

Lawyer can't be sued over alleged misrepresentation

Accused of making false statements at mediation

The confidentiality provision in a mediation agreement blocked a plaintiff from alleging that false statements made by the defendants' lawyer outside the presence of the mediator fraudulently induced the plaintiff into agreeing to a settlement, a Superior Court judge has determined.

The plaintiff, a contractor that had sued a chain of pizza shops to collect unpaid bills, claimed that in agreeing to a settlement, it relied on representations by the defendants' lawyer on how certain funds would be disbursed. But the pizza chain apparently diverted the funds to pay its lawyer and file for bankruptcy, so the contractor sued the lawyer, his law firm and the chain for fraudulent inducement and Chapter 93A violations.

In moving to dismiss the claims, the defendants argued that the attorney's statements were considered privileged under the confidentiality provision, which covered "all communications between and among the parties and their counsel" that were part of the mediation, and thus should be struck.

Judge Christine M. Roach agreed.

"These are sophisticated business parties who were represented by counsel, making an agreement which on its face is unambiguous," Roach said.

"They were free to bargain for more confidentiality than the statute provides, and it is not for the court now to strike a different bargain for them. The Mediation Agreement precludes the use of the alleged ... statement for any purpose; reference to or reliance upon that statement for purposes of [the contractor's] claims must therefore be stricken from the ... complaint," she wrote.

The 14-page decision is *ZVI Construction Company, LLC v. Levy, et al.*, Lawyers Weekly No. 12-045-13. The full text of the ruling can be ordered at masslawyersweekly.com.

Issue of first impression

Richard E. Briansky of Prince, Lobel, Tye in Boston represented the plaintiff. Briansky said he knew of no other case in which a judge addressed whether an allegedly false statement made outside a mediator's presence is protected by the confidentiality provision in a mediation agreement, making *ZVI Construction* an issue of first impression.

"That's critical because the underlying mediation statute [G.L.c. 233, § 23C] only protects statements made in the presence of the mediator," he said. "The agreement [here] was broader than the statute, and the judge enforced it even amid allegations of fraud."

The judge's interpretation was unfortunate, Briansky said, noting that he could not say whether his client would appeal.

"My thought is that the agreement, along with the underlying statute, is intended to protect the mediator, not the parties," he said. "If you read the plain language of the statute, it shouldn't be used affirmatively, like in this case, to insulate an attorney [who is accused of making] a misrepresentation of material fact."

More broadly, Briansky predicted that as a result of Roach's ruling, both mediators and parties to mediations would pay particularly close attention to confidentiality agreements and make them more consistent with the terms of the statute.

West Roxbury attorney and mediator Walter K. McDonough of Elk Consulting Services said the decision illustrates the "tension between wanting to maintain a privilege in mediation and the enforcement of a settlement that's been fairly arrived at during mediation."

The case also serves as a lesson to attorneys that, when executing a mediation agreement, they should be sure to put all elements in writing at the mediation session and have it signed right there and then, McDonough said.



Christopher R. O'Hara
Defends lawyer

"That should include who pays whom, how much, and when and how those payments are going to be made," he said.

Christopher R. O'Hara of Todd & Weld in Boston, who represented the attorney accused of making the statements at issue in *ZVI Construction*, noted that the plaintiff's allegations were "vigorously disputed."

"There's another side to this case than what's in the plaintiff's papers, but it would be inappropriate for me to comment further," O'Hara said, citing ongoing litigation on the counts that survived his clients' motion to dismiss.

Mediation dispute

In 2005, plaintiff *ZVI Construction Co.* performed build-out and renovation work for the Upper Crust, a chain of Boston-area pizza restaurants.

Upper Crust apparently failed to pay for several hundred thousand dollars worth of work, and *ZVI* sued and obtained an injunction preventing Upper Crust and its principals — defendants Joshua Huggard and Brendan F. Higgins — from transferring funds other than in the ordinary course of business. The defendants then hired defendant Franklin Levy and his law firm, defendant Lawson & Weitzen, to represent them in the collection action.

The collection action went to mediation on Sept. 6, 2012. At the start of the process, the parties executed a mediation agreement that included a clause providing that "the mediation, ... including all communications between and among the parties and their counsel, shall be confidential and shall not be used for any purposes other than for said mediation."

