Annual Survey of Massachusetts Law

Volume 1977 Article 14

1-1-1977

Chapter 11: Civil Practice and Procedure

Thomas F. Maffei

Owen S. Walker

CHAPTER 11

Civil Practice and Procedure

THOMAS F. MAFFEI AND OWEN S. WALKER

§11.1. Rule 15: Amendment of Pleadings: Judge's Discretion. Although rule 15(a) of the Massachusetts Rules of Civil Procedure[1] establishes a liberal policy regarding the amendment of pleadings, the rule grants a trial judge discretion to refuse to permit amendment. Rule 15(a) establishes no standards, however, for determining whether such discretion has been exercised properly. Consequently, trial judges must look to appellate decisions for guidance. Thus, *Castellucci v. United Fidelity and Guaranty Co.*,[2] is valuable to trial court judges since the Supreme Judicial Court in this case for the first time established guidelines for trial judges passing upon Rule 15 motions to amend.

Castellucci involved a suit by a homeowner against a contractor for property damage resulting from a gas explosion in April, 1970.[3] The complaint alleged that during excavation work the contractor had disturbed a gas line, causing the explosion.[4] The contractor filed an answer denying the allegations of the complaint and simultaneously commenced a third-party action against his liability insurer and the local gas company.[5] In this third-party action against the insurer, the contractor alleged that under the terms of his insurance policy he was entitled

* Thomas F. Maffei and Owen S. Walker practice with the law firm of Choate, Hall & Stewart, Boston.

§11.1. [1] MASS. R. CIV. P. 15(a), *reprinted in* 365 Mass. 730, 761 (1974) in pertinent part provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal or [in certain other circumstances] within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The adoption of Rule 15 liberalized prior Massachusetts law, which did not permit amendments as of right. See G.L. c. 231, §§ 51-56.

[2] 1977 Mass. Adv. Sh. 646, 361 N.E.2d 1264.

[3] *Id.* at 648, 361 N.E.2d at 1265.

[4] *Id.*

[5] *Id.*

to be furnished with a defense to the home-owner's suit and to be indemnified for any judgment rendered against him.[6] The original and third-party actions were tried together before an auditor in January, 1974. The auditor found for the homeowner in the principal action and for the gas company and the liability insurer in the third-party action.[7] In finding for the insurer, the auditor rejected the contractor's claim that the policy's terms expressly covered the damage in question, pointing to language in the insurance policy specifically excluding coverage for damage caused for the use of excavating equipment.[8]

In March of 1975, the several actions reached jury trial in the superior court. Counsel for each of the four parties appeared and were ready to proceed. However, the contractor's attorney advised the court during a lobby conference that he intended to file a new amended third-party complaint in the action against the insurer.[9] This new complaint, filed shortly after the conference, alleged a theory of liability which the Supreme Judicial Court on review found "markedly different" from the original complaint.[10] In particular, the amended complaint alleged that an agent of the insurer had made an oral promise that such damage was covered, unlike the allegations in the original complaint, which had alleged that the insurance policy by its terms covered damage caused by the use of excavating equipment.[11] The insurer objected to the contractor's motion to allow amendment unless a continuance was also granted. The trial judge denied the motion to amend but failed to state his reasons for so doing.[12]

The Supreme Judicial Court affirmed the judge's ruling.[13] In so doing, the Court noted that there may be circumstances in which a judge must set forth his reasons for denying the motion for the denial to be proper.[14] In the instant case, however, the Court found ample justification for denying the motion to amend and further determined that, in the instant setting, the trial judge was not required to give his reasons for denying such motion. One justification which obviously influenced the Court in reaching its decision was the contractor's long delay in raising the new theory of liability. The Court remarked that the evidence supporting the insured's new theory was probably available before the audi-

[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 649, 361 N.E.2d at 1266.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 650 n.2, 361 N.E.2d at 1266 n.2. The Court stated that "[i]n other circumstances, a statement of reasons, or perhaps findings of facts, may be required to demonstrate adequate justification for a judge's action in denying a motion to amend a pleading." *Id.*

tor's hearing began. The Court, however, observed that undue delay alone may not always suffice to justify the judge's action.[15] Rather, the Court indicated that the primary factors justifying the denial of the motion to amend were the imminence of the trial, "the public interest in the efficient operation of the trial list and . . . the interests of other parties who [were] ready for trial."[16]

After indicating the grounds for affirming the case at hand, the Court *in dicta* provided some valuable guidelines for trial judges ruling upon motions to amend.[17] In this portion of the decision the Supreme Judicial Court suggested that "undue delay, bad faith or dilatory motive[s] . . . repeated failure to cure deficiencies by amendments previously allowed, undue prejudice . . . [and] futility of amendment . . ."[18] were factors which would justify a court denying a motion to amend.

§11.2. Personal Jurisdiction: Long Arm Statute: "Transacting Business." *Ross v. Ross*[1] involved an interpretation of the words "transacting business" as used in section 3(a) of chapter 223A of the General Laws—the state's long arm statute[2]—in the context of a suit to enforce a separation agreement. As in earlier decisions, the court interpreted the transacting business section broadly and found the requisite "minimum contacts"[3] necessary to support jurisdiction.

The plaintiff in *Ross* sought to enforce a separation agreement against his non-resident former wife. The wife had previously petitioned the probate court for a modification of the divorce decree.[4] This proceeding culminated in a probate court order against the husband.[5] The husband

---

[15] *Id.* at 650, 361 N.E.2d at 1266.

[16] *Id.*

[17] *Id.* at 651, 361 N.E.2d at 1266.

[18] *Id.* at 647, 648, 361 N.E.2d at 1265, *quoting* Forman v. Davis, 371 U.S. 178, 182 (1962) (construing identical language under the Federal Rules of Civil Procedure). Regarding the futility of the amendment as a reason for denying a motion to amend, the Supreme Judicial Court in another case decided during the *Survey* year, Jessie v. Boynton, 1977 Mass. Adv. Sh. 652, 361 N.E.2d 1267, held that the trial judge in passing on a motion to amend a complaint can properly consider whether the amended complaint states a cause of action. *Id.* at 654, 361 N.E.2d at 1269.

