

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1685

MATTHEW D. LANZA, trustee,¹ & another²

vs.

ROBERTA J. TONBERG & another.³

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This case arises out of a dispute between neighbors in a luxury golf course development located in Kingston. The subdivision, known as Indian Pond Estates (Estates), was created in 1999, by Frederick M. Tonsberg. Mr. Tonsberg and his son, Frederick W. Tonsberg (Frederick), control several corporations and limited liability companies which play various roles in managing and developing the Estates. Frederick and his wife, Roberta J. Tonsberg (Roberta) (collectively, the Tonsbergs),

¹ Of the Lanza Trust.

² Jeannette S. Lanza, as trustee of the Lanza Trust.

³ Frederick W. Tonsberg.

live next door to Matthew D. (Matthew) and Jeannette S. Lanza (collectively, the Lanzas).

In 2016, Roberta commenced a Land Court action against the Lanzas seeking to enjoin the Lanzas from constructing an in-ground swimming pool in their back yard. The Lanzas responded by asserting counterclaims against the Tonsbergs and High Pines LLC (LLC), a limited liability company that is managed by Frederick and his father but allegedly controlled by Frederick. When a judge of the Land Court expressed doubt about the Land Court's jurisdiction over the Lanzas' counterclaims against the Tonsbergs, the Lanzas voluntarily dismissed their counterclaims and later reasserted them by way of their complaint in the Superior Court.⁴ The Tonsbergs then filed a special motion to dismiss the Lanzas' Superior Court complaint pursuant to G. L. c. 231, § 59H, the "anti-SLAPP" statute (§ 59H).⁵ After hearing, a judge of the Superior Court (motion judge) denied the special motion by margin endorsement. The Tonsbergs appealed. We affirm in part, and reverse in part, and remand for further proceedings.

⁴ The LLC is not a party to the Superior Court action.

⁵ "SLAPP is an acronym for 'strategic litigation against public participation.'" Wenger v. Aceto, 451 Mass. 1, 2 n.1 (2008).

Background. The motion judge had before him the Lanzas' complaint, the Tonsbergs' answer, the special motion to dismiss, with select pleadings and docket entries from the underlying Land Court action attached as exhibits,⁶ the Lanzas' opposition to the special motion to dismiss, attached to which was a docket sheet from a case brought against the LLC by entities controlled by Frederick's father, and the un rebutted affidavit of Matthew.⁷ We draw the facts from these documents and from the docket in the Land Court action, which the Lanzas have attached as an addendum to their brief.⁸

⁶ The exhibits are Roberta's Land Court complaint, the Lanzas' answer and counterclaims, the first page of an emergency motion for a temporary restraining order filed by Roberta, and the Land Court judge's rulings following a December 19, 2017, case management conference.

⁷ Neither Frederick nor Roberta filed an affidavit rebutting Matthew's affidavit.

⁸ We allow the Lanzas' request that we take judicial notice of the docket because the Tonsbergs relied on the docket to support the special motion to dismiss, as evidenced by their attachment of select portions as exhibits, and because the motion judge would have been entitled to take judicial notice of the entire docket. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002). However, we decline to consider the Land Court judge's findings of fact and rulings of law in that case, which issued after the motion judge denied the special motion to dismiss in the instant case, and which the Tonsbergs have sought permission to file as a supplemental appendix. Although the Lanzas do not oppose the Tonsbergs' request, the Land Court judge's decision discusses evidence that was not before the motion judge, who was required to make his decision on the special motion to dismiss "on the basis of a documentary record comprised of the pleadings and any affidavits." O'Gara v. St. Germain, 91 Mass. App. Ct. 490, 495 (2017). See G. L. c. 231, § 59H (judge deciding special motion

In their capacities as trustees, the Lanzas own and reside on a lot in the Estates that is adjacent to a lot owned by Roberta, and on which the Tonsbergs reside. Both lots are subject to restrictive covenants that include a prohibition on in-ground swimming pools.

