MASSACHUSETTS LAWYERS WEEKLY

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Commercial

Equipment rental

Where a defendant lessee of equipment has not paid the rental charge, the plaintiff lessor is entitled to summary judgment on a claim asserting breach of the lease, as the defendant has not presented any evidence that the plaintiff fraudulently induced the defendant's agents to enter into the agreement.

"Defendants, in their motion opposing summary judgment state that there are issues of material fact as to whether [defendant] Village Realty [Inc.] knew that it was entering into a contract with [plaintiff] Wells Fargo. Even construing the facts in the light most favorable to the Defense, that [equipment rental agreement] #2 and the Delivery and Acceptance Certificate were signed under fraudulent pretenses, this does not excuse Defendants from their obligations under that contract...On his own statement of the facts, Defendant learned of his contract with Wells Fargo on January 19, 2004. He did nothing to try to escape from the contract after his conversation with the Wells Fargo agent and only seeks to have the equipment installed, as per ERA #1 and #2...Even assuming fraud in the initiation of ERA #2 and Wells Fargo's liability for any fraud, Defendant did not exercise its right to void the contract and is no barred from so doing.

"The Defendant has presented no evidence that would raise a question of material fact as to Plaintiff Wells Fargo's vicarious liability for any fraud potentially perpetrated by Norvergence ... The only support for Wells Fargo's alleged vicarious liability for any failures of Norvergence to perform its contract obligations with Defendant is the allegation that Defendant spoke with a Wells Fargo agent named 'Bill' who told Defendant that Wells Fargo would 'light a fire under [Norvergence's] feet.' Even viewed in the light most favorable to the Defendant, this is insufficient evidence upon which to establish a relationship of vicarious liability because there is no indication of 'Bill"s authority to speak for Wells Fargo nor his authority to exert some form of control over the actions of Norvergence.

"The failure of the vicarious liability claim also resolves Defendant's counter-claims for various violations of M.G.L. 93A 9 and 11, which are based on the allegation of Wells Fargo's vicarious liability for Norvergence's actions.

"For the above reasons, the motions for summary judgments on Counts 1 and 2 and Counterclaims 1, 2, 3, and 4 are granted."

Wells Fargo Financial Leasing, Inc. v. Village Really, Inc., et al. (Lawyers Weekly No. 16-008-06) (3pages) (Coven, J.) (Quincy District Court) David S. Katz for the plaintiff; John Greene for the defendants (Civil Action No. 200456CV458) (April 17, 2006)

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BOLAN MEDIA COMPANY

THIS WEEK'S DECISIONS

Contract

Purchase of electrical cable

Where the plaintiff supplied electrical cable to the defendant pursuant to a contract, the plaintiff is entitled to payment of $15,357,70.

Discussion

The Court finds the following facts, based on the credible evidence presented at trial: Needham Electrical Supply Corp. d/b/a NESCO...is a commercial supplier of electrical cable and other electrical devices. Interconnect Computer Cabling Services, Inc...is a contractor in the commercial technology field. Interconnect installs a variety of data, video, and security systems in both commercial and public buildings. Interconnect does a substantial amount of work on school building projects.

On March 2, 2004, Interconnect entered into an agreement with NESCO, Terms and Conditions of Sale were executed by Michelle Tilton, the treasurer of Interconnect and the wife of the President of Interconnect, Phillip Tilton. This agreement had a provision that governed substitution of like items, which clearly indicated that unless otherwise specified by purchaser in writing, NESCO will not substitute similar items. William MacDonald was a Project Manager for NESCO. He was NESCO's representative in most of its dealings with Interconnect. Trevor Jollin was the Procurement Manager for Interconnect. MacDonald and Jollin would speak to each other on almost a daily basis. Jollin ordered Comtran cable from NESCO, and estimated that 90% of the cable that Interconnect ordered from NESCO was Comtran. In 2005, MacDonald had a discussion with Jollin regarding Genesis cable, NESCO decided that it would be stocking Genesis, although Comtran would still be available for clients. If Comtran was ordered, there would be a one day wait in getting the Comtran, while Genesis would be on the shelf. MacDonald testified that he was directed by his superior to sell the cable that we (NESCO) had in stock, which was Genesis. After discussing the Genesis cable, Jollin agreed to have NESCO supply Genesis cable for some of Interconnect's ongoing jobs. Jollin believed that the Genesis cable was made by a company related to Comtran, although he admitted that any misunderstanding of the conversation between Jollin and MacDonald regarding the Genesis cable was attributable to Jollin. It is clear that Jollin had the ability to order and bind Interconnect in his position and based on his past dealings with NESCO.