§11.2. [1] 1976 Mass. Adv. Sh. 2726, 358 N.E.2d 437.

[2] G.L. c. 223A, § 3(a) provides: "a court may exercise jurisdiction over a person . . . as to a course of action in law or equity arising from the person's (a) transacting any business in the commonwealth . . ." *See* "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423 (1972); Nichols Assocs., Inc., v. Starr, 1976 Mass. App. Ct. Adv. Sh. 177, 341 N.E.2d 909. For local federal court decisions interpreting this provision, *see* Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972); Seymour v. Parke, Davis & Co., 423 F.2d 584 (1st Cir. 1970).

[3] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[4] 1976 Mass. Adv. Sh. at 2727, 358 N.E.2d at 438.

[5] *Id.*

thereafter commenced a civil action in the superior court seeking specific performance of a portion of the separation agreement whereby the wife agreed not to initiate any action to increase the husband's payment obligations.[6] The superior court accepted the wife's motion to dismiss the action on the ground that it lacked personal jurisdiction over the non-resident former wife. The Supreme Judicial Court ordered direct appellate review and reversed.[7]

The Court held that the wife's contacts with Massachusetts were sufficient to subject her to jurisdiction even though she resided in New Jersey at the time the separation agreement was signed and had apparently signed the agreement in New Jersey. In doing so, the Court reasoned that the divorce proceeding giving rise to the separation agreement took place in Massachusetts. The Court further noted that the separation agreement contained a Massachusetts choice of law provision. Finally, the Court observed that the former wife had voluntarily come into the Massachusetts courts to seek a modification of the decree.[8]

In holding that the superior court had jurisdiction, the Court expressly rejected the notion that section 3(a) is limited solely to nonresident defendants engaged in commercial activity in Massachusetts.[9] Instead, the Court determined that the words "transacting any business" refer to "any purposeful acts [by the nonresident] whether personal, private or commercial."[10] The Court emphasized, however, that such contacts must be purposeful or intentional.[11] Applying this limitation, the Court gave great weight to the fact that the former wife agreed to a Massachusetts choice of law provision in the separation agreement and that she had initiated court proceedings in Massachusetts.[12]

While the Court's construction of "transacting . . . business" to include noncommercial activity apparently has no precedent in the meager case law construing section 3(a), the Court's inquiry into the intentional or purposeful nature of a nonresident defendant's contacts with the forum state is consistent with prior appellate decisions. For exam-

[6] *Id.*

[7] *Id.* at 2728, 358 N.E. 2d at 439.

[8] *Id.* at 2729, 358 N.E.2d at 439.

[9] *Id.* at 2728, 358 N.E.2d at 439. *See* Van Wagenberg v. Van Wagenberg, 241 Md. 154, 170-172, *cert. denied,* 385 U.S. 833 (1966).

[10] 1976 Mass. Adv. Sh. at 2728, 358 N.E.2d at 439.

[11] *Id.*

[12] *Id.* at 2729, 358 N.E.2d at 439. The Court did not discuss whether the choice of law provision alone would have been sufficient to subject the former wife to jurisdiction. In view of the constitutional requirements of International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), it is doubtful whether a mere choice of law provision would provide a sufficient basis for personal jurisdiction, particularly where the nonresident is not in a position to bargain over the provision.

ple, in *Nichols Associates, Inc. v. Starr,*[13] decided during the previous *Survey* Year, the Appeals Court found personal jurisdiction lacking where the defendant's contacts with the forum state were largely beyond his control.[14] The *Ross* and *Nichols* decisions are consequently strong precedent for concluding that section 3(a), once referred to as the "most open-ended provision in the [Long Arm] statute" by the United States Court of Appeals for the First Circuit,[15] is nonetheless limited by the requirement that the contacts be made voluntarily.[16]

§11.3. Statute of Limitations: Misrepresentation: Accrual: Time of Discovery. During the *Survey* year, the Supreme Judicial Court in *Friedman v. Jablonski*[1] adopted the so-called "discovery rule" in certain cases of misrepresentation involving the sale of real estate by holding that a plaintiff's cause of action accrues only when a plaintiff knew or reasonably should have known that a misrepresentation had occurred. The Court prior to *Friedman* had held that a plaintiff's cause of action for misrepresentation accrues at the time the misrepresentation is made.[2]

Friedman involved an action for deceit by purchasers of real estate against both the sellers and their broker. The Purchasers' complaint alleged defendants had induced them to acquire the real estate by knowingly making false oral and written statements. The first alleged misrepresentation was that there was a "600 foot artesian well existing upon and serving the property."[3] The second misrepresentation was that there was a "right of way providing access to the premises over a paved driveway situated upon the land of an adjacent owner."[4] The purchase giving rise to the action occurred on January 12, 1972. Plaintiffs alleged that they did not discover either that no well existed upon the land or that no right of way existed until December, 1972. The then applicable general tort statute of limitations provided, with certain exceptions, that tort actions must be commenced "within two years next after the cause of action accrues."[5] The action in *Friedman* was brought on November

[13] 1976 Mass. App. Ct. Adv. Sh. 177, 341 N.E.2d 909.

[14] *Id.* at 187, 341 N.E.2d at 912-13. In *Starr,* the court found that the defendant's only contacts with Massachusetts were that he accepted services which were fortuitously performed by plaintiff in Massachusetts and that defendant had sent an employee to pick up survey plans at plaintiff's place of business in Massachusetts. *Id.* at 186-87, 341 N.E.2d at 912.

[15] Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079, 1082 (1st Cir. 1973).

[16] A further discussion of the *Ross* case appears in this volume at § 1.3 *supra.*

§11.3. [1] 1976 Mass. Adv. Sh. 2778, 358 N.E.2d 994.

[2] *E.g.,* Brackett v. Perry, 201 Mass. 502, 87 N.E. 903 (1909).

