Recent Developments in Business Courts 2023

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§ 1.1. INTRODUCTION

The 2023 *Recent Developments* describes developments in business courts and summarizes significant cases from a number of business courts with publicly available opinions.[2] There are currently functioning business courts of some type in cities, counties, regions, or statewide in twenty-five states: (1) Arizona; (2) Delaware; (3) Florida; (4) Georgia; (5) Illinois; (6) Indiana; (7) Iowa; (8) Kentucky; (9) Maine; (10) Maryland; (11) Massachusetts; (12) Michigan; (13) Nevada; (14) New Hampshire; (15) New Jersey; (16) New York; (17) North Carolina; (18) Ohio; (19) Pennsylvania; (20) Rhode Island; (21) South Carolina; (22) Tennessee; (23) West Virginia; (24) Wisconsin; and (25) Wyoming.[3] States with dedicated complex litigation programs encompassing business and commercial cases, among other types of complex cases, include California, Connecticut, Minnesota, and Oregon.[4] The California and Connecticut programs are expressly not business court programs as such.[5]

In April 2022, the BLS also published BLS Bench Notes, MBA Complex Commercial Litigation Section, Business Litigation Session Practice Guide ("Bench Notes"). The Bench Notes describe each BLS judges' practices and preferences regarding case management, discovery, motion practice, and trial.

§ 1.2.2.7. Michigan Business Courts

Michigan Business Courts' 10-Year Anniversary. October 16, 2022, marked the 10th anniversary of then-Governor Rick Snyder's signing of Michigan's business court legislation, which took effect on January 1, 2013. Since their inception, Michigan's business courts have held an important place in the state's jurisprudence and have established numerous protocols that circuit courts throughout Michigan have adopted (e.g., early case management conferences and early mediation). Attorneys throughout the state hold the business courts in high regard, finding that the business courts are responsive, efficient, and fulfill their legislatively prescribed purpose of enhancing "the accuracy, consistency, and predictability of decisions in business and commercial cases."[40]

2022 Business Court Appointments. The makeup of Michigan's business court bench changed significantly in 2022 as Judge Christopher P. Yates (formerly a business court judge in Kent County) was appointed to the Michigan Court of Appeals and several judges were newly appointed to the business courts. The new appointees are Judges Annette J. Berry (Wayne County), Curt A. Benson (Kent County), Timothy P. Connors (Washtenaw County), Kenneth S. Hoopes (Muskegon County), and Victoria A. Valentine (Oakland County). These new appointees will all serve for a term expiring April 1, 2025.

Michigan's New Videoconferencing Court Rules. In July 2021, the Michigan Supreme Court responded to the lingering impacts of the COVID–19 pandemic by adopting interim court rules relating to remote proceedings that, *inter alia*, required trial courts to employ videoconferencing or telephone conferencing "to the greatest extent possible." Mich. Ct. R. 2.407(G). The court invited public comment on the efficacy of the interim rules and ultimately received 41 written comments and heard feedback from 49 individuals at a public hearing on March 16, 2022. Thereafter, on September 9, 2022, the court issued a new order making the interim rules permanent, thereby solidifying videoconferencing as an important tool available to Michigan courts to increase efficiency, lower costs, and promote access to the judicial system. The most pertinent modification in the 2022 order affecting business court litigants is the court's adoption of a new rule: Mich. Ct. R. 2.408.[41]

Under Mich. Ct. R. 2.408, "the use of videoconferencing technology shall be presumed" for virtually all civil proceedings besides evidentiary hearings and trials. Nevertheless, courts have discretion to determine the manner and extent to which videoconferencing technology is used. Indeed, even where the presumption applies, the court may require the proceeding to be conducted in person if it determines that the "case is not suited for videoconferencing."[42] In making this determination, the court must consider twelve factors, including the technological capabilities of the court and the parties, whether "specific articulable prejudice" would occur, and the potential to increase access to courts through the use of videoconferencing.[43] On the other hand, the court generally can also require participants to attend proceedings remotely.[44] An exception to this grant of authority lies in Mich. Ct. R. 2.407(B)(4), which provides that a participant can request to appear in person for any proceeding. If the participant so requests, the participant's attorney and the presiding judge must appear in person with the participant; however, the court must allow the other participants to participate remotely using videoconferencing technology if they so choose, assuming the court determines that the case is well-suited for videoconferencing.[45]

