Appellate Notes

PULLMAN & COMLEY

A publication of Pullman & Comley, LLC

Week of July 27

Welcome to our Supreme and Appellate Court summaries webpage. On this page, I provide abbreviated summaries of decisions from the Connecticut appellate courts which highlight important issues and developments in Connecticut law, and provide practical practice pointers to litigants. I have been summarizing these court decisions internally for our firm for more than 10 years, and providing relevant highlights to my municipal and insurance practice clients for almost as long. It was suggested that a wider audience might appreciate brief summaries of recent rulings that condense often long and confusing decisions down to their basic elements. These summaries are limited to the civil litigation decisions. I may from time to time add commentary, and may even criticize a decision's reasoning. Such commentary is solely my own personal opinion.. Pullman & Comley's Appellate Practice Group of which I am a member includes experienced appellate advocates in almost every area of the law. Should you have a need to consult about a potential appeal, please email me at emccreery@pullcom.com I hope the reader finds these summaries helpful. – Edward P. McCreery

Posted July 30, 2015

Appellate Court Advance Release Opinions:

• AC36506 - Sidorova v. East Lyme Board of Education

Due to budget cuts, the Board of Education laid off the plaintiff who was a tenured French teacher. She sued for breach of covenant of good faith and emotional distress. The Trial Court granted summary judgment to the School Board, and the plaintiff appealed. The Board had argued that the plaintiff lacked standing to pursue a breach of the collective bargaining agreement. The Appellate Court agreed, repeating established case law that an employee ordinarily does not have standing to pursue claims under a collective bargaining agreement unless the agreement provides for such standing, or, the employee alleges that the union has breached its duty of fair representation.

There is no blanket exception to that Rule for tenured teachers under the Teacher Tenure Act, C.G.S. §10-151. There are a few case-made exceptions such as for allowance of an administrative appeal contemplated by C.G.S. §10-151, and an exception has been recognized when the school board is accused of violating the constitutional rights of the teacher. Neither exception applies to the facts of this case.

Week of July 27

The Trial Court also properly granted summary judgment to the Board on the emotional distress claims. How to discharge an employee is a discretionary function of a municipal agency, and therefore, government immunity applies. Government officials must be free to exercise their judgment and discretion in the performance of their official functions without fear of being second-guessed or having retaliatory lawsuits filed against them.

The teacher replied that she was only suing over the ministerial manner of how she was told she was fired. The Court replied that unless a statute or regulation spells out the specific manner in which the notice of the discretionary function is to be communicated, even the manner of communicating the discretionary decision is subject to municipal immunity. Here, there was no mandated format on how to notify a teacher that her employment was being terminated, and therefore, the superintendent's manner of communicating the termination was also a discretionary act to which municipal immunity attached.

[One interesting footnote discussed whether or not the Collective Bargaining Agreement could have converted the manner of communicating the Notice of Termination from a discretionary to a ministerial function. The Court decided not to reach that issue.]

• AC35834 - Southhaven Associates, LLC v. McMerlin, LLC

The landlord sued the tenant and the guarantor of the lease for back rent. The defendant filed special defenses of failure to mitigate damages. The decision notes that Connecticut law does not require a commercial landlord to mitigate their damages until such time as it takes steps that indicate an intent to terminate the lease, such as a notice to quit or an action to collect back rent. [Hmmm, I thought you could sue for back rent and still leave the tenant in possession. I'll have to look at that again.] Even when the duty to mitigate is triggered, it only requires the landlord to make reasonable efforts to minimize its damages. Here, the plaintiff/landlord had every right to reject a proposed replacement tenant who had refused to personally guarantee the lease. The landlord could also reject a replacement tenant when it would not agree to the terms of the existing lease. The landlord's efforts to relet using a leasing agent with a standard marketing package, evidenced the landlord's reasonable efforts to mitigate damages. Therefore, the Trial Court's award of damages in excess of $400,000 was upheld.

