS 8 (Jan. 11, 2021) (Davis, J.).

Class Action Waiver Unenforceable Where Arbitration Agreement Not Governed By FAA

Plaintiffs, who worked as delivery drivers for Grubhub, Inc. ("Grubhub"), filed a class action alleging that Grubhub unlawfully retained service and delivery charges and violated the Wage Act by failing to reimburse Plaintiffs for travel expenses. Grubhub filed a motion to compel arbitration based on arbitration agreements signed by Plaintiffs.

The court denied Grubhub's motion. The court agreed with Plaintiffs that Plaintiffs were "workers engaged in foreign or interstate commerce" who were therefore exempt from the enforcement provisions of the Federal Arbitration Act ("FAA"). The court relied on the fact that Plaintiffs periodically transported pre-packaged food items and non-food items with Grubhub's knowledge and consent and many of those items were manufactured outside of Massachusetts. Therefore, the court found that those items were part of the continuous flow of interstate commerce and Plaintiffs' function in transporting those items to their final destination qualified them as transportation workers for purposes of the FAA's exemption.

The court further found that a class action waiver contained in the arbitration agreements was not enforceable under Massachusetts law on public policy grounds. The court explained that, while the public policy prohibition on class action waivers does not apply to agreements covered by the FAA, it remains the law of the Commonwealth where the FAA does not apply. ■

Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.,

2021 Mass. Super. LEXIS 48 (Mar. 31, 2021) (Salinger, J.).

Shareholder Seeking to Vindicate its Contractual Voting Rights Need Not Sue Derivatively

The Eaton Vance Senior Income Trust ("Eaton Vance") sought a declaration upholding the validity of an amendment to its bylaws that permitted a trustee to be removed by a vote of more than half of all outstanding shares ("Majority Rule Amendment"). Saba Capital Master Fund, Ltd. ("Saba"), an Eaton Vance shareholder, challenged that amendment, as well as an amendment adopted by three other Eaton Vance funds (together with Eaton Vance, the "Trusts"), which restricted a shareholder with more than ten percent voting power from voting, unless it obtained agreement from a majority of the other shareholders ("Ten Percent Stake Amendment"). In addition to seeking a declaration that the amendments were invalid, Saba alleged, among other claims, that the amendments violated the Declarations of Trust and breached the Trustees' fiduciary duties. The Trusts moved to dismiss Saba's counterclaims.

The court largely denied the motion to dismiss. With respect to the Majority Rule Amendment, Saba argued that the majority voting requirement made it impossible in practice for a shareholder to mount a realistic challenge to a trustee's election because a significant proportion of shareholders in a fund like Eaton Vance do not participate in voting. The court found that Saba's allegations plausibly suggested that the Majority Rule Amendment violated a provision in the Declaration of Trust giving shareholders the right to remove trustees. The court explained that the right of shareholders to vote for the trustees of a business trust "is one of the most important rights arising from stock ownership." The court also found that Saba stated a viable claim that the Ten Percent Stake Amendment violated the Declarations by effectively depriving certain shareholders of voting rights. The court rejected the Trusts' argument that voting rights attach to shares, not shareholders, explaining that "[s]hares do not vote themselves."

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The court also declined to dismiss Saba's fiduciary duty claims. The court first found that the Trustees owed fiduciary duties to Saba and the other shareholders because "the trustees of a Massachusetts business trust always owe fiduciary duties to the trust beneficiaries." The trustees could not owe duties to the Trusts because the Trusts were not separate legal entities. The court further found that Saba did not need to bring its fiduciary duty claim derivatively "because Saba is seeking to vindicate its own contractual voting rights."

Finally, the Trustees were not entitled to dismissal under the business judgment rule because Saba had alleged facts that would make that rule inapplicable. Specifically, Saba alleged that the amendments were motivated by the Trustees' desire to prevent Saba from voting them out. The court explained that the business judgment rule does not apply where business trustees or corporate directors act solely or primarily out of a desire to perpetuate themselves in office. ■

Commonwealth v. Credit Acceptance Corp.,

2021 Mass. Super. LEXIS 27 (Mar. 15, 2021) (Salinger, J.).

Commonwealth Has Standing to Sue Under Uniform Commercial Code

The Commonwealth brought suit against Credit Acceptance Corporation ("CAC"), which makes high-interest loans to high-risk car buyers, alleging that CAC engaged in unfair and deceptive acts in trying to collect loans and repossess vehicles. CAC moved to dismiss certain of the Commonwealth's claims, and the Commonwealth moved for summary judgment as to liability on three of its claims.

