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LITIGATION REVIEW



New Personnel in the Commercial Divisions

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Since its initiation in Monroe and New York counties in November 1995, the Commercial Division of Supreme Court has expanded to nine counties and the entire Seventh Judicial District. Along the way, the Commercial Division has received awards and accolades from the local bar and others for addressing the unique litigation demands of the business community in New York.

There are now six judges assigned to the Commercial Division in New York County, three each in the counties of Kings and Nassau, two each in the counties of Queens, Suffolk and Westchester and one judge in each of the other jurisdictions.

There have been some noteworthy recent developments in the Commercial Divisions in Long Island. About a year ago, Justice Emily Pines (See Profile) was assigned certain commercial cases, although she continued to receive a steady general civil caseload as well. This past month, Justice Pines was designated to receive half of all new Commercial Division cases in Suffolk County, with Justice Elizabeth Hazlitt Emerson (See Profile) receiving the other half.

Kathryn L. Coward has been appointed principal court attorney for the Suffolk County Commercial Division, assisting both Justices Emerson and Pines with various responsibilities to improve the efficiency of the division.

In Nassau County, Nancy Nicotra was recently appointed law secretary to Justice Leonard B. Austin (See Profile), replacing Fred J. Hirsh, who has become a judge of the District Court in Hempstead.

Justice Pines has been a Supreme Court judge since November 2001, after having served as a Suffolk County District Court judge for nearly three years. Before joining the bench, Justice Pines had 22 years of litigation experience, holding various public service positions. While serving in the Commercial Litigation Division of the New York City Department of Law, she litigated construction contract matters from inception to jury trial and appeal.

Justice Pines' analytical prowess in the commercial arena is evident in a number of recent decisions. In *Gorey v. Allion Healthcare Inc.*, 18 Misc.3d 1118 (A), 2008 WL 183721 (N.Y. Sup. Jan. 7, 2008), for example, she was presented with cross-motions for summary judgment in a commercial dispute between a chief financial officer and his former employer.

Plaintiff alleged his ex-employer breached their employment agreement by failing to provide him with (i) an option to purchase shares in the defendant corporation, (ii) benefits under an executive bonus plan, (iii) a performance bonus, and (iv) a severance package. Plaintiff also claimed he was fraudulently induced to accept employment with the defendant based on false promises regarding the establishment of an executive bonus plan.

Defendant claimed the plaintiff breached the applicable employment agreement and violated the corporation's rights after he left by utilizing confidential corporate documents, soliciting the corporation's employees and disparaging the corporation. Defendant also claimed the plaintiff was not entitled to severance because he did not abide by the terms of the employment agreement, including resigning for "good cause."

In addressing the motions for summary judgment, Justice Pines carefully reviewed the relevant provisions of the employment agreement, finding that based upon the clear language of the agreement, the documentary evidence demonstrated that defendant had indeed granted plaintiff the stock options precisely as the agreement required. The judge relied on documents the plaintiff certified, when he was defendant's CFO, filed with the Securities and Exchange Commission, acknowledging the grant of his stock options.

Concerning plaintiff's claim to the award of a bonus, the court noted that while an employer has an obligation to grant a bonus where it has agreed to do so "without condition," where the employment agreement "vests the employer with absolute discretion to determine whether or not a bonus will be awarded," the employee has "no enforceable right to such bonus." Finding the agreement clear on its face in this regard as well, Justice Pines rejected plaintiff's claim to a performance bonus.

On the other hand, Justice Pines found that the employment agreement was ambiguous with regard to the establishment of an executive bonus plan and plaintiff's rights with respect thereto. The court also ruled that plaintiff "substantially complied" with the notice

provisions of the agreement in claiming to have resigned for good reason as defined therein, noting: "Strict compliance with contract notice provisions will not be enforced where the party against whom the claim is made both admits receipt of the notice and does not claim any prejudice as a result of the deviation."

Analyzing what she referred to as the "fraud-contract dichotomy," Justice Pines dismissed plaintiff's claim for fraud, observing that plaintiff's claim was based on the actual language in the contract and therefore was nothing more than a claim for breach of contract.

The judge also denied plaintiff's motion for summary judgment dismissing defendant's counterclaims, finding issues of fact as to whether plaintiff made disparaging remarks concerning the financial health of the defendant at a party to which he invited several of defendant's employees.