In 2007, the LLC obtained a comprehensive permit to construct eighty-six residential units on certain lots within the Estates. The proposed development changed, and the comprehensive permit was amended, several times between 2007 and the spring of 2016, when the LLC applied to the town's zoning board of appeals (board) for approval of a "minor modification" of the permit. As part of the proposed modification, the LLC "requested to affirm inclusion of Lot 4-24, identified as 'the marketplace,' as part of the [c]omprehensive [p]ermit approval." Roberta operates a beauty salon on lot 4-24.

According to the Lanzas' complaint, Frederick's father opposed Frederick's plan to rezone lot 4-24 for commercial use.

to dismiss "shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based"). More specifically, as we have noted, "[f]or purposes of the threshold determination whether the conduct concerns only petitioning activities, we consider the claims that have been pleaded. [477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 171 n.11 (2017) (Harrison I).] For purposes of the second stage, we consider the pleadings, as well as the 'supporting and opposing affidavits stating the facts upon which the liability or defense is based.' G. L. c. 231, § 59H." 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 522 n.3 (2019).

Matthew also opposed Frederick's plan and believed that rezoning lot 4-24 was not a "minor modification" of the comprehensive permit. On June 15, 2016, Matthew voiced his opinion at a public board meeting. Matthew alleged that after the meeting, Frederick came within a few inches of him, "pointed his finger, and stated 'You chose the wrong side. You will regret it,' or words to that effect."

The following spring, the Lanzas obtained a building permit to construct an in-ground swimming pool on their lot. Roberta became aware of the permit in or around October 2017, when construction on the pool became visible. On October 31, 2017, Roberta alone commenced a Land Court action against the Lanzas seeking to enforce the restriction on in-ground swimming pools. One week later, on November 7, 2017, Roberta filed an emergency motion for a temporary restraining order that was supported by her affidavit, which is not in the record. Roberta's emergency motion asserted that she would suffer irreparable harm to the character and aesthetics of the neighborhood if the Lanzas were allowed to proceed with construction of their in-ground pool. A hearing on Roberta's emergency motion was scheduled to occur three days later; however, Roberta did not appear. Her counsel appeared along with Frederick alone. After the hearing, Matthew alleged that Frederick approached him "and made a statement to the effect that if Mr. Lanza wanted to construct a pool on the

Lanza Property, he must join [Frederick]'s fight against his father" with respect to future development of the Estates.

Frederick's statement to Matthew after the hearing led Matthew to conclude that Roberta's motivation in filing and pursuing the Land Court action was not to block construction of Matthew's pool, but to use the suit as leverage to pressure Matthew to reverse his publicly expressed opposition to Frederick's rezoning petition, and join Frederick's fight against his father. On December 1, 2017, the Lanzas filed an answer to Roberta's Land Court complaint and asserted counterclaims against: Roberta, for abuse of process; Frederick, for aiding and abetting Roberta in abusing process; both Tonsbergs, for civil conspiracy and violation of the Lanzas' civil rights; and the LLC, seeking a declaration that certain lots covered by the comprehensive permit were subject to restrictive covenants. On December 19, 2017, the Land Court judge held a case management conference and ordered Roberta to serve Frederick and the LLC with notice (1) of the lawsuit, and (2) that they may intervene if "doing so would be advisable to protect any interests they may have." The LLC intervened, but there is no evidence that Frederick did.

