O'Connor Carnathan and Mack LLC

Session Watch

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Summarizing opinions from April 1, 2017 through June 30, 2017

FEATURED DECISION:

Gillette Co. v. Provost, 2017 Mass. Super. LEXIS 38 *(Apr. 18, 2017) (Salinger, J.)*; Gillette v. Provost, 2017 Mass. Super. LEXIS 97 *(June 9, 2017) (Salinger, J.)*.

Baseless Litigation to Keep a Competitor Out of the Market May Violate Chapter 93A

Plaintiff, the Gillette Company ("Gillette"), alleged that four of its former employees helped ShaveLogic, Inc. ("ShaveLogic") develop a new disposable razor cartridge using Gillette's confidential information, thereby violating Chapter 93A. ShaveLogic, in turn, alleged that Gillette intentionally interfered with its prospective business relations and violated Chapter 93A by bringing baseless legal claims in an effort to keep ShaveLogic out of the market. The parties filed cross motions for summary judgment.

The court granted summary judgment on Gillette's claims because Gillette failed to present any evidence that the defendants misused Gillette's confidential information. The allegedly misused design concepts were publicly known and "using publicly available information to compete is not an unfair trade practice." There was no evidence that ShaveLogic used any of Gillette's confidential information to design products.

The court also denied summary judgment on ShaveLogic's two counterclaims because a reasonable jury could conclude that Gillette "deliberately asserted baseless claims against ShaveLogic in an attempt to scare off ShaveLogic's investors and potential business partners." With regard to the interference counterclaim, the court explained that ShaveLogic did not need to present direct evidence that Gillette knew of any particular relationship between ShaveLogic and a third party; it was enough for ShaveLogic to show that Gillette knowingly interfered with a prospective relationship between ShaveLogic "and an identifiable class or category of third persons." With respect to the Chapter 93A counterclaim, although the mere filing of a lawsuit does not, without more, constitute trade or commerce under that statute, the court held that a reasonable fact finder could conclude that Gillette was acting in a business context because it brought baseless litigation in order to keep ShaveLogic out of the market.

In a separate decision in June, the court denied Gillette's request for the court to report its summary judgment decision for interlocutory appellate review, rejecting Gillette's argument that the summary judgment decision turned on the resolution of unsettled questions of law.

Beninati v. Borghi, 2017 Mass. Super. LEXIS 107

(June 30, 2017) (Sanders, J.).

Businessman Who Assisted LLC Members in Breaching their Fiduciary Duties Found to Have Violated Chapter 93A

Defendant Harold Dixon ("Dixon") was a businessman who had, according to the findings of fact at trial, aided and abetted Defendants Steven and Linda Borghi (the "Borghis") in breaching their fiduciary duties to certain limited liability companies (collectively, "WOW New England") by assisting the Borghis in opening a chain of competing clubs. On remand, after an appeal establishing that he could be held liable under Chapter 93A for this conduct, the plaintiffs sought a determination that Dixon's Chapter 93A violation was willful and knowing, warranting multiple damages. The court first found that Dixon's actions were sufficiently egregious to constitute a violation of Chapter 93A because Dixon "aided and encouraged the Borghis in misappropriating WOW New England club membership data, revenue information, reports that analyzed the demographics of the WOW New England membership base, employee training manuals, payroll data, and a list of the clubs' vendors," all under the guise of being a consultant.

The court also rejected Dixon's arguments that plaintiffs had failed to demonstrate that WOW New England suffered some loss of money or property and had shown only that the competing clubs unfairly benefitted. The court stated that Dixon read the statute too restrictively: because it was fair to infer that plaintiffs suffered some monetary loss, even though difficult to quantify, disgorgement of profits could be an appropriate means of compensating plaintiffs. The court also concluded that double damages were warranted but did not award treble damages in light of the fact that Dixon acted in concert with the Borghis.