• AC36283 - Mazier v. Signature Pools, Inc.

A pool company appealed a jury verdict in favor of the plaintiff homeowner when they did not locate an in-ground pool according to a plot plan, and it had to be moved. The contract contained exculpatory language, stating that the homeowners acknowledged that they had directed the location of the pool, and would hold harmless and indemnify the pool company. The defendant claimed that the Court's jury instruction on this exculpatory clause was incorrect and misleading. The Trial Court had instructed the jury that the first sentence that says the homeowners acknowledge they directed the location of the pool was ambiguous, and could refer to either errors caused by the property owner, the contractor, both, or by none of them. The

Week of July 27

instruction went on to tell the jury that if they cannot figure it out, then they could charge the language against the pool company that drafted it.

The Appellate Court agreed that was acceptable jury instruction, especially in light of the conflicting testimony where the homeowner claimed they had given a detailed plot plan to the pool company, and the pool company claimed they had only been given a napkin sketch to show where the pool was to go, and that the homeowner later approved the stake location.

Next, the Trial Court instructed the jury to disregard the hold harmless provision of the contract. It provided the homeowner would hold harmless the pool company by reason of trespass and/or damage by the pool company, resulting from the homeowner's designation of the pool location. The Trial Court claimed it was inapplicable to this case. The Appellate Court agreed, noting that the language seemed to envision indemnification only for claims made against the pool company by third parties by virtue of the siting of the pool. The decision seems to say that hold harmless and indemnification clauses envision claims by third parties and are inappropriate to be used to address direct claims between the contracting parties.

Next, the Appellate Court declined to bind the Trial Judge to the earlier holdings in the case by a PJR Judge. The Court noted that the law of the case doctrine did not bind a subsequent judge to the earlier decisions in the same case. [Note: What I think was missed here is that as a general rule, any findings in a PJR proceeding are not binding upon a subsequent Trial Court because of the lesser burden of proof.]

Next, the Appellate Court held it did not require expert testimony to establish the pool company had not installed the pool consistent with a professionally prepared plot plan.

- AC35870 - Stuart v. Blumenthal
- AC35786 - Channing Real Estate, LLC v. Gates

While the plaintiff and the defendants negotiated to form a joint venture to develop a shopping center on property owned by an LLC controlled by the defendant, the defendant would, from time to time, ask the plaintiff for loans. The plaintiff advanced the loans in return for a signed promissory note on six occasions. On each occasion, the note would be signed in Connecticut and mailed to the plaintiff at its New York office, who would thereupon wire the funds to the account of the LLC. Loan payments were mailed to NY. Over time, the loans added up to over $280,000. Despite never having finalized the joint venture agreement or drafted an operating agreement, the plaintiff then requested the defendants to acknowledge they had purchased a one-half interest in the LLC and would receive 50 percent of the profits. The defendants dutifully signed the document. When the defendants defaulted on the notes, the plaintiff filed a collection action. The defendant filed a series of special defenses and counterclaims, including CUTPA.

Week of July 27

The Trial Court found in favor of the defendant on the claims of promissory estoppel, negligent misrepresentation and CUTPA and awarded the defendant $25,000 in attorney's fees. The Trial Court had found that the promissory notes were not integrated documents, and therefore, parol evidence would be allowed to show that the funds advanced by the plaintiff to the defendant were really deposits on the purchase of the LLC interest, and not true loans to be repaid.

The Appellate Court reversed, first holding that it had to review which law to apply, New York or Connecticut? Lacking a choice of law provision in the promissory notes, the Court concluded that New York law applies because that was where the funds were to be repaid. (See Section 195, 1 Restatement 2d. Conflicts of Laws). In any event, the Court noted very little discrepancy between New York and Connecticut's law on the issue of parol evidence.