The court first found that the Commonwealth had standing to sue CAC for allegedly violating a state regulation (940 C.M.R. § 7.04(1)(f)) limiting the frequency of telephone calls by creditors to collect a debt ("Call Regulation"). The court explained that the Attorney General may seek injunctive relief for a Chapter 93A violation even if a company has ceased its unfair and deceptive acts. The Attorney General also does not need to prove economic injury in order to enforce Chapter 93A.

The court, applying an intermediate scrutiny standard, further found that the Call Regulation does not violate the Free Speech clause of the First Amendment. The court found that the Commonwealth had shown a substantial interest in protecting consumers from aggressive debt collection tactics, that the Call Regulation advanced those interests, and that the limits imposed by the Call Regulation were not more extensive than necessary to achieve those interests. The court rejected CAC's argument that the Commonwealth needed to submit affirmative evidence that the Call Regulation was not more extensive than necessary, explaining that the government may justify a restriction on speech "by reference to studies and anecdotes or based solely on history, consensus, and simple common sense."

The court allowed the Commonwealth's motion for summary judgment as to liability under the Uniform Commercial Code ("UCC") based on CAC sending misleading notices regarding repossession. The court rejected CAC's argument that the Commonwealth lacked standing to seek statutory damages under the UCC because the Commonwealth itself had suffered no injury, explaining that the Commonwealth has broad power to bring suit to protect the interests of individual citizens. The court also rejected CAC's argument that G.L. c. 255B, § 20B displaced the UCC's notice requirements.

The court declined to dismiss the Commonwealth's claim that CAC violated Chapter 93A by failing to make accurate interest rate disclosures to consumers. The court stated that the fact that CAC did not directly interact with consumers but, instead, provided its disclosures to dealers, who then passed them on to consumers, did not change the result: "[s]omeone who engages in unfair or deceptive business practices may be liable under c. 93A even if they were facilitating a transaction on behalf of some other entity." The court also found that CAC could be liable under Chapter 93A if its agents engaged in unfair or deceptive acts, "even if CAC did not authorize and was not aware of the wrongdoing." ■

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

2021 Mass. Super. LEXIS 2 (Jan. 28, 2021) (Salinger, J.).

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

2021 Mass. Super. LEXIS 31 (Feb. 10, 2021) (Sanders, J.);

No Misrepresentation Claim Based on Allegedly Erratic Behavior During Negotiations Between Sophisticated Parties

CWB Retail Limited Partnership ("CWB") sought to evict its commercial tenant, Lululemon USA, Inc. ("Lululemon"). Lululemon brought a separate action alleging the attempted eviction was unlawful. CWB dismissed the summary process action and asserted counterclaims against Lululemon in the separate action. CWB's counterclaims alleged that Lululemon made misrepresentations in the course of negotiations between the parties regarding a possible expansion of the leased premises. Lululemon moved to dismiss the counterclaims.

The court allowed the motion. The court explained that the "key problem" with CWB's counterclaims was that the alleged misrepresentations were made in the context of negotiations between two sophisticated parties and no agreement was ever reached as a result of those negotiations. In addition, CWB had failed to identify any particular misstatements of fact made by Lululemon. The court stated, "[t]hat Lululemon changed its mind as negotiations dragged on is not enough" to give rise to an actionable misrepresentation claim.

After CWB voluntarily dismissed its eviction action, Lululemon sought to recover its fees pursuant to a provision in the parties' lease providing that the unsuccessful party in litigation must pay the fees incurred by the successful party "in connection with obtaining [a] final order, decree, or judgment."