Finally, the court confronted the question of whether defendant Steven Borghi, as a member of WOW New England, should be permitted to share in the Chapter 93A award to the company. The court determined as a matter of equity that he should not and ordered that the amount that Dixon had to pay to WOW New England for violating Chapter 93A be reduced by the percentage of Steven Borghi's membership interest.

Wright v. Balise Motor Sales Co., 2017 Mass. Super. LEXIS 44

(Apr. 18, 2017) (Salinger, J.).

Common Law Claims for Unpaid Wages Dismissed Where Implied Contract Evidenced a Policy of Payment Based Solely on Commissions

Plaintiff car salesmen brought suit alleging they were owed certain unpaid wages. They asserted both statutory and common law claims on behalf of themselves and a class of similarly situated salespeople. Defendants moved to dismiss the common law claims, and the court granted the motion.

Although the court found that the facts in the complaint would support a finding that plaintiffs had an implied contract with the corporate defendants, it was a contract for payment in the form of commissions, not any additional wages. The court stated that a policy and practice of paying commissions only, and never compensating salespeople on an hourly basis, could not give rise to an implied contract to pay hourly wages. The court also held that nothing in the implied covenant of good faith and fair dealing would require the defendants to pay additional wages because the implied covenant does not create rights or duties beyond those agreed to in the contract. In addition, because the plaintiffs had alleged an implied contract to pay commissions, they could not recover additional wages on an unjust enrichment or quantum meruit theory.

CRA Int'l, Inc. v. Painter, 2017 Mass. Super. LEXIS 36

(Apr. 11, 2017) (Salinger, J.).

Statements Made During Recruitment of Executive Did Not Give Rise to Actionable Misrepresentation Claim

Plaintiff CRA International, Inc. ("CRA") employed Defendant Donald J. Painter ("Painter") for less than a year. Under the express terms of the parties' contract, Painter was required to repay CRA for certain funds, such as a signing bonus, paid to him by CRA during the time he was employed. In response to CRA's action seeking repayment, Painter asserted that the employment agreement was procured by fraud or negligent misrepresentation and counterclaimed against CRA. CRA moved to dismiss Painter's counterclaim.

The court granted CRA's motion. The counterclaim did not allege any facts plausibly suggesting that CRA made a false statement of material fact to Painter. The court explained that "vague and general statements cannot constitute an unlawful misrepresentation of fact," nor could "asking a potential employee about his commitment to a business" give rise to a claim for fraud. In addition, CRA could not be liable for alleged omissions because the allegations did not suggest that CRA had a fiduciary duty or similar relationship to Painter. The court stated that negotiations during recruitment of an executive do not establish the type of relationship that would carry with it a duty of full disclosure.

Painter's affirmative defenses failed for the same reasons as his fraud claim. With respect to his allegations of negligent misrepresentation, although these did not need to be pleaded with particularity, these allegations were barred by an integration clause in the employment agreement. Finally, the court noted that, even if Painter could prove fraud or negligent misrepresentation, thereby rendering the agreement voidable, he would still be required to repay certain funds, such as the signing bonus, because a party who rescinds an agreement for fraud must give up all he or she received under that agreement.

Geanacopoulos v. Philip Morris USA, Inc., 2017 Mass. Super. LEXIS 73

(June 9, 2017) (Salinger, J.).

Court Declines to Approve Distribution of Residual Settlement Funds in Class Action to Organization Affiliated with Plaintiffs' Counsel

Following a bench trial, Judge Leibensperger found that Defendant Philip Morris USA, Inc. ("Philip Morris") violated Chapter 93A in connection with its marketing of Marlboro Lights. Judge Leibensperger awarded the plaintiff class nearly $5 million in statutory damages, plus interest. The parties subsequently entered into a settlement agreement to govern distribution of the award to eligible class members. The parties expected that $6.8 million would remain in the settlement fund following distribution to class members.

