COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

WILLIAM SILVERSTEIN, Plaintiff,	:	
v.	:	CIVIL ACTION 00-3893
MICROSYSTEMS SOFTWARE, INC., THE LEARNING COMPANY, INC., and MATTEL, INC. Defendants.	:	

DEFENDANTS' MOTION TO DISMISS
PURSUANT TO MASS. R. CIV. P. 12(b)(6) & (9)

On December 27, 2000, by order of the Court, Silverstein filed a Second Amended Complaint in this action (the "Second Complaint"). The Second Complaint is based on the theory that the defendants' settlement positions taken in a previous Superior Court action between the parties[1] amounted to retaliation under the Family and Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), G.L. c. l5lB and the Massachusetts Workers Compensation statute (collectively, the "Statutes") (Second Complaint ¶¶ 39, 43, 46 & 52). The Second Complaint also asserts abuse of process and negligent/intentional infliction of physical/emotional distress claims based on the same facts (Second Complaint ¶¶ 59 & 63).

1 Silverstein's claims in the previous action, entitled Silverstein v. Microsystems Software, Inc. et al., Middlesex Superior CA No. 98-4820 (the "Previous Action") were resolved by offer of judgment in September, 1999 (Second Complaint ¶ 19). The Microsystems Defendants' Counterclaim was later dismissed without prejudice (Second Complaint ¶ 30). Silverstein's appeal of the dismissal of the Counterclaim is pending (Second Complaint ¶ 31).

No Massachusetts law supports Silverstein's retaliation theory - especially because the basis of the alleged retaliation is privileged settlement negotiations. Indeed, Silverstein would have the Court create disincentives to settlement efforts by imposing potential liability when such efforts are unsuccessful. This theory is groundless and should be dismissed. Moreover, the Second Complaint is subject to dismissal under Mass. R. Civ. P. 12(b)(9) as the Previous Action is pending.

BACKGROUND

Silverstein's Previous Superior Court Action

In September 1996, defendant Microsystems Software, Inc. ("Microsystems") terminated the plaintiff William Silverstein ("Silverstein").[2] Based on that event, Silverstein has filed four separate actions: two Massachusetts Commission Against Discrimination complaints, a 1998 action in this Court, and now this action.[3] Silverstein filed the Previous Superior Court Action in October 1998.[4] In the Previous Action, Silverstein

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2 Subsequent to Silverstein's termination, defendant The Learning Company ("TLC") acquired Microsystems and defendant Mattel, Inc. ("Mattel") acquired TLC. "Microsystems Defendants" as used herein shall refer to the three defendants together.

3 On or about March 4, 1997, Silverstein filed his first complaint with the MCAD (Silverstein vs. Microsystems et al, MCAD Docket No. 97-BEM-0674).

4 A copy of the Complaint filed in the Previous Action is attached hereto at Tab A (the "Previous Complaint"). Silverstein appealed the Court's (Sosman, J.) dismissal without prejudice of the Counterclaim in the Previous Action. A copy of Silverstein's appeal is attached hereto at Tab B. The Court may consider pleadings and other materials filed in the Previous Action. See Clark v. Leasecomm Corp. et al, 2000 WL 1512373, at *3 n.7 (Mass. Super. Ct. 2000), citing Watterson v. Page, 987 F.2d 1, 3-4 (lst Cir. 1993)

brought claims under FMLLA, G.L. c. 151B, and the Workers Compensation statute as well as claims for intentional interference with employment, conversion, breach of contract, and negligent or intentional infliction of emotional distress. Silverstein alleged that the Microsystems Defendants violated the Statutes by terminating his employment because of his "qualified" handicap and retaliating against him because of his subsequent exercise of his rights under the Statutes (Previous Complaint ¶¶ 117 - 132).

The Microsystems Defendants' Counterclaim and Its Resolution

In December 1998, the Microsystems Defendants filed an answer and counterclaim (the "Counterclaim") for libel against Silverstein (Second Complaint ¶ 16). On August 31, 1999, the Microsystems Defendants made an offer of judgment to Silverstein of $125,000 for resolution of all of his claims (Second Complaint ¶ 18). On September 1, 1999, Silverstein accepted the Microsystems Defendants' offer of judgment (Second Complaint ¶ 18).

The Previous Action thereafter proceeded only on the Counterclaim and on September 20, 1999, the Microsystems Defendants' counsel forwarded to Silverstein a draft settlement agreement (Second Complaint ¶ 22, Exh. 1). The proposed settlement agreement contained a penalty provision, which the Microsystems Defendants' counsel discussed in a letter dated

September 21, 1999 (Second Complaint ¶¶ 23 - 24, Exh. 2).[5] The Microsystems Defendants later dismissed the Previous Action without prejudice (Second Complaint ¶ 30). Silverstein's appeal of the dismissal of the Counterclaim is pending (Second Complaint ¶ 31; Tab B).[6]

ARGUMENT[7]