The court denied Lululemon's request. Although the dismissal with prejudice rendered Lululemon the "successful" party for purposes of the fee-shifting provision, Lululemon had not shown that it incurred any fees in connection with obtaining that dismissal. The court distinguished between the phrase at issue and a phrase providing for fees incurred "in connection with the litigation." The court stated that Lululemon had not established that any part of its defense efforts, including an unsuccessful motion to dismiss, "had any causal connection to CWB's voluntary dismissal." ■

Blue Cross Blue Shield of Mass., Inc. v. Flexible Fundamentals, Inc.,

2021 Mass. Super. LEXIS 22 (Feb. 22, 2021) (Salinger, J.).

Preliminary Injunction Denied in Absence of Underlying Claim

Plaintiffs Blue Cross Blue Shield of Massachusetts, Inc. and Blue Cross Blue Shield of Massachusetts HMO Blue, Inc. (collectively, "Blue Cross") contracted with defendant Flexible Fundamentals, Inc. ("FlexFun") to provide behavioral services to autistic children. Jennifer McGee ("McGee") and Errion McGrath ("McGrath") formed FlexFun. Blue Cross brought suit seeking to recover millions of dollars in alleged overpayments that it claimed were obtained by fraud and inadvertent overbilling. Blue Cross sought trustee process attachments of defendants' bank accounts and real estate attachments of McGee and McGrath's interests in certain properties. Blue Cross also sought a preliminary injunction barring McGee and McGrath from encumbering those properties. In turn, FlexFun also sought preliminary injunctive relief barring Blue Cross from removing FlexFun as an in-network provider of behavioral services.

The court denied all motions. With respect to Blue Cross' request for prejudgment security, the

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court found that Blue Cross had not proven that it was likely to obtain a judgment equal to or greater than the amount of the attachment. Specifically, the court was concerned that Blue Cross rejected FlexFun's attempt to provide documentary support for the claims submitted to Blue Cross. The court further found that Blue Cross failed to provide admissible evidence to support its claim that certain billing practices were fraudulent. Allegations made solely on information and belief were insufficient to "justify attaching assets or granting other preliminary injunctive relief."

The court also took issue with the fact that Blue Cross sought to attach assets belonging to McGee and McGrath but had not established a likelihood of success in showing that either McGee or McGrath was personally liable for FlexFun's alleged overbilling. Blue Cross had not asserted a breach of contract claim against the individuals and therefore could not obtain prejudgment attachments "to secure a non-existent contract claim."

Finally, the court denied FlexFun's motion for a preliminary injunction because FlexFun had not asserted any claim that its termination as an in-network provider was unlawful. The court explained that the filing of a meritorious claim is a condition precedent to seeking injunctive relief and "[t]here is no such thing as a suit for a traditional injunction in the abstract." ■

Healey v. Uber Techs., Inc.,

2021 Mass. Super. LEXIS 28 (Mar. 25, 2021) (Salinger, J.).

Attorney General May Seek Declaratory Judgment Under Independent Contractor Statute

The Attorney General brought suit against Uber and Lyft claiming that those companies misclassify their drivers as independent contractors and do not pay all required wages and benefits. The Attorney General sought a declaratory judgment that Uber and Lyft drivers are employees and an injunction requiring the companies to treat their drivers as such. Uber and Lyft moved to dismiss, arguing that the complaint did not adequately allege that drivers were denied benefits of employment or that there was an actual controversy. Uber also argued that the Attorney General lacked standing to seek declaratory relief.

The court denied the motions. The court found that the complaint described an actual controversy as to whether Uber and Lyft must treat their drivers as employees and that the Attorney General sought to resolve a "real dispute," not seek an advisory opinion on an abstract question of law. The court explained that a dispute about whether a party owes duties under a statute may properly be resolved by a declaratory judgment.

The court further found that the Attorney General had standing to seek declaratory relief. The court explained that the Attorney General has broad power under the legal doctrine of *parens patriae* to bring suit to protect the interests of Massachusetts citizens and has been granted "all necessary powers" to enforce the independent contractor statute. Therefore, the Attorney General may seek declaratory relief "if she believes that is the best way to enforce the independent contractor statute in a particular case."

