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CASES OF NOTE

UPHILL BATTLE FOR RETAIL CANNABIS APPLICANTS

Mederi, Inc. v. City of Salem, 488 Mass. 60 (2021)

Summary: In *Mederi, Inc. v. City of Salem*, the Massachusetts Supreme Judicial Court grappled with the uncharted territory surrounding the wide discretion afforded to municipalities under the *Regulation and Taxation of Marijuana Act*, which legalized the sale and recreational use of cannabis in the Commonwealth in 2016. Plaintiff Mederi, Inc. ("Mederi") sued the city of Salem alleging that, by rejecting Mederi as a Host Community Agreement ("HCA") partner, the city effectively precluded Mederi from being considered for a license to sell cannabis. Mederi also argued that the city's process in allocating HCAs was arbitrary or capricious and contrary to law. The Court ruled against Mederi, holding that a city's highly discretionary decision in selecting recreational cannabis establishments to host within their borders is not subject to mandamus relief, and that the Court will not overturn a city's decision with respect to HCAs, so long as the city provided a reasonable basis for its decision. The Court's decision means that any business seeking to open a retail cannabis business in Massachusetts will face a heavy burden in challenging a city's denial of its application for an HCA, a threshold requirement necessary prior to applying to the Cannabis Control Commission ("Commission") for a retail cannabis license.

Discussion: In September 2018, Mederi applied for an HCA with the city of Salem to open a retail cannabis establishment on Highland Avenue. The city considered a total of eight applications for four available slots. In addition to meeting all of the city's stated requirements, Mederi made extra property tax payments at the city's request. In December 2018, after the city informed Mederi that it had not been chosen to advance to the next round of consideration, Mederi filed a complaint in the Superior Court seeking relief in the nature of mandamus, i.e., an order requiring the city to enter into an HCA with Mederi, as well as certiorari, or appellate, review of the city's rejection of Mederi's application. The Superior Court ruled in favor of the city and Mederi appealed. The Supreme Judicial Court (SJC) took the case on its own motion.

The SJC upheld the lower court's decision, holding that Mederi was not entitled to mandamus relief and that the city had a rational basis for its decision to deny Mederi's HCA application. As to Mederi's mandamus claim, the Court found that Mederi could not seek an order that the city enter into an HCA with Mederi because the city's approval of HCAs was not a "ministerial act" such that

mandamus was appropriate. Although Mederi argued that the city was required to approve its HCA application because it fulfilled the city's requirements, the Court disagreed. The Court reasoned that neither the relevant statute, nor the city's regulations, required the city to enter into an HCA with every applicant that meets the city's conditions for operating a retail cannabis business in the community. Rather, the city's decision to enter into an HCA with a prospective retail establishment is highly discretionary, such that mandamus relief is not available.

As to Mederi's certiorari claim, the Court found that Mederi failed to sustain its heavy burden to establish that the city acted arbitrarily or capriciously in the decision-making process. The Court noted that the city thoroughly explained its basis in not selecting Mederi for the HCA in a memorandum to the mayor, reasoning that Mederi lacked sufficient capitalization and direct experience in the industry as compared to the other five applicants seeking to operate on Highland Avenue. Ultimately, the Court found that the city made a rational choice to forgo Mederi's application in favor of other prospective retail cannabis establishments to bolster the geographical diversity of retail establishments throughout the city, and that the city's acceptance of community impact fees and financial benefits did not make this decision unlawful.

Although the Court ruled in favor of the city, it nonetheless addressed some concerns with the statutory and regulatory framework for approval of retail cannabis licenses. The Court opined as to the potential illegality of cities requiring HCA partners to make payments in addition to a community impact fee, which creates an unfair advantage for better-funded applicants. The Court also noted how, in practice, the Commission's regulations may fall short of accomplishing its goal of making the cannabis industry more equitable, when municipalities, as the de facto gatekeepers for retail cannabis licenses, are not required to consider whether an entity seeking to enter into an HCA is an applicant who has been disproportionately harmed by cannabis prohibition.

While the Court's ruling answers many questions as to the important role that municipalities play in granting retail cannabis licenses and how difficult it is to successfully challenge those decisions, it also highlights many gaps in the law that require more clarity.