Turning to the document, the Appellate Court disagreed with the Trial Court that the promissory notes were not integrated documents simply because they lacked an integration clause. Nor was it appropriate for the Trial Court to consider the LLC negotiations as part of the note transactions to ascertain if they were integrated. Only the promissory notes should have been considered. The notes stated the amount to be borrowed, the rate of interest and the terms of repayment and events of default. Therefore, the Trial Court should not have allowed parol evidence to suggest the notes were a front for the purchase of the LLC interest. In fact, negotiations to finalize the purchase of an interest in the LLC failed to be finalized despite extensive negotiations where both sides were represented by counsel. Each of the notes also contained a clause that they could not be changed or modified or any provision waived without a writing signed by the parties. There were no written collateral agreements that modified the terms of the notes, which were clear and unambiguous.

On Remand, the Trial Court was directed to consider each note an unambiguous, separate, integrated agreement, and that the only claims pled by the defendant that should be considered were mistake, fraud and CUTPA, with only the CUTPA claim applying Connecticut law because that is where the alleged harm occurred. In a footnote, the Court noted that it did not have to reach the issue of whether CUTPA was barred by this being solely an intra-business dispute. Finally, the Appellate Court stated that the retrial would have to take place in front of a different judge, per C.G.S. § 51-183(c) when a new trial is ordered.

• AC36725 - Zappola v. Zappola

Defendant husband appealed Trial Court (Munro, J.) holding of the defendant in contempt of a New York dissolution decree and financial orders. The Appellate Court, however, refused to consider the appeal because the attorney for the appellant filed a brief that lacked any real argument or analysis of the alleged errors of the Trial Court and did not review applicable law. The Appellate Court noted that it has consistently held that analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief it properly.

PULLMAN & COMLEY

Week of July 27

- AC36272 - Hospital of Central Connecticut v. Neurosurgical Associates, P.C.

Plaintiff hospital entered into a contract with a physician's group to provide neurological coverage for the ER Department for two out of three days of every week. The contract called for the hospital to pay $9,000 per month for this service. As part of the contract, the practice group arranged for its physicians to all sign up for full privileges with the hospital, whereby they agreed to abide by the hospital's bylaws. Generally, physicians with full privileges were expected to provide on-call coverage for their patients. The hospital eventually terminated the contract, but continued to identify the defendant physicians as being on-call for emergencies and assigned them regular shifts. The hospital also continued to make the monthly stipend payment to the practice group. The hospital then notified the physicians that it expected them to provide on-call coverage without compensation. The defendant physicians objected, claiming that other hospitals paid for on-call work. After that meeting, the hospital continued to schedule the defendant physicians for on-call work, but also continued to make the payments. After almost a year of payments, the hospital notified the physicians that it had been making the monthly payments in error and demanded return of $66,000. The hospital claimed that the full privileges enjoyed by the physicians included an expectation that they would provide on-call ER coverage without compensation. The hospital sued the physicians for unjust enrichment. The Trial Court ruled in favor of the physicians, and the hospital appealed.

The Appellate Court upheld the Trial Court's conclusions that the physicians were not unjustly enriched. This is not a case of simple overpayments by mistake for which the plaintiff received no benefit. The Trial Court, in fact, found that the payments were part of the continuing arrangement between the parties. The Trial Court found that the defendants were justified in keeping the funds as they continued to provide the same on-call service they had previously. The fact that the hospital continued to schedule the physicians for specific on call timeframes refuted their claim that the services of the physician were no longer necessary. There was also no express requirement in the bylaws of the hospital mandating that all physicians with full privileges had to provide on-call coverage "without compensation." Rather, the bylaws required that they participate in staffing the emergency service area on a rotational basis without any mention of the issue of compensation

- AC36590 - Astoria Federal Mortgage Corp. v. Genesis Holdings, LLC;
  AC36590 Concurrence - Astoria Federal Mortgage Corp. v. Genesis Holdings, LLC