Beyond the new presumption in favor of videoconferencing for most civil proceedings, the Michigan Supreme Court's 2022 order instituted numerous additional procedural rules related to remote participation. Among these new rules are the requirements that courts must provide participants with reasonable notice of the time and mode of proceedings, permit parties and their counsel to engage in confidential communications during a videoconferencing proceeding (including, for example, through the use of a virtual "break-out room"), and generally make videoconferencing proceedings accessible to the public.[46] Counsel litigating in Michigan's business courts should familiarize themselves with the changes made in the 2022 order, which is available on the Michigan One Court of Justice website.[47]

Katopodis v. Plainville Gaming and Redevelopment, LLC*[69]*(Consumer protection). In a putative class action, Plaintiffs alleged that Plainville Gaming and Redevelopment, LLC d/b/a Plainridge Park Casino ("PPC") violated the Massachusetts Gaming Act, M.G.L. c. 23K, § 29, and its related regulations, by failing to send its rewards cardholders statements notifying them of their bets, wins, and losses ("win/loss statements"). Based on these allegations, Plaintiffs asserted a single claim for violation of Massachusetts' consumer protection statute, M.G.L. c. 93A. PPC moved to dismiss the case under Rule 12(b)(6).

The Court denied PPC's motion, concluding that Plaintiffs had alleged a plausible claim under c. 93A. The Gaming Act and its regulations require casino operators, like PPC, to provide a monthly win/loss statement to patrons with rewards cards. The statement can be sent to a patron's physical address or it can be sent by email unless the patron opts out of electronic notifications. As alleged, PPC failed to provide any win/loss statement to its rewards cardholders for several years and then only provided electronic statements, regardless of whether a patron had provided an email address or had opted out of electronic notifications. Because of this, Plaintiffs claimed they had not received the monthly win/loss statements required by law.

PPC relied on a line of cases holding that a claim under c. 93A requires a plaintiff to show "injury" "separate" and "distinct" from the statutory or regulatory violation itself. Based on this authority, PPC argued the case should be dismissed because its alleged failure to provide the win/loss statement did not, by itself, constitute "injury" to Plaintiffs under c. 93A. The Court disagreed. According to Plaintiffs, without the win/loss statements, they were deprived of the opportunity to make an "informed decision" about their gambling habits. A demand letter sent to PPC – which the Court considered on the motion to dismiss – further claimed that Plaintiffs had gambled less at other casinos when these casinos provided the required win/loss statements. And some of Plaintiffs further claimed that they had suffered financial hardships as a result of their gambling habits. All told, the Court concluded that Plaintiffs had adequately alleged an "injury," *i.e.*, "gambling in the absence of a required consumer protection," that was "separate" and "distinct" from the alleged violation itself.

§ 1.3.9. Michigan Business Courts

Main St. Real Est., LLC v. Conifer Holdings, Inc.[70] ***(Insurance; contract interpretation).*** This case involved an insurance coverage dispute in which Defendant Conifer Holdings, Inc. refused to defend Plaintiff Main Street Real Estate, LLC in a lawsuit concerning Main Street's alleged involvement in a fraudulent real estate transaction. In that underlying suit, the adverse party brought numerous claims against Main Street, including breach of contract, breach of fiduciary duty, and vicarious liability for an independent contractor's criminal misconduct. Main Street sought indemnity from Conifer, its insurer. Conifer, however, denied coverage for all the claims against Main Street, asserting that: (1) only claims pertaining to "real estate services" were covered under Main Street's insurance policy, and none of the allegations against Main Street fell within the scope of this term; and (2) all the claims fell under the policy's list of coverage exclusions.