As previously noted, the Lanzas agreed to dismiss their counterclaims against the Tonsbergs following the December 19, 2017 case management conference. The Lanzas' counterclaims were

then reasserted in their Superior Court complaint, filed in January 2018. On January 31, 2018, the Tonsbergs accepted service of the Superior Court complaint. Sixty-five days later, on April 6, 2018, the Tonsbergs filed their special motion to dismiss, arguing that the Lanzas' claims against them must be dismissed because they were based solely on Roberta's constitutionally protected activity of petitioning the Land Court to enforce the swimming pool restriction. The motion judge conducted a hearing on the special motion and applied the burden-shifting framework set forth in Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 168 (1998) (Duracraft), as augmented by Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 159-161 (2017) (Blanchard I). The motion judge denied the special motion to dismiss after concluding that the Tonsbergs had failed to make the threshold showing under the framework, adding that "[e]ven had that showing been made, movants failed to show that [the Lanzas] lack any reasonable factual support or arguable basis in law for [their] action, or was instituted primarily to chill movants' right of petition." This interlocutory appeal followed. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 515 n.2 (2019) (Harrison II) (order denying special motion to dismiss immediately appealable).

Legal framework. SLAPP suits are "meritless suits that use litigation to intimidate opponents' exercise of rights of petitioning and speech" (quotations and citation omitted). Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413 (2000). To stop such suits "early in its tracks," the anti-SLAPP statute enables a litigant to secure expedited dismissal of a SLAPP suit through a "special motion to dismiss." Blanchard I, 477 Mass. at 147, 157. A judge considering a special motion to dismiss is not required to decide whether the opponent's complaint plausibly suggests an entitlement to relief so as to withstand a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). See Marabello v. Boston Bark Corp., 463 Mass. 394, 398 n.5 (2012). The focus is solely on the conduct complained of. O'Gara v. St. Germain, 91 Mass. App. Ct. 490, 496 (2017).

Because special motions to dismiss are not "to be used . . . as a cudgel to forestall and chill the legitimate claims -- also petitioning activity -- of those who may truly be aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity," the Supreme Judicial Court has established an elaborate burden-shifting framework that is designed to "distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal." Blanchard I, 477 Mass. at 157. Recent cases including 477 Harrison Ave., LLC v. JACE Boston, LLC, 477

Mass. 162 (2017) (Harrison I), Cardno ChemRisk, LLC v. Foytlin, 476 Mass. 479 (2017), Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200 (2019) (Blanchard II), and Harrison II, 483 Mass. 514, have further explicated the Duracraft/Blanchard I framework.

Applying the first stage of the framework to this case, "unlike a motion to dismiss brought under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), [a motion to dismiss pursuant to the anti-SLAPP statute] does not test the sufficiency of the complaint." Harrison I, 477 Mass. at 171 n.11. "For purposes of the threshold determination whether the conduct concerns only petitioning activities, we consider the claims that have been pleaded. Harrison II, 483 Mass. at 522 n.3. For purposes of the second stage, we consider the pleadings, as well as the 'supporting and opposing affidavits stating the facts upon which the liability or defense is based.' G. L. c. 231, § 59H." Id.

At the first stage, if "the only conduct complained of is petitioning activity, then there can be no other 'substantial basis' for the claim." Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002). See O'Gara, 91 Mass. App. Ct. at 491 n.4. Thus, if the Tonsbergs establish that the only conduct complained of is their engagement in petitioning activity -- here, Roberta's Land Court complaint -- the burden in the second stage of the framework shifts to the Lanzas. In deciding

whether the Lanzas' suit is a SLAPP action, "the motion judge, in the exercise of sound discretion, is to assess the totality of the circumstances pertinent to the [Lanzas'] asserted primary purpose in bringing [their] claims[s]." Blanchard I, 477 Mass. at 160. "For purposes of this second path, an anti-SLAPP motion to dismiss will be denied if the motion judge concludes, with fair assurance, that the challenged claim is both colorable and not brought primarily to chill the moving party's legitimate exercise of its right to petition." Blanchard II, 483 Mass. at 205.

Standard of review. We consider the Lanzas' complaint "count by count for anti-SLAPP purposes," Blanchard I, 477 Mass. at 153, and review the motion judge's decision to deny the special motion to dismiss for an abuse of discretion or error of law. See Blanchard II, 483 Mass. at 203. The Tonsbergs claim that the motion judge abused his discretion when he concluded that they had not satisfied their burden at the threshold stage of demonstrating that each of the Lanzas' claims are based solely on the Tonsbergs' protected petitioning activities. They further claim that the judge committed an error of law when he shifted the burden of proof to them in the second stage of the framework.