Plaintiff commenced a foreclosure of a ~$300,000 promissory note, and a defendant mechanic's lien holder asserted a defense of priority. The debtor then filed a Chapter 11 bankruptcy petition, which automatically stayed the foreclosure. The plaintiff obtained relief from the automatic stay for the limited purpose of determining the extent, validity and priority of the mechanic's lien, which also had a face amount of ~ $300,000. Plaintiff then moved for summary judgment, claiming that the defendant's mechanic's lien had expired, when it had not commenced an action to foreclose the lien within thirty days of the Bankruptcy Court granting limited stay relief, pursuant to 11 U.S.C. § 108(c). The mechanic's lien holder objected, claiming that nothing in the Bankruptcy Court's Order terminated the stay so as to allow it to commence its own foreclosure of its lien.

Week of July 27

The Trial Court invited the mechanic's lien holder's counsel to file a motion for clarification with the Bankruptcy Court to resolve the dispute, and gave her two weeks to do so. When a motion for clarification was not filed, the Trial Court issued a memorandum of decision, granting summary judgment to the lender on the grounds that the mechanic's lien had expired. On appeal, this decision noted that the terms of an order modifying an automatic stay must be strictly construed, because a stay otherwise freezes in place all proceedings, and the continuation of any proceeding can only derive its legitimacy from a Bankruptcy Court order, which is entitled to allow the proceedings to advance in dribs and drabs. Here, the order was clear and unambiguous that only a determination of the extent, validity and priority of the lien was to be considered by the State Court. No party was granted authority to proceed with foreclosure of their claim. Summary judgment was reversed.

Judge Alvord concurred in part, and dissented in part. She agreed that summary judgment should not have been granted to the lender, but felt that Judge Shiff's stay order was ambiguous and the parties should have been directed to go back to the Bankruptcy Court to seek clarification.

- AC36163 - Ernesto P. v. Commissioner of Correction
- AC36548 - Palkimas v. Fernandez

Homeowner hired contractor to undertake some repairs to its house. Apparently, a worker of the contractor used a disconnected toilet that flooded various rooms of the house. The contractor's insurance carrier, in turn, hired two companies to remediate the flood damage. Plaintiff claimed that the insurance companies directed those contractors to turn off the heat to the house while repairs dragged on for over a year, which caused additional damage as the cold temps caused the original horse hair plaster to fail. Homeowner sued the insurance company directly for negligence. The Trial Court found that the defendant's insurance company was not in control of the independent contractors and that the plaintiff failed to establish proximate cause. The only issue on appeal was proximate cause, which is ordinarily a question of fact. Each side presented expert testimony. The plaintiff's expert conceded on cross-examination that he had not taken notes, did not measure or observed cracks, did not take moisture readings, did not investigate the effect of cold temperatures on antique plaster walls, and eventually conceded he was not a "plaster expert," nor had he ever worked with or applied horsehair plaster. Rather, he claimed he was an expert on basic engineering principles of freezing, on solid and liquid materials and concluded that the "key ways" the plaster failed was due to a combination of freezing and humidity due to a lack of heat in the house.

The defendant's expert, on the other hand, was an expert in the restoration and protection of historic buildings, with direct experience in the application and restoration of horsehair plaster. He concluded that freezing temperatures do not affect horsehair plaster, nor does moisture. The defendant's expert testified it would take significant amounts of water to cause the wood lathing to swell up to, in turn, break the keyways. The flooded areas in this house were isolated and insufficient to cause the wood lathing to swell up. The Trial Court was therefore entitled to rely upon the defendant's expert, and find that testimony more credible than

Week of July 27

the plaintiff's expert in ruling for the defendant. Appeal dismissed.

[If anybody doesn't know what a ***keyway*** is, ask me, as I have personal experience with horsehair plaster walls from a 200 year old house I took down to be my first residence.]

The facts and holdings of any case may be redacted, paraphrased or condensed for ease of reading. No summary can be an exact rendering of any decision, however, so interested readers are referred to the full decisions. The docket number of each case is a hyperlink to the Connecticut Judicial Department online slip opinion.