The court rejected Conifer's arguments and granted Main Street's motion for summary disposition (i.e., summary judgment) as to Conifer's duty to defend and indemnify Main Street against all the claims. In addressing Conifer's first argument, the court applied the rules of contract interpretation and read the contract to provide that Conifer was required to defend Main Street against claims relating to "real estate services." The court found that while the term "real estate services" was defined in the policy as services rendered by a "real estate agent" or "real estate broker," the policy did not define "real estate broker" or "real estate agent." As such, the court turned to Black's Law Dictionary for guidance and used the dictionary's definitions of "real estate broker" and "real estate agent" to find that several of the claims brought against Main Street related to "real estate services." This included the claim in the underlying suit that Main Street did not draft accurate purchase agreements or properly advise its client regarding escrow funds. Therefore, these claims fell within the scope of the insurance policy such that Conifer had a duty to defend Main Street.

Since at least some of the claims were covered, Conifer's duty to defend extended to *all* the claims: "Michigan case law is clear that when theories of liability which are not covered are raised with theories of liability that are covered under the policy, the insurer has a duty to defend." The court also relied on this principle to dispose of Conifer's second argument––that

the claims against Main Street fell within the policy's list of coverage exclusions. Because the court had already found that some of the claims were covered under the policy, Conifer had a duty to defend Main Street on all claims regardless of whether some of the claims were on the exclusion list.

LiftForward, Inc. v. SimonXpress Pizza, LLC, et al.[71] ***(Breach of Credit Agreement, COVID–19).*** Plaintiff LiftForward, Inc. extended a secured loan to Defendant SimonXpress Pizza, LLC for business purposes pursuant to a credit agreement and an accompanying promissory note. After several months of nonpayment, LiftForward sent a letter of default to SimonXpress, accelerating the unpaid principal balance due, together with accumulated interest and other fees and charges. LiftForward sued SimonXpress and moved for summary disposition, asserting that SimonXpress breached the parties' credit agreement by failing to make required payments. SimonXpress also moved for summary disposition, alleging, *inter alia*: (1) that LiftForward had first breached the parties' agreement by charging an unlawful interest rate; and (2) frustration of purpose due to the COVID-19 pandemic.

The court first found that there was no genuine issue of material fact that SimonXpress was in default and that LiftForward was therefore entitled to the unpaid principal, accrued interest, and any other charges or fees payable pursuant to the parties' credit agreement and promissory note. The court then rejected SimonXpress's affirmative defenses. First, LiftForward had not materially breached the contract first by charging an unlawful interest rate; the promissory note, which SimonXpress had signed, agreed to fix the interest rate such that it would not exceed the "maximum interest rate permitted by applicable law." Additionally, the loan qualified under a statutory exception (Mich. Comp. L. 438.31c(11)) to the criminal usury interest rate provisions, which permits "the parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence…[to]…agree in writing for the payment of any rate of interest."

As to the other affirmative defense—COVID-19 frustration of purpose—SimonXpress failed to demonstrate that it was unable to perform its obligations under the agreement or even that its business was closed during the time period at issue. Moreover, the pandemic did not render LiftForward's performance "virtually worthless" to SimonXpress, as is required under the frustration of purpose doctrine. The funds were intended for business-related purposes, and SimonXpress did not allege that it had stopped operating its business during the pandemic. Finally, SimonXpress's frustration of purpose argument was undermined by the fact that it had allegedly stopped making the required payments more than two months before the COVID–19 shutdown commenced.

Pioneer Gen. Contractors, Inc. v. 20 Fulton St. E. Ltd. Dividend Hous. Ass'n Ltd P'ship, et al.[72] ***(Construction liens).*** Plaintiff Pioneer General Contractors, Inc. served as general contractor for the construction of a building in downtown Grand Rapids, Michigan. Pursuant to its contractual relationship Defendants, the property owners, Pioneer began work on the project in 2015 and provided various services for Defendants, including supervising the work of various subcontractors. In 2017, a certificate of use and occupancy was issued, and tenants began to occupy the building. Defendants, however, failed to pay the $3.6 million outstanding balance that they owed to Pioneer and the subcontractors. Pioneer and some of the subcontractors then executed a "liquidating agreement," in which they agreed to file construction liens on the property. The contractors ultimately carried out their agreement; each filed separate liens that totaled, in aggregate, approximately $6 million. In 2018, the parties entered a settlement agreement wherein Pioneer agreed to discharge all outstanding construction liens in exchange for Defendants' payment of $1 million. Defendants failed to pay this amount, however, so Pioneer sued, seeking to foreclose on its construction liens.

