COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Rochester Bituminous Products, Inc., **Michael P. Todesca**, **Albert M. Todesca**, and **Thomas N. Russo**,
Petitioners,

v.

Office of the Attorney General, Fair Labor Division,
Respondent.

No. LB-22-5

Dated: October 25, 2022

ORDER ON MOTION FOR SUMMARY DECISION

This is a consolidated appeal from twenty-five citations stating violations of the prevailing wage law and related recordkeeping provisions. The petitioners have filed a motion for partial summary decision, which the division opposes.

Summary decision is warranted where "there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law." 801 C.M.R. § 1.01(7)(h). Summary decision is sometimes described as "the functional equivalent of summary judgment in civil proceedings." *King v. FLD*, No. LB-12-367, at 8 (DALA Jan. 29, 2014). But the administrative and civil contexts differ. Administrative proceedings do not offer the full array of discovery tools available in court. The parties generally cannot depose potential witnesses. 801 C.M.R. § 1.01(8)(c). As a result, they typically cannot present firm, precise previews of hearing testimony. It follows that a genuine factual dispute may be presented through a good-faith proffer of subsidiary facts that a party expects, based on articulable reasons, to elicit in witness examinations. *See Smith v. Gloucester Ret. Bd.*, No. CR-19-493, at 7 (DALA Mar. 16, 2022). *Cf. Community Nat. Bank v. Dawes*, 369 Mass. 550, 555-56 (1976).

The petitioners contend that four citations (nos. 15, 16, 26, and 17) are time-barred. Those citations state violations of G.L. c. 149, §§ 27, 27B. Each one covers conduct that occurred more than three years before the citations issued. The parties agree that a three-year limitations period applies; that agreement is reasonable in light of *Suburban Home Health Care, Inc. v. Executive Office of Health & Human Servs.*, 488 Mass. 347 (2021), even if the pertinent statutes do not clearly set time limits on enforcement actions. *Cf. Shepard v. FLD*, No. LB-13-479, at 9 n.1 (DALA May 15, 2014).

The division responds first that the limitations period is subject to equitable tolling. The main factual premise of the argument is that foot-dragging by the petitioners held up the issuance of the citations. The specifics that the division asserts in this regard likely fall short of the circumstances that support equitable tolling. *See Halstrom v. Dube*, 481 Mass. 480, 485-86 (2019); *Shafnacker v. Raymond James & Associates, Inc.*, 425 Mass. 724, 727-28 (1997). Moreover, administrative tribunals are creatures of statute. They do not share the vestigial powers that the courts draw from their traditional equity jurisdiction. It is therefore doubtful that an administrative tribunal is authorized to excuse a party from a statutory requirement on the basis of a doctrine sounding in equity. *See Schwartz v. FLD*, No. LB-19-379, at 7 (DALA Dec. 16, 2019); *Genetics & IVF Inst. v. Kappos*, 801 F. Supp. 2d 497, 509 (E.D. Va. 2011).

The division's second rejoinder is on firmer footing. A party may relinquish a prescription defense by agreement. *See Alpert v. Radner*, 293 Mass. 109, 111-12 (1936). The division outlines potential testimony to the effect that the petitioners agreed orally to toll the limitations period. The agreement was reportedly formed in a March 2021 conversation among Attorney Prince, Attorney Goyer, and investigator Reutlinger. This account is not proven by the

documents on file (including the division's Exhibits 25, 26); but it might be consistent with those documents, read in the light most favorable to the division.[1] *See King*, *supra*, at 8-9.

The division allows that it was the parties' original intention to execute a written tolling agreement. This plan fell through. In such circumstances, the parties are held to their oral agreement if it covered the material terms and reflected an intent to be bound. *See Duff v. McKay*, 89 Mass. App. Ct. 538, 543-46 (2016); *Quint v. A.E. Staley Mfg. Co.*, 246 F.3d 11, 15 (1st Cir. 2001). A triable dispute exists as to whether these conditions are satisfied here.

The petitioners' next argument is that the evidence supporting two citations (nos. 26 and 27) consists of information collected by the Department of Unemployment Assistance pursuant to G.L. c. 151A. The division acknowledges that it received and analyzed such information. The division also recognizes that DUA-collected information "is not . . . admissible in any action or proceeding." *Id.* § 46(a). But the division proffers that it will prove the two pertinent citations through the corporate petitioner's payroll records, and possibly other evidence. For present purposes, these citations are not beyond genuine dispute.

The petitioners' final theory is that the statutes underlying the various citations are inapplicable to two individual petitioners, Albert Todesca and Michael Todesca. The universes of governed persons and entities vary somewhat from one pertinent statute to another. One of the statutes mentions only the "employer." G.L. c. 151, § 15. Two other statutes reach "any officers or agents having the management of [the employing] corporation." G.L. c. 149, §§ 27,

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[1] Attorney Goyer wrote to the petitioners in September 2021 that the division's investigation "includes time that is barred by the SOL." Semple Aff. Ex. B. In the light most favorable to the division, Attorney Goyer may have meant that the division would struggle to overcome limitations issues with only an oral agreement in hand. The precise time period that Attorney Goyer contemplated also is not obvious from the face of her email.

27B. The division outlines potential evidence tending to support the inference that both Albert and Michael Todesca played meaningful roles in the management of the corporate petitioner. *See* Reutlinger Aff. ¶¶ 17, 46, 55, 56. For present purposes, this proffer suffices to make summary decision unavailable.

For the foregoing reasons, it is ORDERED as follows:

1. The petitioners' motion for summary decision is DENIED. Needless to say, each of the defenses presented in that motion may be renewed on the basis of the evidence presented at the evidentiary hearing.

2. The submissions suggest that the parties may intend to offer out-of-court statements of non-testifying declarants into evidence. They shall each ensure forthwith that they have identified any such declarants to the opposing party. *See* Mar. 16, 2022 order ¶ 4.

3. The submissions also suggest that Attorney Goyer and Attorney Semple are potential witnesses. They are directed to file certifications prior to the hearing stating that they have determined, after consultation with colleagues (or the BBO's ethics hotline), that their respective withdrawals are not required under Mass. R. Prof. C. 3.7(a).

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate