

# Probate and Fiduciary Litigation Newsletter February, 2017

February 14, 2017

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Several recent decisions serve as a good reminder that it is not only the Probate and Family Court that addresses important T&E issues in Massachusetts.

In the consolidated matters of *Hanna et al. v. Williams et al.*, Superior Court No. 1684CV0722 BLS 1 and *Berkowitz et al. v. Williams et al.* Superior Court No. 1684CV0724 BLS 1, a Judge in the Business Litigation Session of the Superior Court addressed (in addition to other issues) the viability of a claim for tortious interference with an expectancy and a challenge to the Court's jurisdiction to hear such a claim.

Plaintiffs in each case asserted claims against the same financial advisor and law firm concerning deathbed changes to a 91-year-old woman's estate plan. Although certain issues had been resolved in a compromise agreement approved by the Probate Court, several plaintiff heirs brought further claims in the Superior Court alleging that the actions of the advisor and law firm reduced distributions to the heirs.

In their motion to dismiss, defendants argued that the heirs' claims amounted to a will contest and that the Superior Court lacked subject matter jurisdiction over such a claim. In order to resolve the jurisdictional challenge, the Court first analyzed the nature of a claim for tortious interference with an expectancy (in this case the expectancy of inheritance). The Court determined that the tort of intentional interference is recognized in Massachusetts, that proof of the claim requires a plaintiff to show that "but for" the interference plaintiff would have received something, and that a plaintiff may recover on the tort even where a prior will has been admitted to probate. The Court also held that plaintiffs do not have to prove that the deathbed will at issue in the case is invalid to recover on their interference claim, but instead, they must show that even if the will was valid, defendants' procurement of the will was an intentional tortious act.

The Court went on to hold that because interference with an expectancy is an independent tort available in addition to and/or separate from a will contest, and that the prior compromise agreement by and among the parties was not under attack by plaintiffs, it had jurisdiction over plaintiffs' claim for intentional interference with an expectancy (and noted that the probate courts do not have jurisdiction over tort claims for money damages).

Two other aspects of the Court's decision are instructive. First, the Court ruled that a plaintiff does not have to show an absolute right to a certain asset or sum certain to succeed on a claim for interference with an expectancy, but only must establish a "reasonable probability that they would have received [a benefit] greater than what they received" as a result of the alleged interference. Second, the Court ruled that a plaintiff is not required to prove that a defendant knew the details

and scope of the alleged expectancy, but “only that defendants intentionally interfere[d] with an expectancy.”

In another Business Litigation Session matter, the Court allowed a motion for summary judgment by defendants for claims alleging breach of fiduciary duty against an attorney serving as personal representative to an estate and trustee of an insurance trust based on the fact that the plaintiff beneficiaries had received adequate accountings and had either assented to the accountings or failed to timely object.

In *J. Joseph O’Donnell et al. v. Maryellen O’Donnell et al.*, Opinion No. 135385 2016 Mass. Super. LEXIS 373 (Oct. 14, 2016), plaintiffs asserted a number of corporate shareholder claims and breach of fiduciary duty claims against their late father’s second wife and his long-time attorney in his capacity as personal representative of the estate and as a trustee of an insurance trust. In a motion for partial summary judgment defendants argued that plaintiffs’ prior assents and/or failures to object barred claims challenging the sale of certain shares of stock for the purposes of raising liquidity to pay substantial estate tax.

Plaintiffs did not dispute that the attorney, in his capacity as trustee, had fully disclosed the challenged stock sales in several accountings provided to plaintiffs. On this basis, the Court found that plaintiffs’ claims were barred under the trust instrument, which provided that in the absence of fraud, the failure to object to an accounting with sixty days was deemed to be an assent. The Court also found that plaintiffs’ claims were time barred pursuant to the statute of limitations set forth in Section 1005(a) of the MUTC, which bars claims against trustees brought more than six months after receipt of a final account evidencing the termination of a trust. Finally, the Court found that a ruling made by the Probate Court in pending litigation that plaintiffs had assented to certain of the challenged stock transactions supported defendants’ arguments and that the prior ruling should not and would not be revisited by the Superior Court.

The U.S. Bankruptcy Court for the Eastern Division of Massachusetts also weighed in recently on matters concerning breach of fiduciary duty claims, including specifically whether such claims may be excepted from discharge under federal bankruptcy law. In the matter of *In re Whittaker*, No. 13-15310-FJB, 2017 WL 187533, at \*1 (Bankr. D. Mass. Jan. 17, 2017), the siblings of a chapter 7 debtor sought to except from discharge their unadjudicated claims against the debtor for breaches of fiduciary duty in his capacity as trustee of two inter vivos trusts and as attorney-in-fact for the parties’ parents under a durable power of attorney. Among other claims, the sibling plaintiffs alleged that the debtor had breached the prudent investor rule through a series of risky investments. Ultimately, the Bankruptcy Court determined that the claims should be excepted from discharge on the basis that they were debts for “defalcation while acting in a fiduciary capacity.”

In a lengthy decision, the Court carefully examined the history and meaning of a “defalcation” as the term is used in the bankruptcy code. The Court held that the meaning of defalcation is broader than embezzlement or fraud, and includes any breach of fiduciary duty involving conduct by a fiduciary that he or she knows is improper. On this basis, the Court held that the debtor’s risky investments made as trustee of family trusts were improper and that the debtor “fully appreciated that he was subjecting the Trusts’ assets to a degree of risk that he could not justify” and,

therefore, his breaches of fiduciary duty were defalcations and plaintiffs' claims against him were not subject to discharge.

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