Defendants contended that the construction liens were invalid, raising three arguments to support this assertion. First, Defendants argued that Pioneer and the subcontractors had filed their liens for an amount (about $6 million total) that far exceeded the amount owed under the contract ($3.6 million total), which violated Michigan law (Mich. Comp. L. 570.1107(6)) and should therefore be void *ab initio*. The court disagreed and found that the statutory amount restriction applies to each lien claimant *individually*, rather than to lien claimants in the aggregate. Thus, while the aggregate lien amount did exceed the total amount Defendants owed to all the lien claimants, this did not invalidate the liens because, on an individual basis, each contractor's construction liens did not exceed the amount that Defendants owed to that

contractor. A discrepancy (here of about $2.3 million) between the aggregate lien and individual debt amounts may occur when, as here, a general contractor (Pioneer) and the subcontractors all have valid claims against Defendants for "the same unpaid obligations arising from work on the same construction project." This discrepancy did not render the liens void *ab initio.*

Defendants next argued that the construction liens were invalid because Pioneer had filed them in bad faith. Specifically, Defendants alleged that Pioneer's and the subcontractors' execution of the "liquidating agreement" shortly before they filed their construction liens evinced a bad-faith scheme. The court rejected this claim, finding "nothing untoward" about the agreement or its timing. Indeed, the court noted that such agreements are commonplace within the construction industry as a mechanism to provide some security to subcontractors who lack privity of contract with the property owner. Defendants lastly argued that the parties' master contract obligated Pioneer to refrain from encumbering the property with construction liens. The court flatly rejected this argument, noting that the plain terms of the contract authorized the filing of construction liens and required Pioneer to discharge the liens only if Defendants had paid for the completed work or payment was not yet due. This discharge requirement did not apply since the liens arose from Defendants' failure to pay. The court also noted that a contractual lien forbearance obligation would be functionally equivalent to a contractual waiver of the right to a construction lien, which is expressly prohibited under Michigan law (Mich. Comp. L. 570.1115(1)). Having rejected all three of Defendants' arguments, the court granted partial summary disposition in Pioneer's favor.

Crown Enter., Inc. v. Bounce House KRT, LLC*[73] *(Commercial lease; COVID–19). Beginning in 2019, Plaintiff Crown Enterprises, Inc. leased a 26,000 square-foot commercial property to Defendant Bounce House KRT, LLC. Shortly after the parties' contractual relationship began, the COVID–19 pandemic's emergence prompted federal and state governments to order business closings. On March 23, 2020, the Michigan government ordered a statewide shutdown of non-essential businesses like Bounce House. Beginning in October 2020, the government allowed businesses to reopen at limited capacity. The permissible level of capacity percentage gradually increased (besides a period of complete closure between November and December) until the restrictions were fully lifted on June 17, 2021. Throughout the shutdown, Bounce House paid rent to Crown pro rata based upon the capacity percentage allowed by the government. Crown accepted these partial rent payments. Eventually, however, Crown sued Bounce House for breach of the parties' lease, seeking, *inter alia*, unpaid rent, utilities, and late fees. Bounce House raised the following defenses: (1) the COVID–19 shutdown order triggered the lease's force majeure clause; (2) impossibility; and (3) frustration of purpose.

As to the force-majeure-clause argument, the court noted that the lease contained a provision stating that Bounce House was required to pay rent "without any deduction or set off whatsoever." The court found that this language, rather than the force majeure clause, governed Bounce House's obligation to pay rent. Further, the clause did not authorize rent abatement in consequence of a triggering event. Next, the court summarily rejected the frustration of purpose and impossibility arguments. It noted that frustration of purpose applies only where the purpose of the "entire lease" is frustrated, which was not the case here since Bounce House had partial or complete access to the premises for much of the lease's term. Likewise, the impossibility doctrine was inapposite because the premises were not destroyed; performance was not literally impossible.

