

T&E Litigation Newsletter- 5/25/16

May 25, 2016

In the past month, there were three decisions of note.

First, in the case of *Caffrey v. U.S. Trust*, Case No. 15-P-920, 2016 Mass. App. Unpub. LEXIS 454 (Apr. 27, 2016), the Appeals Court was confronted with the question of whether an award of legal fees to a lawyer for an estate comes with prejudgment interest. The Court's answer was no.

Andrew A. Caffrey served as counsel for an estate and filed a petition seeking legal fees pursuant to G.L. c. 215, § 39A. His petition was granted, but not in the amount he was seeking. Unhappy with this result, he appealed, arguing among other things that the probate judge erred by failing to tack prejudgment interest onto the fees award. In support of this argument, Caffrey cited G.L. c. 231, § 6C, which allows for prejudgment interest in actions based on contract. The Court rejected this argument: "In this instance, Caffrey filed his suit under G.L. c. 215, § 39A, which governs counsel fees in probate court. Because neither § 39A itself, nor any case law decided under the statute provides for prejudgment interest on an award of attorney's fees, we decline to interpret § 39A as requiring such interest here. Furthermore, G.L. c. 231, § 6C, affords interest in actions based on *contractual* obligations; this is not a contract action. In any event, even if the action were based on a valid contract, the probate court lacks jurisdiction over such claims. See G.L. c. 215, §§ 2-3. Therefore, Caffrey is not entitled to any prejudgment interest on his award of attorney's fees."

Second, in *Smith v. Cohen*, Civil Action No. 16-10369-LTS, 2016 U.S. Dist. LEXIS 61193 (D. Mass. May 9, 2016), the U.S. District Court for the District of Massachusetts was confronted with the question of whether an attorney-in-fact who is not a member of the bar has authority to file a lawsuit pro se and practice law on behalf of his principal. Here again, the Court's answer was no. The Massachusetts statute that permitted a person to prosecute a lawsuit if authorized by the party for whom he acted (G.L. c. 221, s. 49) was repealed in 1935—more than 70 years ago. Moreover, the power of attorney by which the attorney-in-fact in this case was attempting to prosecute the lawsuit on behalf of his principal gave him authority over health-care decisions only.

The third decision, *De Prins v. Michaelaes*, Civil Action No. 15-40093-TSH, 2016 U.S. Dist. LEXIS 65024 (D. Mass. May 17, 2016), is more complicated.

In 2008, Donald Belanger executed a Massachusetts irrevocable trust, and four months later, in March 2009, he murdered a couple in Arizona and then committed suicide. The couple's son and only surviving heir filed a wrongful death action in Arizona against the Massachusetts attorney, Michael Michaelaes, who serves as the executor of Belanger's will and the trustee of the trust. That action was dismissed in July 2015 pursuant to a consent judgment against the estate in the amount of \$750,000. This consent judgment was the product of a stipulation entered in open court pursuant to which collection of the judgment was to be paid from the trust exclusively, and that the action to enforce the judgment, which had been filed in Arizona in November 2014, would be

transferred to Massachusetts. After the enforcement action was transferred to Massachusetts, the plaintiff amended his complaint against Michaelles, as executor and trustee, claiming breach of fiduciary duty and seeking to reach and apply the assets of the trust in satisfaction of the consent judgment. Michaelles moved to dismiss.

The Court dismissed the claim for breach of fiduciary duty with prejudice because Michaelles as trustee does not owe any fiduciary duties to the plaintiff, who is nothing more than a creditor of the estate, but not the trust. "Here, as he is not a beneficiary of the Trust, Plaintiff has not shown, by any plausible facts in the complaint, that a fiduciary relationship existed."

As for the reach and apply claim, the Court explained that because Michaelles agreed that the amount of the consent judgment against the estate would be paid from the trust, the indebtedness requirement is satisfied, but that the plaintiff "faces a greater challenge ... when attempting to satisfy the condition that the Trust can be reached." In order to try to satisfy this condition, the plaintiff argued that Belanger had fraudulently conveyed his assets to the trust before he committed the murders, preparing to evade the significant debt that would follow. The problem with this argument, however, according to the Court, is that the plaintiff failed to state a claim for fraud or plead fraud with the specificity required under Rule 9(b). For this reason, the Court dismissed the reach and apply claim without prejudice, allowing the plaintiff the opportunity to try to cure the deficiencies in the complaint.

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