[3] 1976 Mass. Adv. Sh. at 2779, 358 N.E.2d at 996.

[4] *Id.*

[5] Mass. G.L. c. 260, § 2A (1948). G.L. c. 260, § 2A, *as amended by* Acts of 1973, c. 777,

22, 1974, more than two years after the sale of the property, but within two years of the plaintiffs' discovery of the allegedly false representations. Following defendants' motion to dismiss, the superior court judge dismissed the action as barred by the statute of limitations.

The Supreme Judicial Court on appeal reached different conclusions with respect to the applicability of the statute of limitations to plaintiffs' two misrepresentation claims. On one hand, the Court found that plaintiffs' claim regarding the alleged right of way misrepresentation was barred by the statute of limitations.[6] The Court in this portion of its decision reasoned that questions regarding existing rights of way were not "inherently unknowable" at the time of a sale,[7] and thus the statute commenced running with the sale.[8] This conclusion stemmed from the Court's observation that any question with respect to a right of way could be resolved by a title search.[9] On the other hand, the Court, again applying the "inherently unknowable" test,[10] found that plaintiffs' claim regarding the alleged well was not barred by the statute of limitations because the well's non-existence could not have been determined until after the sale.[11] The Court, accodingly, determined that the applicable statute of limitations for such "inherently unknowable" items does not run until a plaintiff knows or should know the representation is false.[12]

The *Friedman* Court's primary authority for holding that plaintiffs' cause of action relating to the well did not accrue until they should have reasonably discovered the representation was false was its recent holding in *Hendrickson v. Sears.*[13] In *Hendrickson,* another misrepresentation case, the Court had held that a client's cause of action against his attorney for negligently certifying title to real estate failed to accrue until the misrepresentation was discovered or should have been discovered.[14] The holding in *Hendrickson* was prompted by the peculiar value inhering in a certificate of title. The *Hendrickson* decision seemed to have been strictly limited to its facts, since the *Hendrickson* Court emphasized that the accrual issue in the negligent certification of title to real estate context had not been decided previously, and that a

§ 1 (1973), now provides for a three-year statute of limitation in such tort and contract claims.

[6] 1976 Mass. Adv. Sh. at 2782, 358 N.E.2d at 997.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 2783, 358 N.E.2d at 998.

[10] *Id.* at 2781, 358 N.E.2d at 997.

[11] *Id.* at 2783, 358 N.E.2d at 998.

[12] *Id.* at 2781, 358 N.E.2d at 997.

[13] 365 Mass. 83, 310 N.E.2d 131 (1974).

[14] *Id.* at 90-91, 310 N.E.2d at 132.

"title report which cannot be relied upon two years after its issuance is practically valueless."[15] In contrast, *Friedman* involved neither title certification nor any fiduciary relationship; the parties in *Friedman* were merely participants in arms length bargaining.[16] *Friedman* therefore signals a significant broadening of the Court's application of the so-called misrepresentation "discovery rule."

The most important question arising from *Friedman* is whether the Court's holding is limited to the context to real estate fraud. Nothing in the Court's language or reasoning indicates such limitation. However, if the Court takes what appears to be the next logical step—applying the discovery rule to all cases of fraudulent sales or to all misrepresentation cases where the misrepresentation is inherently unknowable at the time of the transaction—this will represent a radical departure from previously well-settled Massachusetts precedent. This precedent holds a plaintiff's actual discovery of the misrepresentation is immaterial to the question of when the statute of limitations period commences.[17]

Friedman is also noteworthy because the Court affirmed the dismissal of the plaintiffs' claim concerning the right of way issue. The Court in this portion of the decision determined *as a matter of law* that it was unreasonable for the plaintiff to fail to discover the misrepresentation at or before the time of sale.[18] The Court premised this conclusion on the fact that the misrepresentation concerning the right of way could have been discovered by a proper title search.[19] Accordingly, the Court concluded that plaintiffs must suffer the consequences of their failure to hire an attorney or, if they in fact hired an attorney, of any omission on his part.[20]

It is unusual for a court to rule that an act is unreasonable as a matter of law. The Court's conclusion may have stemmed from the consideration that leaving all questions regarding when a buyer should have discovered a misrepresentation in realty sales to the trier of fact would make the statute of limitations defense too unpredictable. It thus remains for future cases to decide what types of misrepresentations in the

[15] *Id.* at 90, 310 N.E.2d at 135, *quoting* Neal v. Magana, 6 Cal.3d 176, 183, 98 Cal. Rptr. 837, 841, 491 P.2d 421, 425 (1971). In the *Neal* decision, the California Supreme Court held that a title defect not disclosed by an attorney is inherently unknowable to the client, unless the client duplicates his attorney's title search or retains a second attorney to do so. *Id.* at 89-90, 310 N.E.2d at 135.

[16] The *Friedman* Court noted expressly that no fiduciary relationship existed in the instant case. 1976 Mass. Adv. Sh. at 2781, 358 N.E.2d at 997.

[17] *E.g.*, Moseley v. Briggs Realty Co., 320 Mass. 278, 285, 69 N.E.2d 7, 12 (1946); Norwood Trust Co. v. Twenty-Four Fed. St. Corp., 295 Mass. 234, 237, 3 N.E.2d 826, 827-28 (1936).

[18] 1976 Mass. Adv. Sh. at 2782, 358 N.E.2d at 997.