The court did, however, find that Bounce House could obtain rent abatement under the doctrine of "temporary frustration of purpose" (also known as impracticability). Under this doctrine, a party to a contract is excused from performance where: (1) the contract is executory; (2) the party's purpose was known at the time it entered into the contract; and (3) the purpose was temporarily frustrated by an event that was not reasonably foreseeable when the contract was created and which was not the party's fault. The court noted that while jurisdictions are split on whether COVID–19 shutdown orders can excuse a party's contractual performance, the Michigan federal district court in *Bay City Realty, LLC v. Mattress Firm, Inc.* applied temporary frustration of purpose to a similar set of facts.[74] The court found the *Bay City* court's approach persuasive and adopted it. Specifically, the court emphasized that both parties suffered a loss––Bounce House, in the form of "temporarily worthless" premises; Crown, in the form of lost income––caused by an unforeseeable governmental shutdown that was neither party's fault. Moreover, the parties' lease failed to

allocate the risk of such a loss to either party. As such, the court determined that the best solution was to allocate some of the loss to each party by only requiring Bounce House to pay Crown "the applicable pro rata percentage of the allowable occupancy" levels under the state's COVID–19 orders. Since Bounce House had already made rental payments on this pro rata basis, the court dismissed Crown's claim for breach of contract.

§ 1.3.10. New Hampshire Commercial Dispute Docket

Fisher Cat Development, LLC. v. Stephen Johnson[75]***(Breach of contract; contractual ambiguity; extrinsic evidence).*** Seller argued that, while the Parties' Purchase and Sales Agreement contained two inconsistent closing date provisions, an executed addendum resolved such ambiguity. The addendum extended the closing date "to no later than 4/28/21," but also stated "[a]ll other aspects of the aforementioned Purchase and Sales Agreement shall remain in full force and effect."

The Court was not persuaded by Seller's argument that this addendum resolved the ambiguity, due to it incorporating all other provisions of the Agreement. The Court thus found that, because the provisions were ambiguous, the Court could reference extrinsic evidence to interpret the Agreement. The Court determined the extrinsic evidence created a material dispute as to: (1) whether the Parties ever agreed to a closing date; (2) whether the Seller breached the Agreement; and (3) whether the Seller breached the implied covenant of good faith. As a result, summary judgment was denied.

N.H. Elec. Coop., Inc. v. Consol. Communs. of N. New Eng., LLC.[76]***(Impracticability and frustration of purpose defenses).*** After Defendant moved to amend its answer and counterclaims to include the doctrine of impracticability as an affirmative defense, Plaintiff argued an affirmative defense of impracticability is futile and that New Hampshire does not recognize impracticability as a breach of contract defense. Plaintiff asserted that New Hampshire law recognizes frustration of purpose, which Defendant had already pled. Defendant argued that impracticability is synonymous with impossibility, which New Hampshire courts recognize.

The Court agreed with Defendant. Further, the Court found that frustration of purpose is distinguishable from impossibility, and is thus also distinguishable from impracticability.

Finally, the Court determined that, even though impracticability was substantively different from Defendant's original affirmative defenses, Defendant's impracticability argument restates its longstanding position. Thus, the Court allowed Defendant's amended defense of impracticability.

Vt. Tel. Co., Inc. v. FirstLight Fiber, Inc.[77]***(Consequential damages limitations and alleged bad faith).*** Plaintiff brought a number of claims due to Defendant's termination of a lease between the Parties, and Defendant moved for summary judgment. The enforceability of the Limitation Clause of the lease was of particular issue, which barred recovery of consequential damages entirely, and limited monetary recovery to the charges payable to Plaintiff during the term of the lease. Plaintiff argued that the Limitation Clause was unenforceable because Defendant acted in bad faith.

Although the New Hampshire Supreme Court has not definitively ruled on this issue, the Court found that New Hampshire law would adopt the rule that a limitation clause may not be enforceable if the party seeking to enforce it has acted in bad faith, and therefore denied summary judgment due to the factual dispute that bad faith exists.

§ 1.3.11. New Jersey's Complex Business Litigation Program

Jenkinson's Nik Lamas-Richie and Relic Agency, Inc. v. Matthew Richards and Mars Media, LLC[78]***(Jurisdiction).*** In this case involving a dispute concerning the parties' agreement relating to unpaid loan amounts and consulting fees, the New Jersey Superior Court clarified that New Jersey's "first-filed rule" extends not only to actions brought in New Jersey and a