May 31, 2011

T&E Litigation Update: *Kostick v. Fort Hill Community*

First, in *Kostick v. Fort Hill Community*, Case No. 10-P-1294, 2011 Mass. App. Unpub. LEXIS 697 (May 23, 2011), a decision issued pursuant to Rule 1:28, the Appeals Court addressed, among other questions, when the statute of limitations begins to run on a breach of trust or breach of fiduciary duty claim.

Fort Hill Community is a commune that was established in the 1960s. Fort Hill has engaged in real estate development, and the proceeds from the real estate development are held in a trust that names all Fort Hill members as equal beneficiaries.The declaration of trust provides that the trustees are to pay net income to the beneficiaries as the trustees deem advisable, and that each Fort Hill member is to remain a beneficiary unless the member ceases living with the other Fort Hill members or is deprived of membership by a four-fifths vote of the trustees. A person who ceases to be a member through either of these two mechanisms is not entitled to a share of the trust.

Plaintiff John Kostick was a member of Fort Hill, but he stopped living in Fort Hill in 1993. He alleges that he left the commune involuntarily and without a four-fifths vote of the trustees to expel him.

In 2007 or 2008, other members of Fort Hill received distributions from the trust. In November 2008, Kostick made a demand for his beneficial interest, which was rejected, and so he filed suit in superior court in February 2009. In his complaint, Kostick asserted claims for breach of trust, breach of fiduciary duty, an accounting, and a declaratory judgment.

The trustees moved to dismiss the complaint, and the court allowed their motion. Between the time of the court's decision and entry of judgment, Kostick moved to amend his complaint. The court then entered judgment on the motion to dismiss and denied Kostick's motion to amend. In denying the motion to amend, the court reasoned that Kostick's claims are barred by the applicable statute of limitations, G.L. c. 260 2A, because the three-year limitations period began running on Kostick's claims when he was ejected from Fort Hill many years earlier.

The Appeals Court reversed and remanded. On the statute of limitations question, the Court explained that a cause of action for breach of trust or breach of fiduciary duty does not accrue until the trustee repudiates the trust and the beneficiary has actual knowledge of the repudiation. Here, based on the facts alleged in the complaint, which must be deemed to be true, the trustees did not repudiate the trust until they rejected Kostick's demand for his beneficial interest in November 2008, rather than when he alleges that he involuntarily left the commune without a four-fifths vote of the trustees, and thus his claims were not time-barred.

Second, in *Krawczyk v. Beng*, Case No. 10-P-1443, 2011 Mass. App. Unpub. LEXIS 702 (May 24, 2011), another decision issued pursuant to Rule 1:28, the Appeals Court affirmed the appointment of a receiver to oversee and manage a parcel of property owned in trust. The Court explained that a receiver can be appointed within the discretion of the court to prevent waste or loss and conserve the assets in question for the benefit of all parties with an interest in the assets. Here, the Court held that the appointment of a receiver was appropriate as a "prophylactic measure to protect assets," and clearly within the motion judge's discretion, because of the discord between the parties and the trustee's demonstrated inability to manage and protect the trust property.