

Hearsay ACE in the hole

A green-energy salesman has been awarded nearly \$2.9 million in a Massachusetts Wage Act case involving claims that largely would have been time-barred but for his attorneys successfully arguing for the application of equitable tolling.

After a six-day trial, a federal jury in Boston awarded Stephen Ellicott \$958,830 in his lawsuit for unpaid commissions against American Capital Energy; ACE's president, Thomas Hunton; and the company's chief financial officer, Arthur Hennessey.

U.S. District Court Judge F. Dennis Saylor IV subsequently denied the defendants' motions for a new trial and for judgment notwithstanding the verdict. After trebling damages pursuant to the act, Saylor entered judgment for Ellicott in the amount of \$2,876,490. The judge further awarded Ellicott attorneys' fees and costs.

"This case was about trying to cheat a good man out of his paycheck," says Ellicott's Boston attorney, **Christopher A. Kenney**, who tried the case with his **Kenney & Sams** colleague **Anthony L. DeProspo Jr.**

American Capital Energy is a solar energy company based in Lawrence. The plaintiff, a resident of Rhode Island, worked for ACE from 2007 to 2013 selling solar installation projects to commercial customers. According to Kenney, his client's sales resulted in over \$37 million in revenue for the company.



KENNEY

Under an employment agreement executed in 2008, ACE agreed to pay the plaintiff a commission equal to 40 percent of the profit margin from each sale.

The defendants would later contend that the parties orally modified the agreement in early 2011 to reduce the plaintiff's commission rate. The defendants further contended that the plaintiff had agreed to split his commissions with sales support staff at the company. The plaintiff disputed both contentions.

"When he was bringing the money in and making the sales, [Hunton and Hennessey] were his biggest fans," Kenney says. "But when he insisted on getting paid, they changed course entirely."

Ellicott lost his job at ACE in 2013. In April 2014, he filed a complaint for violation of the Wage Act and breach of contract in Middlesex Superior Court. According to the



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plaintiff, ACE owed him \$1.3 million in unpaid commissions for eight solar installation projects that he had sold between 2008 and 2013.

The defendants removed the case to federal court, further claiming Ellicott owed the company \$286,391 in overdrawn advances against his commissions. Moreover, the defendants moved for summary judgment, contending that the plaintiff's Wage Act claims were largely time-barred by the applicable three-year statute of limitations for wage claims, measured from the date of removal of Ellicott's case to federal court — May 16, 2014.

Saylor deferred until trial a ruling on the statute of limitations issue, permitting the plaintiff to present evidence that the defendants made fraudulent promises of payment upon which Ellicott relied in delaying the filing of his suit.

In closing, Kenney argued to the jury that the defendants

shouldn't be "rewarded" for lying to his client, and that his client shouldn't be "punished" for trusting them.

"Every time he requested to have his commissions paid up, the employer first congratulated him on his outstanding work, and then asked him to be patient while they waited for their financial condition to improve so they could pay him," Kenney says.

The employer dropped its recoupment claims at the close of trial. Saylor provided an instruction to the jury on equitable tolling.

Kenney says the jury tipped its hand an hour into deliberations when it sent the judge a question asking if Ellicott could be awarded *more* in wages than what he had asked for.

"It was like a moment out of the movie 'The Verdict,'" Kenney says. "We knew then that things were going well."

After another two to three hours of deliberation, the jury returned.

"When they came out with the verdict, you could tell that they almost wanted to 'high five' us," DeProspo says. "They were happy for our client that he would finally get some relief."

The defendants' attorneys, **Peter D. Bilowz** of **Goulston & Storrs** in Boston and Texas attorney **Robert K. Dowd**, did not respond to a request for comment prior to deadline.

— PAT MURPHY