PUSHING THE BOUNDARIES OF EASEMENT IMPROVEMENTS

Koepp v. Simon, 100 Mass. App. Ct. 1104 (2021)

Summary: In *Koepp v. Simon*, the Massachusetts Appeals Court explored the outer limits of what improvements can be made by the owner of an easement. In a trespass action concerning an easement over a driveway of a residential property, the Court held that the alterations performed by defendants, who owned the easement, exceeded the scope of their easement rights and constituted trespass, and ordered defendants to replace or repair the easement property.

Discussion: The dispute concerned an easement over a driveway on plaintiffs' property, which serves as access to and from defendants' property. Over time, the driveway became uneven in spots, and cracks and potholes developed in the asphalt. In November 2014, after notifying plaintiffs that they planned to improve the driveway, defendants removed the asphalt and replaced it with two parallel raised concrete driving lanes. Notably, at various points near plaintiffs' garage,

the new driveway protruded several inches above the grade of the adjoining ground and that of the former driveway, which hindered plaintiffs from driving to and from their garage. After failed attempts by the parties to reach a solution that would enable plaintiffs to access their driveway, including adding gravel fill to even the surfaces, plaintiffs brought suit in the Superior Court.

The Superior Court concluded that the work done on the driveway was reasonable, except where the new driveway abuts plaintiffs' garage area. The judge ordered defendants to replace or repair the driveway in a way that restored plaintiffs' access to their garage. Defendants appealed the remedy imposed, arguing that the judge should have resolved the dispute simply by holding defendants responsible for maintaining the gravel fill, or that they replace the fill with cement grading, rather than requiring full repair or replacement of the driveway. The Appeals Court upheld the lower court's decision.

The Appeals Court reasoned that the judge lacked the power to order a remedy that would require plaintiffs to make changes to their property beyond the boundaries of the easement. The Court noted that the owner of the property benefitted by an easement has no right to make repairs to the easement such that the servient owner would be required to adapt the servient land and make changes to the servient property. Such a requirement would violate the servient owner's right to the uninterrupted enjoyment of the servient estate – a settled principle in property law. The Appeals Court's ruling serves as a reminder of the important rights possessed by landowners, even when their property is subject to an easement.

COURT TAKES NOVEL APPROACH TO PETITIONING ACTIVITY

Finkel v. Lovenberg & Assocs., P.C., 100 Mass. App. Ct. 1103 (2021)

Summary: In *Finkel v. Lovenberg & Assocs., P.C.*, the Massachusetts Appeals Court recognized the recording of trustee certificates as a petitioning activity that is protected by the Massachusetts anti-SLAPP statute. In a dispute over a residential condominium, the Court dismissed nearly all claims against defendants, reasoning that the recording of real estate documents giving rise to the dispute was protected by the statute, and thus immune from liability.

Discussion: The parties each own one unit in a three-unit condominium in Jamaica Plain. The condominium is managed by the Goldsmith Arboretum Condominium Trust ("Trust"). In 2009, the condominium's basement was flooded. Shortly after, a dispute arose between plaintiff and the company hired to conduct repairs, which eventually morphed into a dispute between the three condominium owners. As a result, plaintiff refused to pay his monthly condominium fees and assessments relating to the maintenance of common areas. In 2012, defendants executed and recorded trustee certificates in the Suffolk Registry of Deeds naming themselves as trustees of the Trust.

After a series of lawsuits centered on plaintiff's interference with the operation and maintenance of the condominium, plaintiff was ordered to pay the assessed common expenses and charges. Thereafter, plaintiff brought a lawsuit against defendants (and the law firm that represented them in the prior action) alleging slander of title, tortious interference, willful malfeasance (all related to the recording of the trustee certificates), breach of contract, and unjust enrichment. Defendants

successfully obtained dismissal of all claims against them pursuant to M.G.L. c. 231 s. 59H, commonly referred to as the anti-SLAPP statute. Plaintiff appealed.

The anti-SLAPP statute prohibits liability for a party's "petitioning activities." The right to petition is broadly defined as "any written or oral statement made before or submitted to a legislative, executive, or judicial body ...; [or] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body[.]" Accordingly, defendants successfully moved to dismiss plaintiff's lawsuit, arguing that plaintiff's claims were barred by the anti-SLAPP statute because they were based on defendants' petitioning activities of recording trustee certificates and filing the initial lawsuit against plaintiff. The Appeals Court upheld the dismissal of plaintiff's claims of slander, breach of contract, and tortious interference. In relevant part, the Court reasoned that the recording of trust certificates "constitutes the making of written statements submitted to an executive body, and, consequently, constitutes petitioning activity." However, the Appeals Court reversed the dismissal of plaintiff's breach of contract and unjust enrichment claims, reasoning that the failure by defendants to compensate plaintiff for the costs of repair to the condominium and the ensuing litigation with the repair company were premised on private conduct, and thus not protected by the anti-SLAPP statute.