I. The Microsystems Defendants' Settlement Communications Cannot Be The Basis Of A Cause of Action

An offer to compromise a dispute is inadmissible in evidence. LePage v. Bumila, 407 Mass. 163, 166 (1991) (offer of compromise inadmissible as an admission); Hunt v. Rice, 25 Mass. App. Ct. 622, 633 (1988) ("The letter in question was an offer to compromise the litigation. As such, it was properly excluded."); Chase v. Chase, 271 Mass. 485, 491 (1930) (finding no error for the "exclusion of a letter passing from plaintiff's to defendant's counsel during a period in which negotiations for compromise were going on."). "This rule is founded in public policy, that there may be no discouragement to amicable adjustments of disputes, by a fear, that if not completed, the party amicably disposed may be injured." Liacos, Massachusetts

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5 The Microsystems Defendants object to Silverstein's use for any purpose of the settlement documents attached as Exhs. 1 and 2 to the Second Complaint. See Section I, infra.

6 In September, 1999 Silverstein withdrew his first MCAD Complaint only to file a second MCAD Complaint on September 27, 1999 (Silverstein v. Mattel Inc. et al, MCAD Docket No. 99-BEM-2634) (Second Complaint ¶¶ 21 & 27).

7 In keeping with the Court's long-standing instruction to save ink and paper by omitting the standards for granting or denying motions to dismiss or for summary judgment, no such authorities are presented here.

Evidence, at 187 (7th Ed. 1999); LaPage, 407 Mass. at 166 ("the law looks with favor upon the settlement of controversies") (citations omitted); Anonik v. Ominsky, 261 Mass. 65, 67 (1927) (holding that evidence of attempts to "buy peace" from litigation are inadmissible).

"Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Proposed Mass. R. Evid. 408(2).

> [P]roof of an offer by either party to compromise the controversy involved in a litigation between them, or of any statements which are an integral part of such an offer, is inadmissible. In Massachusetts the rule extends beyond proof of the bare facts of the offer and its precise terms, and also excludes proof of anything that occurred during the negotiations and constituted an inseparable part of the effort to compromise -- including declarations and admissions made for that purpose and with that end in view.

Young, Pollets and Poreda, Massachusetts Practice, vol. 19, §408.1 (emphasis added)

Nevertheless, Silverstein seeks to hold the Microsystems Defendants liable for positions taken during settlement negotiations (See e.g. Second Complaint ¶ 22 ("On September 20, 1999 MSI . . . [sent] a draft settlement agreement with respect to the libel counterclaim that required the plaintiff to agree to confidentiality in exchange for the counterclaim's being dismissed with prejudice"); and ¶ 24 ("On September 21, 1999 . . . [the Microsystems Defendants'] counsel . . . sent a letter to the plaintiff's counsel saying that the defendants wanted the "penalty" provision to restrain the plaintiff . . . "). Indeed, as "evidence" of this purported retaliation, Silverstein attaches to the Second Complaint two documents: (1) a confidential E-mail

dated September 20, 1999 from the Microsystems Defendants' counsel to Silverstein's counsel transmitting a draft settlement agreement (Second Complaint Exh. 1); and (2) a letter dated September 21, 1999 from the Microsystems Defendants' counsel to Silverstein's counsel responding to Silverstein's counsel's comments on the draft settlement agreement (Second Complaint Exh. 2).

Positions taken in settlement negotiations by the Microsystems Defendants - such as those referenced in the Second Complaint - are inadmissible and, therefore, cannot provide Silverstein with the basis for a cause of action against the Microsystems Defendants. LePage, 407 Mass. at 166; Hunt, 25 Mass. App. Ct. at 633; Chase, 271 Mass. at 491. As Silverstein alleges no facts to suggest that the September 20 and 21, 1999 correspondence constitutes anything other than pure settlement negotiations, such communications are inadmissible and his complaint should be dismissed. Cf. Deisenroth v. Numonics Corp., 997 F. Supp. 153, 157 (D. Mass. 1998) (granting motion to dismiss on claims that settlement negotiations provided basis for G.L. c. 93A claim where "[e]xposing a party to Chapter 93A liability for statements made in failed settlement discussions would hardly further the public policy in favor of compromise and settlement of disputes.")

II. The Microsystems Defendants' Counterclaim Does Not Constitute Retaliation Under the Statutes

To sustain a cause of action for retaliation under the Statutes, Silverstein must allege facts sufficient to prove that:

(a) he engaged in a protected activity;

(b) the Microsystems Defendants were aware of that protected activity;

(c) the Microsystems Defendants thereafter took an adverse action against Silverstein; and

(d) but for Silverstein's activity, the Microsystems Defendants would not have taken the adverse action.[8]

Diaz v. Henry Lee Willis Comm. Ctr., 1998 WL 1181731, at *2 (Mass. Super. Ct. 1998) (allowing employer's motion for summary judgment on employee's retaliation claim under Massachusetts worker's compensation statute), citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662-3 (1996) (upholding finding for employer on G.L. c. l5lB retaliation claim).

