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Seasons Greetings and a Happy New Year to all of our clients and friends, from Thomas Paschos & Associates

December, 2012

I. GENERAL LITIGATION

Crime-Fraud Exception Prevents Documents Held by Former Counsel of Corporation from Being Shielded by the Attorney-Client Privilege

In *In re Grand Jury*, --- F.3d ----, 2012 WL 6156176, (3d Cir. (Pa.), December 11, 2012), ABC Corp. ("ABC"), John Doe 1, and John Doe 2 were subjects of an ongoing grand jury investigation into an alleged criminal tax scheme. As part of that scheme, ABC, under the direction of John Doe 1 and John Doe 2, purchased and subsequently sold numerous companies. As part of its investigation, the grand jury issued a subpoena to ABC requesting records between ABC and the limited liability companies. A law firm that represented ABC turned over documents that were not privileged but retained those subject to privilege. The Government then filed a subpoena followed by a motion to enforce subpoena, in order to obtain most of the privileged documents arguing that the crime-fraud exception trumped the attorney-client and work-product privilege. The district court entered two orders requiring disclosure of most of the documents because the crime-fraud exception barred the attorney-client privilege.

ABC appealed the district court's order to ABC and its counsel (the "March Order") and the second order to ABC's former in-house counsel (the "June Order"). The Third Circuit noted that disclosure orders cannot be appealed until the privilege holder is found in contempt of the court's disclosure order and appeals the contempt order. Because ABC had not defied the disclosure order, the Court dismissed the appeal of the March Order for lack of appellate jurisdiction.

The Third Circuit determined that it had jurisdiction over the June Order and acknowledged that the attorney-client privilege and the work-product privilege are not absolute. The court was faced with the question of what was required in order to assert the crime-fraud exception. The court applied a reasonable basis standard providing that a party meets its burden of overcoming the attorney-client privilege when there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and the privileged communications or work product were used in furtherance of the alleged crime or fraud.

The Third Circuit affirmed the District Court's finding that there was a reasonable basis to believe that ABC willfully evaded paying federal income taxes, defrauded the U.S. of federal incomes taxes, and used the legal advice from its three former in-house lawyers to further its fraud scheme. As such, the court held that in this matter the attorney-client privilege did not apply because of the crime-fraud exception. The court concluded in the precedential ruling that a reasonable basis of suspicion of intended crimes is enough to trump the privilege.

The court declined to consider ABC's argument that the crime-fraud exception could not apply to the work-product document unless the attorneys knew of the criminal scheme, noting that the former in-house counsel had not appealed the June Order.

II. CONSTRUCTION LAW

Implied Warranty of Habitability Extends Beyond Initial Purchaser of a Home to Subsequent Purchaser

In *Conway v. Cutler Group, Inc.*, --- A.3d ----, 2012 WL 5383161 (Pa.Super., November 05, 2012), appellants, Michael and Deborah Conway, purchased their home from David and Holly Fields who bought it new from Cutler Group. The home was built in 2003 and was sold to the Conways in 2006. Approximately 2 years after buying the home, the Conways noted water infiltration issues. An engineering and architecture expert retained by the Conways determined that there were latent defects causing the problem.

The Conways filed a one count complaint against Cutler asserting breach of the implied warranty of habitability. The Conways did not name the Fields in their complaint nor did they assert any breach of contract claim. Conway filed preliminary objections asserting that "as a matter of law, the implied warranty of habitability only extends from the builder to the initial third-party purchaser." The trial court entered an order granting Cutler's preliminary objections and dismissing the Conways' complaint with prejudice.

On appeal, the Pennsylvania Superior Court was faced with a question of first impression in the Commonwealth. Specifically, the court was asked to determine whether the implied warranty of habitability extends beyond the initial user-purchaser of a home to a second or subsequent purchaser. Cutler argued that the Conways' claim was properly dismissed because it was not in privity with the Conways. On the contrary, the Conways argued that "privity of contract [is] not required for a homeowner to assert a breach of implied warranty of habitability against the builder/vendor."

The Court held that accepting Cutler's position would present problematic consequences. The court provided by example that if a given structural defect does not materialize until a home is five-years old, and the original purchaser is still occupying the home, he or she may recover under the implied warranty of habitability. However, if the same defect materializes when a home is five-years-old, but the original purchaser sold the home after the third year, the current homeowner cannot recover. The court concluded that allowing such divided recovery based on whether the home is sold, a factor that is immaterial to whether a "[d]efect ... [would be] apparent to the ordinary purchaser as a result of a reasonable inspection[.]" would be inherently unfair. Based on such public policy considerations, the Pennsylvania Superior Court held that a builder can be liable to subsequent home buyers beyond the initial purchaser for breach of the implied warranty of habitability.

III. EMPLOYMENT LITIGATION

Claims Barred for Plaintiff's Failure to Comply with Statute Requiring Pre-Suit Notice

In *Santiago v. New York & New Jersey Port Authority*, --- A.3d ----, 2012 WL 6027204 (N.J.Super.A.D., December 05, 2012), plaintiff, Enid Santiago, a provisional police officer with the Port Authority Police Department, was terminated after what, she alleged, was a sham internal affairs investigation. Plaintiff filed a complaint against defendant the Port Authority of New York and New Jersey (the Port Authority), and one of its employees, Tunnel and Bridge Agent Gregory Noa. Plaintiff alleged: violations of the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (LAD), common law claims for abuse of process, interference with contractual rights, and defamation; and claims for violations of the civil rights act. (CRA).

Relying upon *N.J.S.A. 32:1-163* (requiring sixty days notice prior to filing suit), defendants moved to dismiss the complaint. Defendants contended that because plaintiff admittedly failed to serve any notice of claim prior to filing her complaint, the court lacked subject

matter jurisdiction. The motion judge agreed and entered an order dismissing the complaint because of plaintiff's failure to comply with the statutory prerequisites set forth *N.J.S.A. 32:1-163*.

On appeal, plaintiff argues that the judge erred as a matter of law because New Jersey and New York adopted "complimentary" legislation addressing workplace discrimination and whistleblowing and because no notice of claim was required under New Jersey's Tort Claims Act prior to filing suit under the LAD, CEPA or the CRA, she need not have provided pre-suit notice to the Port Authority.

Without reaching a conclusion as to plaintiff's "complimentary" legislation argument, the court disagreed with plaintiff's arguments. The court noted that the Tort Claims Act does not apply to the Port Authority, so it could not "accept plaintiff's argument by analogy to a statute that is inapplicable from the start." Further, the court found it "unwise for us to conclude that the notice provisions of *N.J.S.A. 32:1-163* do not apply to plaintiff's statutory causes of action given the significant implications of such a holding." As such, the court affirmed the dismissal of plaintiff's complaint because she failed to comply with the sixty-day notice provisions of *N.J.S.A. 32:1-163*.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

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