Plaintiffs requested that the court distribute these residual funds to four separate non-profit organizations and to the Massachusetts IOLTA Committee, pursuant to Mass. R. Civ. P. 23(e). The court approved the distribution to the Massachusetts IOLTA Committee and three of the non-profit organizations, but declined to authorize distributions to Northeastern University's Public Health Advocacy Institute (the "Institute") because one of the lead attorneys for plaintiffs served as the litigation director for the Institute. Although the court stated that it credited the Institute's showing that the attorney would not benefit personally from the residual funds, the court wanted to avoid any appearance of impropriety.

DeMego v. Nisonson, 2017 Mass. Super. LEXIS 72

(May 23, 2017) (Salinger, J.).

Corporate President's Possible Wage Act Liability Limited to Wages that Became Due During Tenure

Plaintiffs asserted claims for unpaid wages against certain individual directors and executives (collectively, "Defendants") of ConnectEDU, Inc. ("ConnectEDU"). The parties cross-moved for summary judgment, and Plaintiffs also moved to certify a class.

The court allowed the motion to certify a class, denied Plaintiffs' motion for summary judgment, and partially allowed Defendants' motions for summary judgment. The court held that ConnectEDU's President could not be liable under the Wage Act for wages that became due before he joined ConnectEDU or after he was terminated, stating, "[n]othing in the Wage Act or in appellate decisions construing the statute indicates that someone newly hired as the president of the company becomes personally liable on their first day on the job for all wages that were allegedly earned but not paid before that time." The court was not persuaded by Plaintiffs' argument that the managers of a company should not be able to escape Wage Act liability by arranging to be fired (in this case, on the eve of a bankruptcy filing) before other employees, stating that Plaintiffs pointed to no evidence that the President conspired to get fired in order to cut off personal liability.

The court denied summary judgment as to the claims against ConnectEDU's CFO, finding a disputed issue of fact as to whether he had any power to formulate and implement company policy. The court noted that if he did have such power, he could be liable for unpaid commissions that became due and payable during his tenure, even if the incentive compensation plan defining the commission rights was put in place before he was hired. The court also denied summary judgment as to the Wage Act claim against a low-level financial analyst because Plaintiffs presented evidence that she was the de facto CFO. In addition, the court denied summary judgment with respect to the Wage Act claims against members of ConnectEDU's board of directors and Capital Strategy Committee because Plaintiffs had presented evidence that these individuals "had operational control of the company and were exercising authority to set company financial policy, including with respect to what wages owed to employees got paid and which ones did not."

Finally, the court granted summary judgment as to cross-claims between the Defendants for indemnification and contribution. The indemnification claims failed because the liability of individual defendants was not derivative in nature since the Wage Act provides for personal liability of certain corporate officers. The contribution claims failed because Wage Act claims "do not sound in tort."

Oxford Global Res., LLC v. Hernandez, 2017 Mass. Super. LEXIS 49

(June 9, 2017) (Salinger, J.).

Choice-of-Law Provision in Adhesion Contract Unenforceable

Plaintiff Oxford Global Resources, LLC ("Oxford") alleged that its employee, Defendant Jeremy Hernandez ("Hernandez"), breached certain restrictive covenants in an agreement he executed in connection with accepting employment at Oxford ("Agreement"). Hernandez was hired to work in Oxford's California office; however, the Agreement provided that it was governed by Massachusetts law and all disputes arising from the Agreement had to be brought in Massachusetts. Hernandez moved to dismiss on forum non conveniens grounds, arguing that the case should be heard in California. The

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court allowed the motion to dismiss, holding that the forum selection clause was unenforceable and justice required the case to be heard in California.

The court found that the Agreement was a contract of adhesion and that Hernandez had no power to bargain over the choice-of-law and forum selection provision. The court also found that the choice-of-law provision "was an attempt by Oxford to circumvent California's strong public policy against the enforceability of non-competition agreements." The court explained that the Agreement would be void under California law. The court found that depriving Hernandez of the freedom to compete against Oxford in California, which is guaranteed under California law, would result in a substantial injustice, particularly where Hernandez had no meaningful opportunity to negotiate when he was hired. The court went on to conclude that California was an adequate alternative forum because all relevant events occurred there.