The Second Complaint only alleges that Silverstein engaged in protected activity when he filed suit, that the Microsystems Defendants were aware of his suit and filed, prosecuted and attempted to settle the Counterclaim as a form of retaliation. (See E.g., Second Complaint ¶¶ 37 - 39). This argument lacks

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8 Claims of retaliation under the Statutes require proof of essentially the same elements. See, G.L. c. 152 S 75B(2) ("No employer
. . . shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by this chapter"); G.L. c. 151B § 4(4A) (making it an unlawful practice for any employer "to discourage, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter"); 42 U.S.C.A. § 12203 ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment . . . of, any right granted or protected by this chapter"); and 29 U.S.C.A. § 2615 ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided by this subchapter"). Claims of retaliation under discrimination statutes such as G.L. c. 152 § 75B(2) and G.L. c. l5lB are "nearly identical". Diaz v. Henry Lee Willis Community Ctr., Inc., 1998 WL 1181731, at *2 (Mass. Super. Ct. 1998) (allowing employer's motion for summary judgment on retaliation claims).

merit. Silverstein alleges no facts other than his own conclusion to demonstrate any such intent to retaliate.

The mere fact that the Microsystems Defendants filed the Counterclaim against Silverstein after Silverstein filed the Previous Action is insufficient to support a claim of retaliation. MacCormack, 423 Mass. at 662 n. 11. By definition, a counterclaim must be filed after the initial complaint. Mass. R. Civ. P. 13. Furthermore, access to the Courts is an absolute privilege and should not be restricted. United Transp. Union v. Michigan Bar, 401 U.S. 576, 585 (1971) (meaningful access to the courts is a fundamental right). To penalize the Microsystems Defendants for filing the Counterclaim would be tantamount to denying Microsystems the right to petition the Superior Court for redress of its grievances. Indeed, any objection to the Counterclaim should have been filed with that action, not now. Cf. Bagley v. Moxley, 407 Mass. 633, 636-637 (1990) (claim was precluded by doctrine of res judicata for plaintiff's failure to present claim in prior proceeding). Therefore, Silverstein is unable to satisfy his burden of proof on the retaliation claim and the Complaint must be dismissed.[9]

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9 Moreover, Silverstein can allege no facts to prove intentional or negligent infliction of emotional or physical distress or abuse of process and those claims should be dismissed, because: (1) the filing of a counterclaim is permitted by the Massachusetts Rules of Civil Procedure, Mass. R. Civ. P. 13; (2) the filing of a motion for sanctions is permitted by MCAD regulation 804 CMR 1.09(d); (3) the settlement of litigation is encouraged by the courts and therefore these actions cannot amount to "extreme and outrageous" on the part of the Microsystems Defendants and Silverstein's claims must fail. White v. ABC Home Inspection, Inc., 2000 WL 14731744, at *5 (Mass. Super. Ct. 2000) ("Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond

III. Alternatively, the Second Complaint Should Be Dismissed Pursuant to Mass. R. Civ. P. 12(b)(9)

A complaint is subject to dismissal where a prior related action remains pending between the two parties in the Commonwealth. Fruit Sever Assoc. v. Mass. Elec. Co., 1998 WL 1183979, at *1 (Mass. Super. Ct. 1998) (allowing motion to dismiss pursuant to Mass. R. Civ. P. 12(b) (9) where appeal of first action was pending). An action is still "pending" within the meaning of the rule if an appeal of the judgment in the first action is still viable when the second action commenced. Fruit Sever Associates, 1998 WL 1183979, at *1; Keen v. Western New England College, 23 Mass. App. Ct. 84, 85 (1986) (affirming dismissal of second action where appeal of first action was pending); Mass. Bread Co., Inc. v. Brice, Jr., 13 Mass. App. Ct. 1053, 1054 (1982) (affirming dismissal of second action where appeal period for first action had not yet run). Dismissal under Rule 12(b)(9) is proper even where "issues have arisen since the . . . [first] . . . judgment" if "the risk of inconsistent judgments would be too great." Fruit Sever Associates, 1998 WL

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all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community."), quoting Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987).

Likewise, the abuse of process theory should be dismissed because: (i) it is premature, Gabriel v. Borowy, 324 Mass. 231, 236 (1949) ("One cannot bring an action against a defendant on the ba[s]is that the latter has brought a groundless action until it has been decided in the previous action."); and (ii) counterclaims and settlement discussions do not constitute "process" for abuse of process. Jones v. Brockton Pub. Marketing, 369 Mass. 387, 389 (1975) (affirming dismissal of abuse of process claim and declining to broaden definition of "process" to include injunctions).

1183979, at *2.

It is undisputed that Silverstein's appeal of the Previous Action is pending (Second Complaint ¶ 31; Tab B). Silverstein's appeal of the Previous Action will determine whether or not the Court acted appropriately when it allowed the Microsystems Defendants to dismiss the Counterclaim without prejudice (Id.). As the resolution of Silverstein's appeal could resolve this suit and the possibility of inconsistent judgments exists, the Second Superior Court Action should be dismissed. Fruit Sever Associates, 1998 WL 1183979, at *2.

CONCLUSION

For the foregoing reasons, pursuant to Mass. R. Civ. P. 12(b)(6) and (9), the Microsystems Defendants respectfully request that the Court dismiss this action.

Dated: January 11, 2001

Respectfully submitted,

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