When NESCO delivered the Genesis cable to Interconnect. it came in clearly labeled Genesis boxes. On the invoices sent by NESCO, it indicated that Comtran was being supplied to Interconnect. NESCO double-shipped an order of Genesis, resulting in twice as much cable as was necessary being sent to a job site. The excess cable was brought back to Interconnect to be picked up by NESCO. Michelle Tilton saw the Genesis boxes and immediately questioned why Genesis was being used. Interconnect had concerns about warranties, as in some cases the Genesis cable had a shorter warranty period than Comtran cable.

Michelle Tilton testified that Trevor Jollin would purchase the items necessary for a job, and that she would eventually get the packing slip. She would match the packing slip with the purchase orders. She was the office manger, and she would process all receivables/payables. Ms. Tilton was upset when she discovered that Genesis cable was being used, and she tried on a number of occasions to get information about the warranties that Genesis had as related to the systems being installed by Interconnect. NESCO was slow in responding to requests from Interconnect regarding the warranty information.

The Court finds that the Plaintiff has proven by a preponderance of the evidence that there was an agreement between the parties supported by valid consideration. The Plaintiff performed by providing the cable, which Mr. Jollin agreed to accept. The Defendant used the cable and subsequently did not tender payment. The agreement to use the Genesis was not a substitution made unilaterally by the Plaintiff, but rather a decision by Interconnect, at the suggestion of NESCO, to use Genesis cable. Comtran was still available and could still be ordered from NESCO. Interconnect chose to use the Genesis. While NESCO had a financial incentive to sell the Genesis cable, it was still Interconnect's decision to use the Genesis. Jollin chose to order and accept the Genesis cable, without consulting the Tiltons. In his position, Jollin had the authority to act in this manner and bind Interconnect.

Interconnect owes monies to the Plaintiff for the product that was provided. There was no evidence that NESCO was a party to any bid specifications for any jobs being performed by Interconnect. It was Interconnect's decision to use the Genesis cable, at NESCO's suggestion. The Court does not find violation of the Terms and Conditions, and if a violation did occur, it was de minimis. The Plaintiff is entitled to recover for the fair and reasonable value of the material and labor supplied to the Defendant.

Accordingly, the Court enters judgement for the Plaintiff in the amount of $15,357.70.

Needham Electrical Supply Corporation v. Interconnect Computer Cabling Systems, Inc. (Lawyers Weekly No, 16-014-09) (3 pages) (Canavan, J.) ***David S. Katz*** *for the plaintiff; Leo S. McNamara for the defendant (Dedham District Court) (Docket No. 0654-CV-1125) (July 27, 2009).*

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BOLAN MEDIA COMPANY

THIS WEEK'S DECISIONS

Civil practice

Fraud – Relief from judgment

Where a plaintiff was awarded summary judgment in an action alleging a default on a finance lease, a motion by the defendants for relief from that judgment must be denied, as they have not shown that the judgment was obtained by fraud.

Wells Fargo Financial Leasing v. Village Realty, Inc., et al. (Lawyers Weekly No. 16-021-08) (2 pages) (Coven, J.) David S. Katz for the plaintiff; Jonathan Braverman, of Baker, Braverman and Barbadoro for the defendant (Quincy District Court) (Docket No. 04 CV 2458) (Aug. 12, 2008).