[19] *Id.*

[20] *Id.*

sale of real estate are reasonably discoverable at the time of sale as a matter of law. Similarly, determining what types of misrepresentation create factual questions as to when plaintiffs should discover them awaits future decisions in this area. In any event, it is safe to assume that the Court, in applying the "discovery rule", will continue to be guided by the "inherently unknowable" standard it relied upon in *Friedman.*[21]

§11.4. Statute of Limitations: Nonresident Defendants. Until this *Survey* year, an unresolved issue of Massachusetts law was whether section 9 of chapter 260 of the General Laws, the statute providing for tolling of the statute of limitations for the period during which a defendant resides outside the Commonwealth, should be interpreted as applying only to defendants outside the *jurisdiction* of a Massachusetts court. This year, in *Walsh v. Ogovzalek,*[2] the Supreme Judicial Court held that the statute applied solely to defendants who are beyond the reach of Massachusetts' long arm statute.[3] Thus, the statute tolling the statute of limitations is not triggered simply by the fact a defendant resides outside the Commonwealth; it must further be shown that the defendant could not be served either by way of substituted service upon the Registrar of Motor Vehicles[4] or pursuant to the service provisions of the Massachusetts long arm statute.[5]

The *Walsh* case involved a motor vehicle tort claim for personal injuries. The plaintiff had been injured on January 15, 1973 while a passenger in the defendant's automobile.[6] She brought suit against the defendant on June 10, 1975, more than two years after the accident and seemingly beyond the then-applicable two-year tort statute of limitations.[7] However, the record disclosed that twenty-three months after the accident the defendant resided in Connecticut.[8] The plaintiff consequently contended that the statute of limitations was tolled during the defendant's absence from the state owing to the provisions of section 9 of chapter 269.

---

[21] The Court stated "to the extent that any misrepresentation concerns a fact which is 'inherently unknowable' by the plaintiffs at the time it was made and at the time of the sale, we think that the rule of the *Hendrickson* case should be applied. . . ." *Id.* at 2781, 358 N.E.2d at 997.

§11.4. [1] G.L. c. 260, § 9. Section 9 provides, in pertinent part, "if, after a cause of action has accrued, the person against whom it has accrued resides outside of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; . . ." *Id.*

[2] 1977 Mass. Adv. Sh. 624, 361 N.E.2d 1247.

[3] *Id.* at 628, 361 N.E.2d at 1250.

[4] G.L. c. 90, § 3A.

[5] G.L. c. 223A, § 6.

[6] 1977 Mass. Adv. Sh. at 625, 361 N.E.2d at 1249.

[7] G.L. c. 260 § 2A (1948).

[8] 1977 Mass. Adv. Sh. at 625-26, 361 N.E.2d at 1249.

Despite this contention, the Court held that the plaintiff was barred from suit by the statute of limitations.[9] In so holding, the Court interpreted the words "resides out of the Commonwealth" as used in section 9 of chapter 260 of the General Laws as being limited to defendants who by reason of nonresidence are beyond the jurisdiction of the court.[10] (However, the Court limited its holding to those cases in which the name and location of the nonresident defendant are known to the plaintiff.)[11] To construe the statute otherwise, the Court reasoned, "would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff."[12] The holding in *Walsh* is consistent both with similar cases in other jurisdictions[13] and with the holding of the Massachusetts Federal District Court in a diversity case applying Massachusetts law.[14]

§11.5. Appeals from Interlocutory Orders: General Unavailability. Litigants and their counsel have persistently attempted to have superior court interlocutory orders reviewed by the Supreme Judicial Court despite repeated warnings to desist by the Court. During the *Survey* Year, three such attempts met with no success.[1] More significantly, the Court imposed double costs in one case, and indicated that henceforth such refusals to grant review of interlocutory orders will be accompanied by double costs.

In the first case, *Kargman v. Superior Court*,[2] the plaintiff landlords had brought proceedings in the district court seeking to evict eighty-one of their tenants.[3] After a trial extending over thirty-one days in the district court, judgments were entered against fifty-nine of the tenants.[4] The tenants against whom judgments were entered applied to the superior court for *de novo* trials, whereupon a superior court judge referred the cases to a master for trial.[5] In order "to save tremendous expense to the taxpayers,"[6] the superior court appointed as master the district

[9] *Id.* at 626, 361 N.E.2d at 1249.

[10] *Id.* at 628, 361 N.E.2d at 1250.

[11] *Id.*

[12] *Id.*

[13] *E.g.*, Byrne v. Ogle, 488 P.2d 716 (Alaska 1971); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Bolduc v. Richards, 101 N.H. 303, 142 A.2d 156 (1958); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947).

[14] Smith v. Pasqunletto, 146 F. Supp. 680 (D. Mass. 1956).

§11.5. [1] Pollack v. Kelley, 1977 Mass. Adv. Sh. 883, 362 N.E.2d 525; Cappadona v. Riverside 400 Function Room, Inc., 1977 Mass. Adv. Sh. 493, 360 N.E.2d 1048; Kargman v. Superior Court, 1976 Mass. Adv. Sh. 2580, 357 N.E.2d 300.

[2] 1976 Mass. Adv. Sh. 2580, 357 N.E.2d 300.

[3] *Id.* at 2581, 357 N.E.2d at 300.

[4] *Id.* at 2581, 357 N.E.2d at 301.

[5] *Id.*

[6] *Id.*

court judge who had heard the case initially.[7] At the same time, the superior court judge denied certain interim rent relief requested by the landlords.[8]

Plaintiffs then filed a motion in the Supreme Judicial Court seeking to revoke the interlocutory superior court order appointing the district court judge master.[9] In seeking this relief, plaintiffs relied on the Supreme Judicial Court's statutory powers of general superintendence of all courts of inferior jurisdiction.[10] A single justice dismissed the complaint,[11] and plaintiffs appealed to the full court.

The *Kargman* Court described the case as another in a "long line of recent cases in which a litigant seeks to obtain full appellate review by this court of an interlocutory ruling or order which has not been reported by the judge who entered it",[12] and held that such review was not available "regardless of the procedural vehicle by which it is sought."[13] In support of its decision, the Court relied on numerous recent decisions directly on point.[14]

In *Cappadona v. Riverside 400 Function Room, Inc.*,[15] the second *Survey* Year case concerning full court review of interlocutory orders, a superior court judge issued an interlocutory order staying the plaintiffs' contract action because of a related pending bankruptcy proceeding in the United States District Court.[16] The plaintiffs then filed a petition pursuant to section 118 of chapter 231 with a single justice of the Supreme Judicial Court, seeking relief from the order of stay.[17] After the single justice denied the petition,[18] the plaintiffs, as had the plaintiffs in *Kargman*, sought review by the full Court, asking the Court to exercise its general superintendency over lower courts under section 3 of chapter 211.[19]

---

[7] *Id.* at 2582, 357 N.E.2d at 301.