The court concluded by finding that the Attorney General had alleged facts sufficient to show that the drivers should be classified as employees. The court rejected Uber and Lyft's argument that the Attorney General was required to allege that individual drivers were harmed by being misclassified, stating, "[t]he Attorney General need not allege that any driver has suffered injury in order to state a viable claim for declaratory relief under G.L. c. 231A." The court further explained that a party with standing may seek declaratory relief either before or after a breach or violation has occurred. ■

Golden Bridge, LLC v. Navem Partners, LLC,

2021 Mass. Super. LEXIS 14 (Feb. 2, 2021) (Salinger, J.).

Preliminary Injunction Issued Compelling LLC's Managing Member to Comply with Notice of its Removal

Golden Bridge, LLC ("Golden Bridge") and Navem Partners, LLC ("Navem") formed The Freeport South Boston, LLC ("Freeport") to undertake development of condominiums in South Boston. Navem was Freeport's Managing Member. Golden Bridge brought suit against Navem and various individuals, claiming that Navem engaged in conversion and a breach of Freeport's operating agreement by paying itself $1 million in excessive fees. Golden Bridge also sought a declaration that its attempt to remove Navem as Managing Member was legally effective and moved for a preliminary injunction barring Navem and the individual defendants from acting on behalf of Freeport.

The court allowed the motion for preliminary injunction, finding that Golden Bridge was likely to succeed on its claim that Navem misappropriated funds and therefore Golden Bridge was entitled to remove it as Managing Member. The court further found that Golden Bridge was likely to suffer irreparable harm if Navem were to continue to ignore the attempted removal and conduct Freeport's business because Golden Bridge had "negotiated for the right to take management control of the company in the event of malfeasance by Navem." The court found that Navem was unlikely to suffer irreparable harm and stated that the fact that Navem might disagree with future business decisions by the new manager was "of no moment."

The court also was not persuaded by defendants' argument that the preliminary injunction should not issue because it overlapped with the ultimate relief sought in the case. The court stated that the injunction "merely enforces a notice [of removal] that was properly issued over four months ago" and, in any event, a court may issue an injunction that has the effect of temporarily granting the plaintiff all that it seeks as final relief. ■

Jian Sun v. Goodman,

2021 Mass. Super. LEXIS 35 (Feb. 11, 2021) (Sanders, J.).

Interest of Passive LLC Members Irrelevant to Demand Futility Analysis Under Delaware Law

Plaintiffs hold a collective fifty percent membership interest in a Massachusetts limited liability company called 420 E Street Sponsor, LLC ("Sponsor"). Sponsor was organized in order to purchase a warehouse in Boston (the "Property"). Defendant Steven E. Goodman ("Goodman"), through his wholly-owned business, holds a twenty-five percent interest in Sponsor and was responsible for managing and selling the Property. Plaintiffs alleged that the Property sold but they did not receive their expected share of the profits and they challenged certain expenses claimed by Goodman in connection with his management of Sponsor. Plaintiffs asserted a derivative claim for breach of contract and direct claims for breach of fiduciary duty and an accounting.

Defendants moved to dismiss, arguing: (i) Plaintiffs' contract claim failed to satisfy the pleading requirements of Mass. R. Civ. P. 23.1; (ii) the fiduciary duty claim was barred by the terms of Sponsor's operating agreement; and (iii) the operating agreement disclaims the fiduciary relationship necessary to maintain an accounting claim.

The court denied the motion to dismiss. The court rejected defendants' argument that Plaintiffs had failed (under Delaware law) to plead futility with the requisite particularity. The allegations in

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the complaint that Goodman paid himself for expenses not reasonably incurred and tried to hide that wrongdoing from the Plaintiffs were sufficient to create a reasonable doubt as to whether Goodman was disinterested. The court rejected defendants' argument that a majority of Sponsor's members were disinterested because, under Delaware law, "passive members are not the proper recipients of a demand."

The court also rejected defendants' argument that a provision in Sponsor's operating agreement disclaiming manager liability to members except for gross negligence or willful misconduct barred the fiduciary duty claim. The court stated that drafters of an LLC agreement must make an intent to eliminate fiduciary duties plain and unambiguous, and the language at issue was ambiguous. ■

Lambert-Egan v. Lambert,

2021 Mass. Super. LEXIS 37 (Feb. 12, 2021) (Davis, J.).

Trustee Could Not Authorize Agreement that Restricted Rights of Trust Beneficiaries

Plaintiff Tracy Lambert-Egan ("Tracy") brought suit against various defendants claiming breach of fiduciary duty in the management of a commercial real estate and grocery business known as Lamberts Rainbow Market ("Lamberts Market"). The parties cross moved for summary judgment on various claims. Tracy sought summary judgment on her claims requesting a declaration that certain documents were void.