CareOne Mgmt., LLC v. Navisite, Inc., 2017 Mass. Super. LEXIS 58

(Apr. 24, 2017) (Salinger, J.).

Employee Time Spent Responding to Alleged Unfair Trade Practice Not "Loss of Money" Under Chapter 93A

Defendant NaviSite, Inc. ("NaviSite") agreed to develop and provide information technology services to plaintiff CareOne Management, LLC ("CareOne") and its affiliate, Partners Pharmacy Services, LLC ("Partners"). A dispute arose concerning implementation of the contract, and NaviSite terminated. CareOne and Partners brought suit against NaviSite, and NaviSite asserted claims against CareOne. NaviSite and CareOne both moved for summary judgment. The court found that both parties were entitled to summary judgment as to all claims asserted against them.

With respect to NaviSite's breach of contract claim, which was based on NaviSite's allegation that CareOne refused to pay monthly invoices, the court found that NaviSite could not prevail because it never complied with a condition precedent to being able to bill and get paid by CareOne. The court rejected NaviSite's argument that summary judgment was improper because the contract did not expressly use the term "condition precedent": "where a contract provides that a party must make payment for services or goods that are accepted or approved . . . the acceptance or approval is a condition precedent to any duty to make the payment."

With respect to CareOne's claims, the court held that the breach of contract claim failed because CareOne had expressly waived any right to seek actual or consequential damages. The court rejected CareOne's argument that this limitation of remedies was unconscionable: "There is nothing unconscionable about a contract in which two commercially sophisticated parties have agreed to limit potential liabilities in order to allocate among themselves the risks of non-performance." The court also held that CareOne did not have a viable Chapter 93A claim because the loss of employee time spent allegedly dealing with NaviSite's threats to terminate the contract did not constitute a loss of money within the meaning of Chapter 93A. The court noted that CareOne had not presented any evidence that it lost money because it was unable to charge its employees' time to other projects.

Finally, the court held that Partners' claims against NaviSite also failed. Among other claims, Partners had alleged that NaviSite had tortiously interfered with Partners' contractual relationships with hundreds of long-term care facilities. Partners alleged that NaviSite's conduct caused the performance of these contracts to be more expensive and burdensome. The court held that Partners did not have a viable tortious interference claim because it had not presented evidence that this additional burden caused either Partners or its customers to stop performing the contracts.

Merrimack Coll. v. KPMG, LLP, 2017 Mass. Super. LEXIS 40

(May 15, 2017) (Salinger, J.).

Doctrine of In Pari Delicto Barred College's Claims Against Auditor Arising From Misconduct of College's Former Employee

Plaintiff Merrimack College ("Merrimack") incurred substantial financial losses when its former financial aid director, Christine Mordach ("Mordach"), deliberately approved fake Perkins loans for students without their knowledge. Merrimack sought to recover its losses from its former auditor, KPMG, LLC ("KPMG"), alleging that KPMG noticed but failed to follow up on discrepancies in student loan accounting. KPMG moved for summary judgment, arguing that Merrimack's claims were barred by the equitable doctrine of *in pari delicto.* The court agreed and allowed KPMG's motion.

The court explained that the doctrine of *in pari delicto* bars a plaintiff who has participated in wrongdoing from recovering damages for loss resulting from that wrongdoing. The doctrine applies to corporations or other legal entities injured by wrongdoing committed by an employee acting on its behalf. In this case, the court held that Mordach's fraudulent conduct could be imputed to Merrimack, such that Merrimack was legally responsible for the fraud, because Mordach carried out her action in order to improve Merrimack's finances, not for personal gain. It is irrelevant that Mordach's actions may have harmed Merrimack in the long run because the actions were motivated by a desire to help Merrimack. The court found that Mordach's fraud was "far more serious" than any failure by KPMG to discover that fraud.