[8] *Id.*

[9] *Id.* at 2583, 357 N.E.2d at 301.

[10] G.L. c. 211, § 3, *as amended by* Acts of 1973, c. 114, § 44.

[11] 1976 Mass. Adv. Sh. at 3583, 357 N.E.2d at 302.

[12] *Id.* at 2580, 357 N.E.2d at 300.

[13] *Id.*

[14] *Id.* at 2587, 357 N.E.2d at 303, *citing* Martin v. Townsend, 1976 Mass. Adv. Sh. 1013, 345 N.E.2d 702; Corbett v. Kargman, 1976 Mass. Adv. Sh. 559, 343 N.E.2d 408 (removal of the actions to the Supreme Judicial Court sought under G.L. c. 211, § 4A); Giacobbe v. First Coolidge Corp., 1975 Mass. Adv. Sh. at 894, 325 N.E.2d 922; Foreign Auto Import, Inc. v. Renault Northeast, Inc., 1975 Mass. Adv. Sh. 1121, 326 N.E.2d 888; Rollins Environmental Serv. Inc. v. Superior Court, 1975 Mass. Adv. Sh. 2052, 330 N.E.2d 814 (relief sought under G.L. c. 211, § 3); Albano v. Jordan Marsh Co., 1975 Mass. Adv. Sh. 1406, 327 N.E.2d 739.

[15] 1977 Mass. Adv. Sh. 493, 360 N.E.2d 1048.

[16] *Id.* at 494, 360 N.E.2d at 1050.

[17] *Id.* at 493, 360 N.E.2d at 1049.

[18] *Id.*

[19] *Id.* at 494, 360 N.E.2d at 1050.

The Court dismissed the appeal, relying on *Kargman* and the numerous other cases cited in *Kargman.*[20] The Court also quoted its decision in *Healy v. First District Court of Bristol*[21] for the proposition that the power of general superintendence "should be exercised only in exceptional circumstances, when necessary to protect substantive rights."[22] Finally, the Court stated that future attempts to appeal interlocutory matters to the full Court in any but the most unusual circumstances would be regarded as frivolous appeals and subject to the double costs penalty provided for in Rule 25 of the Massachusetts Rules of Appellate Procedure.[23]

The final attempt to obtain review of an interlocutory order during the *Survey* Year, *Pollack v. Kelley*,[24] involved an appellate division dismissal of a district court order overruling a demurrer. As in the previous two cases, the Court dismissed the appeal and, in strong language, made clear that it would no longer tolerate attempts to obtain full appellate review of interlocutory orders in the absence of extraordinary circumstances.[25] The Court protested that "[f]or reasons which we are unable to discern, litigants continue to beseige this court with premature requests for appellate review of interlocutory rulings or orders of trial judges . . . ."[26] The Court maintained that its earlier decisions, including thoe in *Kargman* and *Cappadona*, "demonstrate the extent to which this court has been needlessly burdened in the last few years by these foredoomed, and threfore futile and unsuccessful, premature attempts to obtain appellate review of interlocutory matters."[27] True to the earlier warning in *Cappadona*, the Court's dismissal was accompanied by an award of double costs to the appellee.[28]

The result reached in *Kargman, Cappadonna* and *Pollack* highlights a significant difference between federal and Massachusetts civil procedure with respect to appellate review of interlocutory orders, particularly those involving injunctive relief. Under Massachusetts procedure, a partly aggrieved by an interlocutory order of the superior court may

---

[20] *Id.* at 495, 360 N.E.2d at 1050. See text at notes 1-14 *supra* for a discussion of *Kargman.*

[21] 1975 Mass. Adv. Sh. 1623, 327 N.E.2d 894.

[22] 1977 Mass. Adv. Sh. at 496, 360 N.E.2d at 1050, *quoting* Healy v. First District Court of Bristol, 1975 Mass. Adv. Sh. 1623, 1624, 327 N.E.2d 894, 895.

[23] 1977 Mass. Adv. Sh. at 496-97, 360 N.E.2d at 1051. Rule 25 of the Rules of Appellate Procedure provides that: "If the appellate court shall determine that an appeal is frivolous, it may award single or double costs to the appellee, and such interest on the amount of the judgment as may be allowed by law."

[24] 1977 Mass. Adv. Sh. 883, 362 N.E.2d 525.

[25] *Id.* at 884-86, 362 N.E.2d at 526-27.

[26] *Id.* at 884, 362 N.E.2d at 526.

[27] *Id.* at 886, 362 N.E.2d at 527.

[28] *Id.*

seek to have a single justice of the Supreme Judicial Court or the Appeals Court suspend or modify the order by filing a complaint under section 118 of chapter 231.[29] However, if the single justice denies relief—which he may do without stating his reasons—the moving party has no right to full appellate revew by the Court. This resulting unavailability of full Supreme Judicial Court review would presumably arise even if a single justice grants relief under section 118 from an interlocutory order of the superior court, although this issue has not been specifically decided. In contrast, the parties in federal courts have a statutory right to full appellate review of interlocutory district court orders either "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" as well as certain other interlocutory orders.[30] As a result, a considerable body of decisional law at the appellate level has arisen to guide the federal district courts in acting on requests for preliminary injunctions.