The *Finkel* decision is instructive because of the novel approach the Court took in determining what constitutes petitioning activity, and its inclusion of actions commonly taken in the real estate context.

DESPITE COVID-19, LEGAL PRINCIPLES STILL STAND

Martorella v. Rapp, 100 Mass. App. Ct. 1104 (2021)

Summary: In *Martorella v. Rapp*, the Massachusetts Appeals Court considered the defense of impossibility of performance in a breach of contract action in the context of the COVID-19 pandemic. The Court held that the general rule of contract that a buyer of real property assumes the risk of failing to obtain financing was not altered by COVID, where the inability to perform by the buyer was temporary and plaintiff failed to contract for a financing contingency clause. The Land Court's previous decision in this case was reported in the July 2020 edition of this newsletter.

Discussion: The case concerns a house on Nantucket owned by plaintiff's wife, Laura Martorella, and defendants Jeffrey Stark and Rachel Donaldson. In 2017, defendants petitioned for partition of the property. In November 2019, following a failed attempt to sell the property through a broker, the judge ordered the property be sold at public auction. At the auction in February 2020, the plaintiff, Christopher Martorella, made the winning bid for $1.8 million and signed a purchase and sale agreement ("P&S") on the same day. The P&S contained no contingencies affecting plaintiff's obligation to perform, except for Mr. Rapp's inability to deliver marketable title. The P&S did not contain a financing contingency clause. The closing was scheduled for March 16, 2020.

Shortly after the parties executed the P&S, the spread of COVID-19 led to a global crisis and the Governor of Massachusetts declared a state of emergency. Unbeknownst to Mr. Rapp, plaintiff intended to finance the purchase price but he did not apply for a mortgage himself. Instead, Mrs. Martorella and the plaintiff's business partner applied for a mortgage. On March 4, 2020, plaintiff

requested a continuance of the closing date because of difficulties in obtaining financing, to which Mr. Rapp agreed, and the closing was extended to March 23, 2020. The closing was then postponed again to April 6, 2020. On March 13, 2020, Mrs. Martorella obtained a mortgage preapproval letter. However, on March 26, 2020, Mrs. Martorella became seriously ill with COVID-19 and required hospitalization. The complications from her illness rendered her incapacitated and on a ventilator for several weeks.

On March 30, 2020, Mr. Rapp contacted plaintiff and notified him that he was ready and willing to close on April 6. After failing to agree upon an additional extension to the closing date, the April 6 closing date came and went. Shortly after, Mr. Martorella filed suit seeking a declaration that the P&S was unenforceable because the pandemic rendered it impracticable to secure financing by April 6, 2020. At the time, Mrs. Martorella was still hospitalized. The lower court ruled against plaintiff, holding that he assumed the risk that he would be unable to obtain financing when he signed a P&S with no financing contingency and that Mrs. Martorella's illness could not form the basis of an impracticability defense because she was not a party to the P&S. Plaintiff appealed.

The Appeals Court affirmed, holding that plaintiff's allegations do not support a finding that his breach of the P&S was excused under the doctrine of impossibility. The Court reasoned that Mrs. Martorella's illness and hospitalization from COVID-19, although not foreseeable, could not form the basis for an impracticability defense for two reasons. First, to the extent that plaintiff was prevented from appearing for the closing, his performance was only excused during the time that he was required to quarantine due to his exposure to COVID-19, which had expired by the time that plaintiff sought to render the P&S unenforceable. Second, the plaintiff's ability to obtain financing was not a condition precedent to his obligation to perform under the contract because plaintiff failed to include a financing contingency clause in the contract and gave no indication to the seller that he was dependent on his wife to obtain financing. Accordingly, plaintiff was not entitled to rely on the impossibility defense because he was aware of the risk that he would be unable to obtain financing, and proceeded in the face of that risk without negotiating contract terms that might have protected against the risk.

In essence, the Court did not agree that plaintiff was prevented from performing because of COVID-19, and it concluded that the real question before the Court was a simple contract question: whether a breaching buyer assumes the risk of not obtaining financing when he or she fails to contract for protections against that risk in the P&S.

If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our Real Estate Litigation Group.