The court agreed that a document referred to as a "Beneficiary Agreement," which imposed restrictions on the rights of beneficiaries under a trust called the GAL Trust, was unenforceable. The court found that the "fundamental fiduciary doctrine" precluded the sole trustee of the GAL Trust from authorizing the agreement because a trustee has a duty of loyalty to administer a trust solely in accordance with its terms and in the interest of the beneficiaries.

The court declined to declare, on summary judgment, that a 1994 Partnership Agreement should be rescinded, despite Tracy's allegation that the parties had not followed that Agreement in conducting the affairs of the partnership. The court explained that, although mutual assent to rescission may be inferred from conduct, the actions of the parties indicating an intent to rescind must be positive and unequivocal, and the evidence in the record did not meet that standard.

The court denied Defendants' cross motion for judgment on the fiduciary duty claims on statute of limitations grounds, explaining that there was evidence that Defendants did not fully disclose all relevant facts, thereby supporting tolling under G.L. c. 260, § 12. ■

Mass. Water Res. Auth. v. Dewberry Eng'rs, Inc.,

2021 Mass. Super. LEXIS 38 (Feb. 25, 2021) (Davis, J.).

Privilege Waived Where Counsel Did Not Act Promptly to Address Notice of Inadvertent Disclosure

Plaintiff Massachusetts Water Resources Authority ("MWRA") brought suit against Dewberry Engineers, Inc. ("Dewberry"), alleging that Dewberry improperly designed a water main. Dewberry denied any design error and counterclaimed for its unpaid fees and expenses on the project. Dewberry produced documents in the litigation, and counsel for the MWRA discovered that the documents included potentially privileged communications. MWRA's counsel sent Dewberry's counsel notice of the inadvertent production, but Dewberry's counsel took no action on the letter for more than six weeks. Dewberry then requested a return of the privileged documents, and the MWRA's counsel refused. The MWRA filed a motion seeking a determination regarding Dewberry's claim of privilege, arguing that Dewberry waived the privilege by failing to take reasonable steps to prevent, and then to rectify, disclosure of the documents. Dewberry argued that its actions were reasonable and timely.

The court allowed the MWRA's motion in part. The court stated that Dewberry's counsel "waited too long" when it inexplicably waited over six weeks after notice to investigate the inadvertent disclosure and then waited an additional three weeks before responding to the MWRA's counsel. The court explained that inadvertent production of privileged communications is an extremely serious matter that has to be addressed promptly. The court likened it to the "litigation equivalent of a cry of 'FIRE!'." Therefore, the court concluded that Dewberry had waived the privilege as to the inadvertently produced documents. However, the court did not waive the privilege as to a second set of inadvertently-produced documents that Dewberry acted more promptly to address. ■

Steward Health Care Sys., LLC v. Aya Healthcare, Inc.,

2021 Mass. Super. LEXIS 59 (Mar. 8, 2021) (Salinger, J.).

Preliminary Injunction Entered Compelling Defendant to Continue Performing Under Contract Despite Plaintiff's Alleged Nonpayment

Aya Healthcare, Inc. ("Aya") provided nurses and other healthcare professionals to Steward Health Care System, LLC ("Steward"). When Steward fell behind in payment, Aya stopped performing under the parties' contract and told its clinicians not to report to work. Steward brought suit against Aya and moved for a preliminary injunction compelling Aya to continue providing Steward with staff.

The court allowed the motion for preliminary injunction, finding that Steward was likely to succeed in proving that Aya breached its contractual obligations. Aya argued that Steward's breach of its payment obligations excused Aya from performing. The court found, however, that the parties had agreed to modify that common law rule by requiring both sides to carry out their contractual obligations while attempting to resolve billing disputes. The court also explained that Aya could not take advantage of a contractual termination provision because it had not given notice that it would terminate the contract if Steward did not cure its payment breach.