'Drain'

Drain v. Paragon Capital Management Corp., 16 Misc.3d 1115 (A), 847 N.Y.S.2d 896 (N.Y. Sup. 2007) is another instructive decision recently rendered by Justice Pines, in which she analyzed claims for fraud, breach of fiduciary duty, breach of contract, punitive damages and the statutes of limitations applicable thereto. In *Drain*, an action by investors against their investment advisors, defendants moved to dismiss the entire complaint.

Justice Pines denied defendants' motion to dismiss the fraud claim, noting that plaintiffs alleged, among other things, that the corporate defendant failed to inform plaintiffs that its "chief executive officer, principal and the person with whom the Plaintiffs had ongoing contact . . . had been suspended from the NASD for forgery of account documents; and had been terminated from employment in the securities industry."

Justice Pines also sustained the cause of action for breach of fiduciary duty, finding that plaintiffs had established that a fiduciary relationship existed with their broker because the broker was granted "broad discretion in the investment account" and plaintiffs relied on "the expertise and the broad authority" of the defendants in investing their money.

Finally, Justice Pines ruled that plaintiffs had stated a claim for breach of contract, finding that the complaint contained "far broader allegations" than simply seeking to hold defendants liable for "a downturn in the market," as defendants argued. In this regard, Justice Pines found that plaintiffs alleged specific breaches of the agreement, "such as provisions setting forth a floor of when to liquidate holdings, and those limiting the percentage of holdings to be invested in equities."

Justice Pines also refused to dismiss the claims of fraud and breach of contract against the individual defendant, noting that the allegations of fraud based in large part on the actions of the individual defendant "state a claim without need to discuss the doctrine of veil piercing."

In addressing the statutes of limitations relating to the breach of fiduciary duty claims, the court noted that where the relief sought is equitable in nature, a six-year limitation period applies, while such a claim seeking only monetary damages must be brought within three years. Accordingly, the court dismissed those claims outside of the three-year limitation period.

Justice Pines also sustained the claim for punitive damages in connection with the cause of action for fraud. The court noted that while "both Plaintiffs' and Defendants' counsel center their arguments around the ability to seek punitive damages where the parties' relationship is grounded in contract, they both, in the Court's opinion, miss the point."

The judge found that "[a]cts of concealment of mandatory reporting and of intimidation by a party with a disproportionate power over another are precisely the kind of acts that society seeks to deter, not only in relation to a particular claimant but to society at large," finding that the allegations "if proven, give rise to the remedy of punitive damages."

Preparing Cases for Trial

Before becoming Justice Austin's law secretary, Ms. Nicotra practiced eleven years as a litigator, most recently as deputy bureau chief of the General Litigation Bureau in the Nassau County

Attorney's Office.

While working for the county, Ms. Nicotra handled §1983 civil rights cases, Title VII and Americans With Disability claims, as well as general commercial litigation from inception to trial. She has tried cases throughout her career, including jury trials, in both the state and federal courts.

In a recent interview, Ms. Nicotra offered ways of assisting counsel and the court in preparing cases for trial and/or resolution. She suggested counsel carefully consider the issues concerning their case in preparation for the initial preliminary conference and provide copies of the pleadings to the court when appearing at the conference.

Since the trial date is ordinarily firmly set at that first conference, Ms. Nicotra recommended that counsel consider all pretrial proceedings that will be necessary so that an appropriate time period is allowed before setting the trial date.

Once the trial date is set, the court schedules all other pretrial events by working backwards, to afford counsel enough time to complete all anticipated discovery and to submit any dispositive motions so that they can be determined sufficiently in advance of the trial date.

Conferencing Cases

Ms. Coward joined the Suffolk County Commercial Division about a year ago, assisting both Justices Emerson and Pines in conferencing cases, mediating disputes and helping to resolve discovery issues and other substantive motions.

On Mondays, Ms. Coward conducts preliminary conferences of cases in the Differentiated Case Management part that have been designated "contract" in the Request for Judicial Intervention. Ms. Coward assesses cases that are appropriate for the Commercial Division and assigns them accordingly, whether or not the parties have specifically so requested.

Ms. Coward brings to the Commercial Division 10 years of business experience in finance, including as corporate controller. She attended Touro College Jacob D. Fuchsberg Law Center at night while working full time, graduating in 2001.