MASSACHUSETTS LAWYERS WEEKLY

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ARBITRATION
GAIL GUAY vs. STARBUCKS COFFEE COMPANY

Statement of the Case

This arbitration arose from a May 30, 1998 incident when the claimant sustained a painful second-degree bum in the area of her left inside ankle and upon her lower left front skin. The burns clearly resulted from a very brief exposure of but a few seconds duration at the injury site by the spillage of hot coffee served at a temperature of between 175 to 185 degrees Fahrenheit. The product had been sold by the respondent corporation a few moments earlier and delivered over in a sturdy paper container to the claimant.

The Facts and Rulings

For whatever reasons, this matter was extremely difficult factually. The law in Massachusetts with respect to the Uniform Commercial Code is that in determining liability for a breach of warranty of merchantability, G.L. 106, Section 2-314(2)(c) the focus is to be placed upon what are the reasonable expectations for the purchaser of a consummate. Of course, the customer is to expect heat in the coffee and coffee is not defective simply because it is hot or because it is very hot, or even if it is too hot to immediately ingest it. Rather the issue whether the product as it is sold in its container is a product which carries a foreseeable risk of injury; i.e. if the harm causing characteristic would not have been expected or anticipated by the ordinary reasonable consumer.

With reference to the issue of negligence, the law in Massachusetts permits an inference to be drawn by the fact finder if the incident is of a kind that does not ordinarily occur unless a respondent was negligent and where other reasonable causes including activities of the petitioner are, under all the circumstances, not the proximate cause. Also, in Massachusetts, by statute, a plaintiff is presumed to be in the exercise of due care and the burden is upon a defendant to establish otherwise.

I am satisfied from the evidence that Starbucks brewed its coffee pursuant to an accepted industry wide standard that coffee be brewed in water that has been brought to 195 to 205 degrees Fahrenheit and thereafter held it for sale to its customers (and this claimant) at a temperature of approximately 180 degrees.

From the evidence the undersigned has concluded that the coffee container has a printed warning that the contents are hot but the evidence does not support that the cup as delivered contained an addition warning wrapper or that any tray or like carrier was offered or available. However, the issue of warning suitability is not the determining factor in this case. What would any additional warning accomplish? Perhaps one asserting this coffee was unusually hot? Perhaps a statement that coffee served at 175 to 185 degrees is hot enough to cause a second-degree burn upon contact. Perhaps if a paper carrying tray and additional wrapper had been used, that would have been sufficient. The evidence however makes plain that this claimant was aware the product was very hot.

I am further satisfied that the evidence supports the conclusion of the undersigned that these two burns, one the size of a half dollar, and the other the size of a dime, resulted in painful second degree blistering in just a few seconds and caused residual scarring.

The undersigned did not find the testimony of the petitioner in regard to the injury sustained sufficient to establish by a fair preponderance of the evidence, the duration and severity of discomfort claimed. Lastly, I conclude that the claimant was at least 75% negligent.

AWARD

After three days of hearing and after consideration of all of the evidence, I award judgement to the defendant Starbucks Coffee Company in this action.

Respectfully Submitted
Hon. John T. Ronan
Ronan Arbitration Services

ATTORNEY FOR THE PLAINTIFF GAIL GUAY-
BRITTANY SMITH

ATTORNEY FOR THE DEFENDANT-
STARBUCKS COFFEE COMPANY
DAVID S. KATZ
KATZ LAW GROUP, PC.