The absence of similar statutory provision in Massachusetts deprives state superior courts of similar guidance except in those rare cases when a superior court judge reports the matter pursuant to Rule 64 of the Massachusetts Rules of Civil Procedure.[31] More importantly, owing to the crucial importance of preliminary injunctions, attachments and trustee process in many cases, the absence of a procedural method for obtaining review of interlocutory orders deprives litigants of appellate review of what may be the most important issue in the case.[32]

§11.6. Housing Court—Jurisdiction. This *Survey* year, the Supreme Judicial Court in *Police Commissioner of Boston v. Lewis,*[1] imposed a significant limitation upon the housing court's jurisdiction. *Lewis* arose out of race-related incidents which occurred in two public housing projects in Boston. The plaintiffs, black tenants of the housing

[29] G.L. c. 231, § 118 provides in pertinent part that "[a] party aggrieved by an interlocutory order of a justice of the superior court . . ., may file a petition in the appropriate appellate court seeking relief from such order . . . ."

[30] 28 U.S.C. § 1292(a) (1976).

[31] Rule 64 of the Massachusetts Rules of Civil Procedure provides in pertinent part that

> If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties.

[32] However, by Stat. 1977, c. 405, G.L. c. 231, § 118 was amended to allow parties aggrieved by superior court and housing court orders "granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction" to appeal to the Appeals Court. This may allow full appellate review of superior court orders concerning injunctions, as in the federal system. *But see* J. Henn, *Civil and Interlocutory Appeals in Massachusetts State Courts,* 62 MASS. L.Q. 225, 230-31 (1977).

§11.6. [1] 1976 Mass. Adv. Sh. 2590, 357 N.E.2d 305.

projects involved, filed a class action in the Housing Court of the City of Boston against, among others, the Boston Police Department ("department") and the commissioner, seeking injunctive relief and damages "to secure the protection of black public housing tenants . . . from racial harassment . . . ."[2]

After an evidentiary hearing on plaintiff's request for a preliminary injunction, the housing court judge found that the department had failed to maintain order during a violent racial conflict in and around the housing projects.[3] The housing court therefore entered an order requiring the commissioner to provide twenty-four hour security protection to the persons and apartments of the named plaintiffs and the class they represented until such time as the need no longer existed.[4] Thereafter, the police commissioner filed a petition with a single justice of the Supreme Judicial Court under section 118 of chapter 231[5] for relief from the interlocutory order of the housing court on the ground that the housing court lacked subject matter jurisdiction.[6] After a hearing, the single justice reserved the case and reported to the full court.[7]

The Supreme Judicial Court held that the housing court had no jurisdiction over police protection and the allocation of police resources, notwithstanding the relationship in this instance between police protection and housing.[8] The Court reached its decision despite the provisions of section 3 of chapter 185A, which gives the housing court jurisdiction over actions arising under "any other general or special law, ordinance, rule or regulation as is concerned with the health, safety or welfare of any occupant of any place used, or intended for use, as a place of human habitation"[9] as well as jurisdiction over criminal and civil actions arising out of a variety of itemized housing statutes. The Court determined that adopting the housing court's broad interpretation of the above-quoted clause would give the housing court jurisdiction over every matter affecting the health, safety or welfare of tenants in Boston.[10] Such

---

[2] *Id.* at 2591, 357 N.E.2d at 306.

[3] *Id.* at 2593, 357 N.E.2d at 307.

[4] *Id.* at 2594, 357 N.E.2d at 307.

[5] G. L. c. 231, § 118 provides, in part, that:

> [a] party aggrieved by an interlocutory order of . . . the housing court of the city of Boston . . ., may file a petition in the appropriate appellate court seeking relief from such order. The appellate court may, in its discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen. The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by the appellate court.

[6] 1976 Mass. Adv. Sh. at 2594, 357 N.E.2d at 307.

[7] *Id.*

[8] *Id.* at 2596, 357 N.E.2d at 308.

[9] G. L. c. 185A, § 3, *as amended by* Acts of 1974, c. 700, § 1.

[10] 1976 Mass. Adv. Sh. at 2596, 357 N.E.2d at 308.

an expansive reading of the housing court's jursdictional statute, the Court reasoned, would be contrary to the intent of the legislature to grant only limited jurisdiction to the housing court.[11]

The Court's reasoning in this regard stemmed from its analysis of the legislative history of chapter 185A, the statute creating the housing court. The *Lewis* Court determined that in enacting chapter 185A, the legislature "did not intend to create a court to handle all problems affecting residents of Boston, but rather its objective was to establish a separate, specialized court with expertise in the area of housing."[12] While declining to delineate the exact scope of the housing court's jurisdiction, the Court did find that "police protection and allocation of police resources, despite their significant impact on the welfare and safety of Boston residents, are not sufficiently related to housing to come within the housing court's jurisdiction . . . ."[13]

It is interesting to note that instead of merely ordering the housing court action dismissed, the Court remanded the case to the single justice for further proceedings "to determine the merits of the controversy."[14] Although the Court indicated that the single justice might exercise his statutory power to transfer the case to the superior court for further proceedings on the merits, the court explicitly did not order the injunction dissolved.[15] Since the issue in the commissioner's suit before the single justice was not on the merits of the controversy, it is difficult as a theoretical matter to see how the injunction could remain in effect after the Court had held it was issued by a court having no jurisdiction to do so. Apparently, the Court deemed these theoretical considerations of less importance than the practical consideration of achieving a speedy and just resolution of the controversy.

§11.7. Impoundment—Non-Party Challenge to Order—Newspapers. Prior to the *Survey* year, the Supreme Judicial Court had never specifically delineated the proper procedure to be employed by a non-party seeking to vacate an impoundment order. The Supreme Judicial Court during the *Survey* year resolved many issues in this area in *Ottaway Newspapers, Inc. v. Appeals Court*.[1] *Ottaway* involved an action, brought in the Supreme Judicial Court under the Court's general superintendency power,[2] in which a newspaper sought to have vacated an impoundment order entered by a single judge of the

[11] *Id.*
[12] *Id.*
[13] *Id.* at 2600, 357 N.E.2d at 310.
[14] *Id.*
[15] *Id.* at 2591, 357 N.E.2d at 306.

§11.7. [1] 1977 Mass. Adv. Sh. 973, 362 N.E.2d 1189.
[2] G. L. c. 211, § 3, *as amended by* Acts of 1973, c. 1114, § 44.