The court further found that Steward and its patients were likely to suffer irreparable harm if Aya were not compelled to continue providing staff because Steward would be unable to provide necessary patient care. The court found that the risk to Aya that it may provide clinicians and not get paid could be eliminated or greatly reduced by requiring Steward to post a bond. ■

Shoemaker v. Clay Family Dealerships, Inc.,

2021 Mass. Super. LEXIS 4 (Jan. 20, 2021) (Davis, J.).

Wage Act Creates Private Cause of Action for Recovery of Unpaid Premium Pay

Plaintiff Russel Shoemaker ("Shoemaker") brought a putative class action against his former employer, Clay Chevrolet, Inc. ("Clay Chevrolet"), under the Wage Act. Shoemaker worked as a salesperson for Clay Chevrolet and was paid entirely on commission. Shoemaker repeatedly worked overtime or on Sundays and holidays but was not issued a separate overtime or premium payment except that, if his commissions were insufficient to satisfy minimum wage and overtime requirements, he would be paid the difference.

Plaintiff moved for summary judgment on liability, which the court allowed in part. The court first found that Clay Chevrolet's failure to pay Shoemaker separate overtime and premium pay violated the Wage Act. The court also found that the Wage Act affords plaintiffs a private right of action to recover unpaid premium pay.

The court was unwilling, however, to enter summary judgment for Shoemaker on the issue of whether his damages could be reduced based upon Clay Chevrolet's occasional separate overtime payments. Shoemaker argued that Clay Chevrolet was trying to retroactively apply those payments to its overtime obligations, while Clay Chevrolet argued that its pay plan informed Shoemaker in advance that such payments would be made. Such conflicting evidence concerning the nature and purpose of the payments required a trial on damages. ■

Marks v. The Realty Assocs. Fund X, L.P.,

2021 Mass. Super. LEXIS 32 (Feb. 9, 2021) (Davis, J.).

Court Rejects Proposed Class Action Settlement Requiring Class Members to Submit Form in Order to Receive Payment

The tenants of a residential apartment complex in Revere brought a putative class action against the purported owner of the complex, defendant The Realty Associates Fund X, L.P. ("RAFX"), alleging that RAFX unlawfully billed them for water and sewer charges and mishandled their security deposits. The parties settled their dispute in 2020, but the court rejected the first proposed settlement agreement in light of a provision requiring residual settlement funds to be returned to RAFX instead of being disbursed to a nonprofit organization pursuant to Mass. R. Civ. P. 23(e)(2). The parties then revised their agreement so that it would effectively eliminate residual funds by requiring class members to submit claim forms in order to obtain a settlement payment.

The court once again rejected the proposed settlement, finding that the terms were not fair, adequate, and reasonable for class members because requiring them to submit a claim form "would subject them to a meaningless and unwarranted burden." The court explained that, because the names and addresses of the qualifying class members were already known, the settlement administrator was "fully capable of distributing appropriate settlement payments to all of the class members without the additional effort and complexity posed by the Claim Form Requirement." ■

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Shen v. Casa Sys., Inc.,

2021 Mass. Super. LEXIS 17 (Jan. 11, 2021) (Sanders, J.).

Securities Act Claim Dismissed Due to Absence of Allegations that Omitted Facts were Knowable at Time of Offering

Plaintiffs, holders of common stock in defendant Casa Systems, Inc. ("Casa"), brought putative class actions alleging violations of the Securities Act of 1933. Plaintiffs alleged that they purchased the stock in an initial public stock offering ("IPO") that was made based on an inaccurate and misleading Registration Statement and Prospectus. Specifically, Plaintiffs argued that Casa's statements suggesting it would continue to grow at a previous rate were misleading because it did not discuss significant issues facing its customers that were reasonably likely to imperil profitability.

The court allowed defendants' motion to dismiss, finding that the Plaintiffs failed to identify any actionable misstatement or material omission. The court explained that Plaintiffs must allege that the omitted facts existed and were knowable at the time of the offering. In this case, there were no allegations that Casa knew or had reason to know of its customers' plan to reduce purchasing in the future. The court stated that having an "insight" is not the same as actual knowledge of customers' planned purchases months into the future. The court further found that Casa's statements about its ability to take advantage of a lucrative marketplace in the future were "couched in terms of opportunity and belief" and therefore were "nonactionable opinion or statements of corporate optimism, or were immaterial puffery." ■