The court also refused to recognize an exception to the *in pari delicto* doctrine for auditors, pointing out that only one state recognizes such an exception. The court stated, "Merrimack has not shown that there is a compelling public policy justification for letting entities that were injured by the deliberate fraud of their employees sidestep the i*n pari delicto* doctrine and shift responsibility to an independent auditor that negligently failed to discover the fraud."

Meunier v. Mkt. Strategies, Inc., 2017 Mass. Super. LEXIS 91

(June 12, 2017) (Salinger, J.).

Owners of LLC Could Not Directly Seek Recovery of Debt to LLC

Plaintiffs brought suit against Defendant Market Strategies, Inc. ("MSI"), claiming that MSI breached an obligation to make certain payments to a third party, Cogent Research Holdings, LLC ("CRH"). Plaintiffs also claimed that, after signing the contract, MSI misrepresented its willingness and ability to pay what it owed, thereby violating Chapter 93A. MSI moved for summary judgment.

The court granted summary judgment in MSI's favor on the contract claim because Plaintiffs were not intended beneficiaries of MSI's payment obligations to CRH. The court explained that Plaintiffs could enforce the MRI/CRH contract only if the agreement conveyed a clear and definite intent to grant Plaintiffs that right. The court found the contract to be unambiguous and lacking any such clear and definite intent. The court also stated that the fact that Plaintiffs are the sole owners of CRH and, therefore, would directly benefit from MSI's payments, is not enough to show that Plaintiffs were intended beneficiaries: "Massachusetts is consistent with other jurisdictions in confining intended beneficiary status to people and entities that have a right directly to receive benefits from performance of a contractual promise."

The court denied summary judgment as to Plaintiffs' misrepresentation and Chapter 93A claims, however, finding that these claims "do not depend on and are not derivative of" the failed contract claim."

Petrucci v. Esdaile, 2017 Mass. Super. LEXIS 65

(May 31, 2017) (Salinger, J.).

Massachusetts Statute of Limitations Applied to LLC Dispute Despite Delaware Choice-of-Law Provision in Operating Agreement

Plaintiff Daniel Petrucci ("Petrucci"), a 30% owner of a Delaware limited liability company called Market Maker Solutions, LLC ("MMS"), brought suit against the other owners of MMS ("Defendants"), alleging, among other things, that Defendants had frozen Petrucci out of MMS and leveraged his contributions to develop a new venture. The Defendants moved to dismiss Petrucci's claims, arguing that they were time-barred and failed to state a claim.

The court first found that none of the claims were time-barred because the Massachusetts, not Delaware, statutes of limitations applied, despite the existence of a choice-of-law provision in the MMS operating agreement which stated that the agreement was governed by Delaware law. The court explained that the choice-of-law provision did not "expressly address limitations periods and, for that reason, does not control which State's statute of limitations applies here." The court then applied the principles summarized in Restatement (Second) of Conflict of Laws § 142(2) to determine whether the Delaware or Massachusetts statutes of limitations should apply to Petrucci's contract claims and found that Massachusetts had a more significant relationship to the parties and the facts giving rise to the dispute. Therefore, although the merits of Petrucci's contract claims were governed by Delaware law, the Massachusetts six-year statute of limitations governed the determination of whether the claims were timely filed.

The court went on to find that several of Petrucci's claims failed to state a claim. Specifically, the court dismissed part of Petrucci's contract claims, as well as his claim for breach of fiduciary duty based on misappropriation of corporate opportunities, because the MMS operating agreement permitted the LLC members to compete with MMS, a provision that is enforceable under Delaware law. The court also dismissed Petrucci's Chapter 93A claim because the parties' dispute was purely private in nature and because "merely competing to convince customers to do business with a different company is perfectly legal and does not violate c. 93A."