Appeals Court.[3]

The litigation leading to the impoundment order originated in superior court between the Commissioner of Banks ("commissioner") and a savings bank. The commissioner had initiated a procedure to remove the bank's president and members of its board of investment.[4] Both the superior court and the single judge of the Appeals Court had impounded the papers in the case with the acquiescence of the commissioner and the bank.[5] The plaintiff, a local newspaper which desired the information in the impounded papers, challenged the impoundment order[6] by means of a supervisory action against the Court of Appeals and its clerk.[7] This action was dismissed, whereupon the newspaper appealed to the Supreme Judicial Court.[8]

The Supreme Judicial Court upheld the Appeals Court impoundment order[9] despite "the general principle of publicity"[10] applicable to court records.[11] In reaching its decision, the Court observed that the general rule of publicity respecting the public character of judicial proceedings often is circumscribed by statutes expressly or impliedly limiting access to court records and official documents for a variety of policy reasons.[12] The Court thereafter determined that section 5 of chapter 167, which deals with removal of bank officers, impliedly requires nondisclosure of administrative records to keep the case private until an administrative decision adverse to the bank officer is subjected to judicial review.[13]

One important aspect of the *Ottaway* decision is that the Court set forth the proper procedure a non-party should employ when seeking to vacate an impoundment order.[14] The Court announced that:

> [A]s a general rule, . . . a stranger seeking relief against an impoundment order may bring a civil action in the court which issued it, joining the clerk of that court in his official capacity and the parties to the action or at least any who obtained or may defend the order . . . . The action will end in a judgment capable of appeal under ordinary rules. (Special expedition may be needed at every stage.).[15]

---

[3] 1977 Mass. Adv. Sh. at 973-74, 362 N.E.2d at 1191.
[4] *Id.* at 974-75, 362 N.E.2d at 1191-92.
[5] *Id.*
[6] *Id.* at 976, 362 N.E.2d at 1192.
[7] *Id.*
[8] *Id.* at 976-77, 362 N.E.2d at 1192.
[9] *Id.* at 982, 362 N.E.2d at 1194.
[10] *Id.* at 980, 362 N.E.2d at 1194.
[11] *Id.* at 981, 362 N.E.2d at 1194.
[12] *Id.* at 981-82, 362 N.E.2d at 1194.
[13] *Id.* at 986, 362 N.E.2d at 1197.
[14] *Id.*
[15] *Id.*

An additional noteworthy aspect of the *Ottaway* decision is that the Court observed that a newspaper publisher has standing to maintain a suit to vacate an impoundment order.[16]

§11.8. Interrogatories—Failure to Answer Properly—Sanctions. Rule 37(b) of the Massachusetts Rules of Civil Procedure[1] allows a trial court to impose sanctions upon a party who fails to comply with a court order to permit discovery. During the *Survey* year, the Supreme Judicial Court, in *Partlow v. Hertz Corp.*,[2] applied rule 37(b) and upheld a superior court judge's order dismissing a complaint because the plaintiff failed to file proper answers to an interrogatory concerning damages.[3]

Partlow arose out of an automobile accident in which plaintiff was injured.[4] Plaintiff brought suit against Hertz, which owned the car in which plaintiff sustained his injuries, alleging that the car was defective.[5] The discovery issue leading to the order dismissing plaintiff's complaint arose out of defendant's interrogatory No. 14, which asked plaintiff to "[g]ive an itemized statement to date of all monetary losses sustained by you or in your behalf as a result of your alleged accident, including in your answer those losses which have not been paid."[6] Plaintiff's first answer was simply "I will provide this."[7] After the trial court ordered this answer expunged,[8] the plaintiff's second answer was "the list of expenses is not complete at this time, since I have not received all of my hospital bills."[9] The plaintiff's third answer, filed after the superior court ordered the entry of a conditional judgment for the defendant unless the plaintiff filed a proper further answer,[10] itemized charges due the Boston City Hospital, and stated that "I have not yet received a bill from the Massachusetts General Hospital, but given the length of my hospital stay, I presume the bill will be substantially in excess of the Boston City Hospital bill. I have not paid a hospital bill thus far."[11] The

---

[16] *Id.*

§11.8. [1] Rule 37 provides in part:

> Failure to Make Discovery: Sanctions . . . (B) Failure to comply with Order . . . (2) Sanctions by Court in Which Action is Pending. If a party . . . willfully fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (C) An order . . . dismissing the action . . . ."

[2] 1976 Mass. Adv. Sh. 2062, 352 N.E.2d 902.
[3] *Id.* at 2067, 352 N.E.2d at 904.
[4] *Id.* at 2063, 352 N.E.2d at 904.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 2063-64, 352 N.E.2d at 903.
[10] *Id.* at 2064, 352 N.E.2d at 903.
[11] *Id.*

superior court found the third answer "still insufficient and improper"[12] and ordered the complaint dismissed.[13]

In upholding the dismissal, the Supreme Judicial Court noted that the third answer was filed approximately seven months after the plaintiff had lasted received treatment from the Massachusetts General Hospital, and that plaintiff could have easily found out from the hospital what the charges would be.[14] Although recognizing that dismissal was "not a trivial sanction,"[15] the Court stated that the superior court's action was a proper exercise of its discretion.[16] Although the Court's specific holding—that the superior court judge had not abused his discretion in dismissing the complaint— is not surprising, the significance of the case arises from the Court's full endorsement of the sanction of dismissal for failure to comply with discovery orders in appropriate cases. The Court's emphatic language, particularly with respect to answering interrogatories, is worth quoting: "compliance with the rules of civil procedure is not accomplished if the parties make of answers to interrogatories some kind of a game, and in these days of heavily burdened civil dockets the courts are not expected to be subjected to that type of abuse . . . ."[17] Consequently, practitioners are well advised to comply fully with discovery requests since they may be faced with rule 37(b) sanctions for failure to do so.