As a result of the mediation, the parties agreed to a settlement under which Upper Crust would make an initial \$250,000 payment to *ZVI*, followed by 36 monthly payments of \$11,000.

The cash-strapped chain was to make the payment with the \$250,000 in settlement funds from unrelated litigation with former Upper Crust principal Jordan Tobins.

But before signing the settlement agreement, ZVI balked at the mechanics of the payment. The plaintiff wanted to receive the \$250,000 directly from Tobins instead of it first going to the Upper Crust.

Levy apparently insisted that the Tobins settlement proceeds be paid to the Upper Crust first and then delivered to ZVI. The plaintiff claimed that in order to induce ZVI to agree, Levy expressly represented that he himself would pay the funds to ZVI, which the plaintiff apparently believed he and his firm would be holding in escrow. Those representations purportedly occurred outside the mediator's presence.

According to the plaintiff, it relied on these alleged representations when it signed the settlement agreement that day.

The plaintiff never received the \$250,000. Instead, according to the plaintiff, the Tobins settlement proceeds were used to pay the Upper Crust principals, to pay attorneys' fees to Levy and his firm, and to hire counsel to file for bankruptcy.

Additionally, the plaintiff claimed, Levy and his firm assisted in diverting the funds through their handling of the money and through their communications with plaintiff's counsel in the weeks following the mediation.

According to ZVI, those actions stalled it from enforcing the settlement agreement before the Upper Crust filed for bankruptcy.

The plaintiff subsequently sued the Upper Crust's principals in Superior Court, alleging fraud and misrepresentation and unfair busi-

ness practices under Chapter 93A. In an amended complaint, the plaintiff sued Levy and his firm for misrepresentation, aiding and abetting fraud, and violation of 93A.

Levy and the firm moved to dismiss all counts. Citing the confidentiality provision in the mediation agreement, Levy and his firm also moved to strike any factual allegations in the complaint that referred to the misrepresentations he allegedly made during mediation.

fraud was continuing or contemplated, by either Levy or his client."

Instead, Roach said, the pleadings merely allege that all parties knew of Upper Crust's precarious financial situation and that its principals were juggling multiple creditors and claims.

"It is not fraud to do so, nor is it necessarily fraud to state that one 'would pay' the creditor with whom one is currently dealing," she said.

Roach also found unconvincing the plaintiff's argument that the mediation agreement should not be considered by the court at all, and

that if it were, it should not be read more broadly than the confidentiality protections in the mediation statute.

"The amended complaint fully references the mediation and the settlement agreement, and thus puts the mediation process at issue," the judge said. "ZVI cannot ask the court to consider all of the circumstances of that day for purposes of assessing its pleadings, but then simultaneously ask the court to ignore one of the written agreements indisputably entered into by the parties on that same day, on the same subject matter."

The plaintiff, a sophisticated business entity that was represented by counsel, was free to bargain for more or less confidentiality than what was provided by statute, and it was not the court's job to make a better deal, Roach said, granting the defendants' motion to strike.

Accordingly, Roach dismissed the misrepresentation and aiding and abetting claims. But based on allegations that the lawyer and the firm engaged in "self-dealing" by soliciting or accepting payment of their own fees from the Tobins settlement proceeds, she allowed claims of tortious interference, conversion and Chapter 93A violations to proceed on a limited basis.

— ERIC T. BERKMAN

CASE: *ZVI Construction Company, LLC v. Levy, et al.*, Lawyers Weekly No. 12-045-13

COURT: Superior Court

ISSUE: Did the confidentiality provision in a mediation agreement block a plaintiff from alleging that false statements made by the defendants' lawyer outside the presence of the mediator fraudulently induced the plaintiff into signing a settlement agreement?

DECISION: Yes, because the confidentiality provision protected all statements made by any party or counsel in the course of mediation for any purpose other than the mediation itself and made no exception for alleged fraud or misrepresentations

Privileged information

Roach rejected the plaintiff's argument that the alleged statement was subject to the crime/fraud exception and thus should not be protected by the confidentiality provision or by statutory confidentiality.

"[N]othing in the amended complaint plausibly pleads that at the time that [the] privileged statement was made, it was 'made for the purpose of getting advice for the commission of a fraud or crime,'" the judge said, quoting the Supreme Judicial Court's 1997 decision in *Purcell v. District Attorney for the Suffolk District*. "Nor is there a plausible allegation that crime or

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