Bay Colony Prop. Dev. Co. v. Headlands Realty Corp., 2017 Mass. Super. LEXIS 71

(June 7, 2017) (Salinger, J.).

Letter Disputing Enforceability of Contract Did Not Start Limitations Period for Breach of Contract Claim

Plaintiffs Bay Colony Property Development Company ("Bay Colony") and William E. Locke, Jr. ("Locke") (collectively, "Plaintiffs") allege that Defendants hired them to plan, coordinate, and supervise the development of two different properties in Pennsylvania, that Defendants promised to pay certain amounts to Plaintiffs, and that Defendants failed to make those payments. Plaintiffs brought claims for breach of contract, unjust enrichment, and declaratory judgment.

Defendants moved to dismiss on statute of limitations grounds. Defendants argued that the statute of limitations began to run when one of the Defendants sent a letter disputing that it had an enforceable contract with Bay Colony. The court denied the motion to dismiss, holding that the letter did not put the Plaintiffs on notice of any actual or anticipated breach of contract. The letter did not, for example, state that Defendants were refusing to pay amounts Bay Colony claimed were owed for services rendered. The court pointed out that nothing in the complaint suggested that contract termination was, in and of itself, a contract breach that would start the statute of limitations period.

Gowen v. Benchmark Senior Living, LLC, 2017 Mass. Super. LEXIS 92

(May 5, 2017) (Salinger, J.).

Assisted Living Facility Subject to Residential Lease Statute, G.L. c. 186, § 15B

Plaintiff Adrienne Gowen ("Gowen"), a resident of an assisted living facility, brought suit against the manager of that facility, Benchmark Senior Living, LLC ("Benchmark"), alleging that Benchmark's predecessor violated Massachusetts residential landlord/tenant law by charging her a $2,500 community fee at the inception of the lease and by failing to comply with the legal requirements for assessing a security deposit. Gowen asserted claims for violation of G.L. c. 186, § 15B, violation of G.L. c. 93A, negligent misrepresentation, intentional fraud, and unjust enrichment. Benchmark claimed that Gowen had failed to pay what she owed for living in the facility. Both Benchmark and Gowen moved to dismiss all claims against them.

The court found that Gowen had stated a viable claim for violation of Section 15B, which deals with a tenant's rights in connection with a residential lease. The court rejected Benchmark's argument that assisted living facilities are not subject to that statute. The court also found that Gowen alleged facts sufficient to suggest that Benchmark could be held liable as the successor-in-interest to the original landlord because she alleged, among other facts, that Benchmark had received the $2,500 community fee payment from the prior operator. The court rejected Gowen's claims for violation of Chapter 93A (with respect to the community fee), negligent misrepresentation, or fraud against Benchmark because she had not alleged a de facto merger or any other facts suggesting that Benchmark had assumed the liabilities of its predecessor. The court held that Gowen had stated a viable Chapter 93A claim based on Benchmark's failure to pay interest on her security deposit and failure to hold that deposit in a separate interest-bearing account.

The court denied Gowen's motion to dismiss the counterclaims, rejecting Gowen's argument that Benchmark was impermissibly trying to circumvent the requirements of summary process. The court noted that Benchmark did not seek to evict Gowen in the present action and was "free to sue Gowen seeking unpaid rent without asserting such a claim as part of a summary process action."

Williamson-Green v. Interstate Fire & Cas. Co., 2017 Mass. Super. LEXIS 70

(May 26, 2017) (Salinger, J.).