§11.9. Summary Judgment: Sufficiency of Affidavits. Rule 56 of the Massachusetts Rules of Civil Procedure provides that cases may be disposed via summary judgment where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law.[1] In the three summary judgment cases to reach the state's appellate courts during this *Survey* year, the granting of summary judgment was affirmed. Two of the decisions involved suits based on negotiable instruments;[2] one was a review of the actions of an administrative agency.[3] Significantly, in each case, the determinative factor for sustaining the motion was the insufficiency of the affidavits filed in opposition to the summary judgment motions.

---

[12] *Id.*

[13] *Id.*

[14] *Id.* at 2065, 352 N.E.2d at 903.

[15] *Id.* at 2066, 352 N.E.2d at 904.

[16] *Id.*

[17] *Id.* at 2065-66, 352 N.E.2d at 904.

§11.9. [1] MASS. R. CIV. PRO. 56, *reprinted in* 365 Mass. 824 (1974).

[2] Commonwealth Bank and Trust Co. v. Plotkin, 1976 Mass. Adv. Sh. 2442, 355 N.E.2d 917; John B. Deary, Inc. v. Crane, 1976 Mass. App. Ct. Adv. Sh. 1259, 358 N.E.2d 456.

[3] Olde Towne Liquor Store, Inc. v. Alcholic Beverage Control Comm'n, 1977 Mass. Adv. Sh. 472, 360 N.E.2d 1057.

The first case, *Commonwealth Bank and Trust Co. v. Plotkin,*[4] involved an action by a bank against the indorser of a check. The indorser's principal defense was that he signed the back of the check in a representative capacity and not individually. It appeared that immediately above the indorser's signature on the back of the check was the name of the company on whose behalf defendant maintained he had indorsed the check.

The defendant's affidavit opposing the motion for summary judgment stated that the bank "well knew"[5] both that the check represented payment of money due the company named on the back of the check and that the check had been deposited to that company's account. The opposing affidavit also stated that the bank had previously credited the named company's account with checks issued in the defendant's name and indorsed by him as the company's agent on many occasions.

Although the Court indicated that the pertinent provisions of the Uniform Commercial Code favored the bank's position, it passed "These difficulties [of interpreting the Code sections] because on [defendant's] analysis we think he has not met the requirements of Rule 56(e)."[6] In short, the Court ruled that the defendant's statements that the bank knew the check represented payment of money due the company named on the back of the check fell short of showing that the bank agreed to accept a check for deposit without recourse against the indorser. In particular, the Court stated that defendant's affidavit "does not disclose who acted for the bank in the deposit of the check, what disclosure was made of defendant's intention [not to be personally bound], what manifestation of intention was made on behalf of the bank, or what authority existed for such a manifestation."[7]

In the second case, *John B. Deary, Inc. v. Crane,*[8] the Appeals Court upheld a grant of summary judgment in a suit to recover a deficiency established after a real estate foreclosure sale. At issue in the case was whether the foreclosure sale had been conducted properly. The plaintiff filed supporting affidavits with his motion for summary judgment. The defendant's opposing affidavit, while not disputing most of the statements in plaintiff's affidavits, "alleged the failure of the plaintiff to have the notice of the sale published in conformity with N.H. REV. STAT. ANN. §479.25. . . ."[9]

In upholding the lower court's grant of summary judgment, the court observed that the plaintiff had carried its burden of demonstrating that

[4] 1976 Mass. Adv. Sh. 2442, 355 N.E.2d 917.
[5] *Id.* at 2443, 355 N.E.2d at 918.
[6] *Id.* at 2446, 355 N.E.2d at 919.
[7] *Id.*
[8] 1976 Mass. App. Ct. Adv. Sh. 1259, 358 N.E.2d 456.
[9] *Id.* at 1261, 358 N.E.2d at 458.

no genuine issue of material fact remained in controversy and further pointed out that plaintiff's motion shifted to the defendant the burden of alleging "specific facts which establish a triable issue"[10] in order to avoid having the motion granted. In seeking to satisfy this burden, the defendant in *Crane* had relied solely on the statement in its affidavit that the plaintiff had failed to comply with the publication requirements contained in the applicable New Hampshire statute. The court determined that this allegation was insufficient to create a triable issue, characterizing it as a "bald assertion."[11] The court further noted that the salutary purpose of rule 56 "should not be 'set at naught' where the opposing party merely raises 'vague and general allegations of expected proof.'"[12]

In the third case, *Olde Towne Liquor Store, Inc. v. ABCC,*[13] the plaintiff sought superior court review of an Alcoholic Beverage Control Commission's decision to suspend plaintiff's liquor license. The superior court judge granted the town of Burlington's motion for summary judgment and upheld the Alcoholic Beverage Control Commission's decision. Plaintiff thereafter appealed to the Supreme Judicial Court.

In reviewing the superior court record, the Court noted substantial evidentiary support existed for the license suspension. Apparently, however, the plaintiff raised a constitutional question regarding the propriety of the sanctions imposed, although plaintiff's affidavit failed to mention this claim. On this constitutional issue, the Court maintained that "[i]f the plaintiff believed that there was a genuine issue of material fact regarding the constitutionality of sanctions, the burden was on it to present specific evidence in opposition to the . . . motion for summary judgment."[14]

These three summary judgment cases applied consistently the principles announced by the Supreme Judicial Court in *Community National Bank v. Dawes*[15] regarding the sufficiency of Rule 56 affidavits. The *Community National Bank* Court observed that affidavits filed in opposition to a motion for summary judgment cannot contain mere broad denials, but must set forth specific facts showing that a genuine triable issue exists.[16]

---

[10] *Id.* at 1262, 358 N.E.2d at 458.
[11] *Id.* at 1264, 358 N.E.2d at 459.
[12] *Id.*
[13] 1977 Mass. Adv. Sh. 472, 360 N.E.2d 1057.
[14] *Id.* at 475, 360 N.E.2d at 1060.
[15] 1976 Mass. Adv. Sh. 194, 340 N.E.2d 877.
[16] *Id.* at 200-04, 340 N.E.2d at 880-882.