MASSACHUSETTS LAWYERS WEEKLY

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MCAD-SPRINGFIELD, MASSACHUSETTS DIVISION

KOLENE MANSDOERFER V. SPENCER GIFTS, LLC, 02SEM03008
FINDINGS BY THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Facts-Summary

The complainant Kolene Mansdoerfer was hired by Spencer as an associate manager in November of 1999. After serving as an associate manager for approximately one year, Mansdoerfer was promoted to the position of store manager in November 2001. During her tenure as an assistant store manager, Mansdoerfer became well acquainted with Spencer Gifts' loss prevention policies, particularly as it pertained to customer theft and shrinkage issues. She was also aware of the company's anti-fraternization policies.

Shortly after she started as a manager, Mansdoerfer hired an individual named Charles Fuller with whom she had a platonic relationship previously. In January of 2002, in direct violation of Spencer's anti-fraternization policy, Mansdoerfer became sexually involved with Fuller who was under her supervision at Spencer at the time. Again, in violation of Spencer's anti-fraternization policy, Mansdoefer did not communicate any information to Spencer relating to her relationship with Fuller. In late February, 2002 Mansdoerfer realized that she was pregnant with Fuller's child as a result of the January interlude.

Beginning in April of 2002, there were several employee complaints filed against Mansdoerfer with Spencer management. On May 8, 2002, Spencer management,including Director of Loss Prevention Wendy Cook, visited with Mansdoerfer regarding the issues raised by several employees relating to improper use of employee discounts by Mansdoerfer as well as time clock violations. In that meeting, Mansdoerfer informed management that she was in violation of the policies and entered into an agreement to repay Spencer for the unauthorized employee discounts. Her admissions were memorialized in a written statement to Spencer management on the day of the meeting. Mansdoefer was suspended pending a full investigation by Spencer and was later terminated from her employment on May 16, 2002.

Issues Investigated

On August 29, 2002, Complainant, a pregnant female, filed a complaint with this Commission charging that Respondent subjected her to unlawful discrimination by terminating her because other status as a pregnant female, in violation of M.G.L. Chapter 151B, Section 4, paragraph I and Title VII of the 1964 Civil Rights Act, as amended.

Recommendation

The evidence presented does not support the allegations made by Complainant that she was subjected to unlawful discrimination by being terminated based on her being a pregnant female. The evidence submitted corroborates Respondent's contention that Complainant was terminated for performance related reasons. Respondent contends that they received complaints from employees regarding Complainant's conduct and that she violated several company policies that she was aware were prohibited as the manager of the store.

Complainant has failed to produce sufficient evidence of pretext.

Therefore, there is insufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the Respondent committed an unlawful practice.

Attorney for the Respondent, Spencer Gifts, LLC-David S. Katz, Katz Law Group, Westborough, Massachusetts.

Attorney for the Complainant, Kolene Mansdoerfer- William E. Martin, Martin, Oliveira, Alessio and Lee, Pittsfield, Massachusetts.

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The Facts and Rulings

For whatever reasons, this matter was extremely difficult factually. The law in Massachusetts with respect to the Uniform Commercial Code is that in determining liability for a breach of warranty of merchantability, G.L. 106, Section 2-314(2)(c) the focus is to be placed upon what are the reasonable expectations for the purchaser of a consummate. Of course, the customer is to expect heat in the coffee and coffee is not defective simply because it is hot or because it is very hot, or even if it is too hot to immediately ingest it. Rather the issue whether the product as it is sold in its container is a product which carries a foreseeable risk of injury; i.e. if the harm causing characteristic would not have been expected or anticipated by the ordinary reasonable consumer.

With reference to the issue of negligence, the law in Massachusetts permits an inference to be drawn by the fact finder if the incident is of a kind that does not ordinarily occur unless a respondent was negligent and where other reasonable causes including activities of the petitioner are, under all the circumstances, not the proximate cause. Also, in Massachusetts, by statute, a plaintiff is presumed to be in the exercise of due care and the burden is upon a defendant to establish otherwise.

I am satisfied from the evidence that Starbucks brewed its coffee pursuant to an accepted industry wide standard that coffee be brewed in water that has been brought to 195 to 205 degrees Fahrenheit and thereafter held it for sale to its customers (and this claimant) at a temperature of approximately 180 degrees.