In Suit Alleging Insurer's Breach of Duty to Settle, Insurer May Be Liable for Punitive Damages Awarded Against Insured

James W. Williamson, IV ("Williamson") died from injuries sustained when a bucket lift tipped over while he was inspecting a roof. His estate brought a wrongful death action against the lift manufacturer and against Equipment 4 Rent, Inc. ("E4R"), the company that had rented out the lift, and was awarded $4.3 million in compensatory damages and $5.9 million in punitive damages. E4R's insurer, Interstate Fire and Casualty Company ("Interstate"), paid E4R's share of the compensatory damages but refused to pay any of the punitive damages. Plaintiff (on behalf of Williamson's estate and as E4R's assignee) then brought suit against Interstate, claiming that Interstate failed to settle the claims against E4R after liability had become reasonably clear and that E4R had been harmed by having to pay punitive damages.

Interstate moved for judgment on the pleadings, arguing that it would be against public policy to require an insurer to pay any part of a punitive damages award, including as consequential damages flowing from a failure to settle.

The court denied Interstate's motion. The court explained that an insurer who breaches its duty to settle is liable for all consequential damages caused by that breach, even if those damages exceed what is covered by the insurance policy. The court also explained that, in Massachusetts, there is no public policy "against an insurer indemnifying its insured for punitive damages awarded in a wrongful death case based on a finding that reckless or grossly negligent conduct caused bodily injury and thus death."

In re ReWalk Robotics Ltd. Stockholder Litig., 2017 Mass. Super. LEXIS 41

(Apr. 3, 2017) (Salinger, J.).

Court Declines to Stay State Court Action Asserting Federal Claims Despite Existence of Similar Federal Suit

Plaintiffs brought putative state court class actions, which were consolidated, against Defendants based on alleged violations of the federal Securities Act. A similar lawsuit against Defendants was subsequently filed in federal court in Massachusetts. Defendants moved to stay the state court action pending dispositive resolution of the federal case.

The court denied Defendants' motion to stay, explaining that Defendants had not put forth any convincing explanation as to why the state court action – which was filed first – should be stayed instead of the federal action. The court also noted that the state court plaintiffs had made more progress investigating their claims than the federal plaintiffs. Finally, the court stated that the fact that the state court action asserted federal claims had no bearing on the issue of whether it should be stayed in favor of the federal suit: "Plaintiffs' choice of forum should not be disregarded merely because they are asserting federal claims."

FTI, LLC v. Duffy, 2017 Mass. Super. LEXIS 93

(May 3, 2017) (Salinger, J.).

Former Employee Subject to Massachusetts Jurisdiction for Providing New Employer with Confidential Information Connected to Massachusetts

Plaintiff FTI, LLC ("FTI") brought suit against several of its former employees based on allegations that the employees breached certain restrictive covenants and misappropriated trade secrets when they went to work for their new employer, Berkeley Research Group ("BRG"). Several months before FTI filed suit, BRG had filed suit in California seeking a declaration that the non-competition agreements were unenforceable. The Defendants all moved to stay the case pending final resolution of the California action. One of the Defendants, Elliot Fuhr ("Fuhr"), also moved to dismiss the claims against him based on an alleged lack of personal jurisdiction.

The court denied both motions. With respect to the motion to stay, the court held that a stay would be inappropriate because the California action concerned only a small portion of the claims at issue in the Massachusetts case. The court stated: "Whatever the end result of the California action, it will not resolve FTI's claims in this case that Defendants violated their non-solicitation and confidentiality agreements, misappropriated trade secrets, breached fiduciary duties . . . or aided and abetted others in doing so."

As to Fuhr's motion to dismiss, the court found that Fuhr purposefully transacted and conducted business in Massachusetts when he supervised six employees located in Boston and regularly traveled to Boston in connection with his work for FTI. The court also relied on FTI's allegation that Fuhr provided BRG with confidential FTI information regarding relationships with clients serviced from the Boston office. The court also noted that "FTI need not prove its claims are likely to succeed in order to establish that a court may exercise personal jurisdiction over Fuhr."

New Eng. Patriots Fans v. NFL, 2017 Mass. Super. LEXIS 95

(May 16, 2017) (Salinger, J.).

Mailbox Rule Does Not Apply to Ten-Day Deadline for Serving Postjudgment Motions Under Rule 52(b)

The court entered judgment dismissing Plaintiffs' case, and Plaintiffs filed an untimely notice of appeal. The court allowed Defendants' motion to dismiss the appeal and explained that Plaintiffs' postjudgment motion for findings did not toll the deadline for filing a notice of appeal because the motion for findings was not served within ten days of the entry of judgment.

Plaintiffs moved for reconsideration of the dismissal, arguing that their motion for findings had been timely because the final judgment had been mailed to their counsel, thereby automatically extending the deadline by three days. The court rejected this argument, holding that the three-day grace period provided in Mass. R. Civ. P. 6(b) does not apply to the deadline for serving postjudgment motions under Rule 52(b). The court explained that the ten-day deadline for serving postjudgment motions does not start to run upon service of anything, but, rather, runs from the date of entry of judgment.

FBT Everett Realty, LLC v. Mass. Gaming Comm'n, 2017 Mass. Super. LEXIS 110

(June 7, 2017) (Kaplan, J.).

Massachusetts Gaming Commission Not A Public Employer for Purposes of MTCA

Plaintiff FBT Everett Realty, LLC ("FBT") entered into an Option Agreement with Wynn MA, LLC ("Wynn"), pursuant to which Wynn was given the option to purchase a parcel of land owned by FBT if the Massachusetts Gaming Commission ("Commission") awarded Wynn a casino license. FBT subsequently brought suit against the Commission, alleging that the Commission tortiously interfered with the Option Agreement when it allegedly pressured Wynn to insist on a renegotiation of the purchase price with FBT. The Commission moved to dismiss FBT's complaint on the basis that it is a "public employer" under Section 1 of the Massachusetts Tort Claims Act ("MTCA") and, therefore, is immune from suits for intentional torts.

The court allowed the motion to dismiss. Although the court found it to be a "difficult analytical question," the court relied on the fact that the MTCA specifically lists commissions as one of the entities that are public employers, that its finances are subject to the state finance law, and that most of the taxes and fees it collects are expressly subject to appropriation by the Legislature or are immediately transferred to the control of other agencies or entities. The court also noted that the Commission is not authorized to bring litigation in its own name. Therefore, the court held that the Commission is a public employer under the MTCA and is not subject to claims asserting inten-tional interference with contractual relations.

Yarpah v. Bowden Hosp. Newton, LLC, 2017 Mass. Super. LEXIS 57

(May 18, 2017) (Salinger, J.).

No Tips Act Liability for Entities Who Did Not Collect Disputed Charges

Plaintiff Roland Yarpah ("Yarpah") brought suit against his former employer, the Crowne Plaza Hotel in Newton ("Crowne Plaza"), and the Crowne Plaza's owner, Bowden Hospitality Newton, LLC ("Bowden"). Yarpah alleged that the Crowne Plaza violated the Massa-chusetts Tips Act by levying an administrative charge for certain functions and not passing the monies collected onto the wait staff. Yarpah subsequently sought to amend his complaint to add the entity that licensed Bowden, Holiday Hospitality Franchising, LLC ("HHFL"), and HHFL's parent, Six Continent Hotels, Inc. ("SCH"), as defendants.

The court denied the request to add these entities as defendants because Yarpah lacked standing to sue them and, therefore, adding them would be futile. The court explained that entities that neither collect nor retain any part of a tip or service charge have no duty to employees under the Tips Act, and in this case, HHFL and SCH did not assess or collect any of the administrative charges at issue. The court rejected Yarpah's argument that HHFL could be held vicariously liable as Bowden's franchisor because HHFL had no right to control Bowden's assessment, collection, or disposition of the administrative charges.

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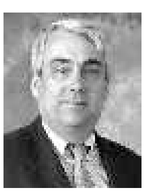
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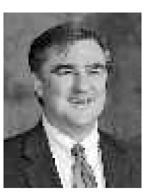
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