From the evidence the undersigned has concluded that the coffee container has a printed warning that the contents are hot but the evidence does not support that the cup as delivered contained an addition warning wrapper or that any tray or like carrier was offered or available. However, the issue of warning suitability is not the determining factor in this case. What would any additional warning accomplish? Perhaps one asserting this coffee was unusually hot? Perhaps a statement that coffee served at 175 to 185 degrees is hot enough to cause a second-degree burn upon contact. Perhaps if a paper carrying tray and additional wrapper had been used, that would have been sufficient. The evidence however makes plain that this claimant was aware the product was very hot.

I am further satisfied that the evidence supports the conclusion of the undersigned that these two burns, one the size of a half dollar, and the other the size of a dime, resulted in painful second degree blistering in just a few seconds and caused residual scarring.

The undersigned did not find the testimony of the petitioner in regard to the injury sustained sufficient to establish by a fair preponderance of the evidence, the duration and severity of discomfort claimed. Lastly, I conclude that the claimant was at least 75% negligent.

AWARD

After three days of hearing and after consideration of all of the evidence, I award judgement to the defendant Starbucks Coffee Company in this action.

Respectfully Submitted
Hon. John T. Ronan
Ronan Arbitration Services

ATTORNEY FOR THE PLAINTIFF GAIL GUAY-
BRITTANY SMITH

ATTORNEY FOR THE DEFENDANT-
STARBUCKS COFFEE COMPANY
DAVID S. KATZ
KATZ LAW GROUP, PC.

Monthly Summaries of Civil Jury Verdicts From MA, CT & RI

THE VERDICT REPORTER

Volume 16 Issue 1

Your Essential Guide To Case Evaluation Since 1987

Essex County, MA

District Court - Peabody

Directed Verdict on Store Patron's Falldown Claim

Case Caption:
Roseanne Cody v. Hannaford Brothers Company

Verdict:	Directed verdict for defendant.
Judge:	Santo J. Ruma
Date of Verdict:	8/10/2004
Attorneys:	
Plaintiff:	Withheld
Defendant:	David S. Katz, Westborough

Facts: A school teacher who claimed to have slipped and fallen in a puddle of water created by melted snow pursued this premises liability claim against a grocery store owner. The owner denied notice of the defect and filed a motion with the court for a directed verdict. The court granted the motion.

Plaintiff Roseanne Cody was a patron at Defendant Hannaford Brothers' supermarket. She claimed she slipped on an accumulation of water in the foyer area of the store. Plaintiff was wearing boots because it was snowing at the time of her visit to the store. According to plaintiff, the water on the floor was the result of melted snow.

Plaintiff, a 52 year old school teacher, alleged that defendant knew or should have known of the water on the floor. Plaintiff argued that defendant failed to clean the area, resulting in a hazardous condition for defendant's customers. Plaintiff did not remember whether there were mats on the floor. Nor could she identify how long the water had been on the floor. Plaintiff claimed to have sustained a soft tissue neck injury as a result of this fall.

Defendant contended that it had no notice of water on the floor and claimed to have taken reasonable measures to provide for patron safety. The store manager put out mats and cones when it began to snow, which was two hours prior to plaintiff's visit. Defendant also argued that plaintiff did not seek treatment for her alleged injury until 2.5 months after the accident and, in the interim, had treated with an orthopedist without mentioning this incident. Defendant claimed that plaintiff may have suffered a minor muscle strain when she fell, but that she had fully recovered from her injury.

Plaintiff Profile: Plaintiff was a 52 year old single female who was a school teacher.

Alleged Injury: Soft tissue paracervical sprain of the neck which required sporadic chiropractic treatment and neurological treatment one year after the accident. Plaintiff claimed $3,254 in medicals.

Settlement Efforts:	Last Demand: $25,000 Last Offer: None
Case Number:	0186CV0087