Discussion. 1. Abuse of process. Roberta's institution of the Land Court action clearly constitutes petitioning

activity that is protected under § 59H. See Harrison I, 477 Mass. at 169. The question is whether Roberta's Land Court action is "the only conduct complained of" in the Lanzas' abuse of process complaint that was before the motion judge. Fabre v. Walton, 436 Mass. 517, 524 (2002). We conclude that it was. At the first stage of the analysis, "we consider the claims that have been pleaded" and limit our review to "determining whether 'the actual conduct complained of' is petitioning activity." Harrison II, 483 Mass. at 522 n.3, 526. The complaint, fairly read, contained numerous allegations of unlawful acts by Frederick, but the only conduct complained of vis-à-vis Roberta was her filing of the Land Court action.

It is true that the complaint alleged that Roberta filed the Land Court action with the "ulterior motive" of coercing the Lanzas to support Frederick's zoning petition. But Roberta's motivation for bringing that action will not suffice to defeat her special motion to dismiss the Lanzas' abuse of process claim. See Duracraft, 427 Mass. at 167-168. "[T]he motive behind the petitioning activity is irrelevant at this initial stage. . . . The focus solely is on the conduct complained of, and, if the only conduct complained of is petitioning activity, then there can be no other 'substantial basis' for the claim." Office One, Inc., 437 Mass. at 122. Rather, as we have stated, the key inquiry here is whether "the only conduct complained of

is . . . petitioning activity." Harrison I, 477 Mass. at 168, quoting Fabre, 436 Mass. at 524.

Under a fair reading of the complaint, the only conduct (as opposed to motive) complained of with respect to Roberta is her filing of the Land Court action. Although the Lanzas argue on appeal that they can rely on the nonpetitioning activity of someone other than the named defendant to defeat a special motion to dismiss, they cite no authority for that proposition. Roberta has therefore met her threshold burden of showing that the only conduct complained of was petitioning activity.

The burden thus shifted to the Lanzas under the second stage of the framework. While this burden can be satisfied through one of two paths, the Lanzas acknowledge that they made no showing under the traditional first path, which would have required them to demonstrate that the Land Court action lacked any reasonable factual basis or arguable basis in law and caused them actual injury. See Blanchard II, 483 Mass. at 204. Instead, the Lanzas rely solely on the second path, under which they can defeat a special motion to dismiss by showing "that the challenged claim is both colorable and not brought primarily to chill the moving party's legitimate exercise of its right to petition." Id. at 205. Although the motion judge found that the Lanzas met their second-stage burden, we agree that the language he used suggests that he erroneously applied the burden

of proof to the Tonsbergs. Accordingly, we conclude that remand is required for the judge to determine in the first instance whether the Lanzas met their burden at the second stage of the burden-shifting framework.

2. Aiding and abetting abuse of process. The complaint alleged that Frederick and Matthew attended the board meeting as private citizens, and that, after the meeting ended, Frederick threatened Matthew that he would "regret" his position before the board (opposing Frederick's rezoning application). Thereafter, Roberta, "acting in concert with Frederick," instituted the Land Court action, and Frederick used it as leverage for an ulterior purpose. By appearing as a nonparty at the hearing on Roberta's request for a preliminary injunction, and by waiting for that hearing to end before communicating to Matthew (in essence) that Roberta's action to block construction of his pool would be dismissed if Matthew agreed to support Frederick's development and rezoning plan, the Lanzas allege that Frederick participated and substantially assisted Roberta in abusing process.

The anti-SLAPP statute "protects several types of 'statements' that constitute protected petitioning activity regardless of whether the parties provide support for, or are named parties, in judicial proceedings." Hanover v. New England Regional Council of Carpenters, 467 Mass. 587, 591-592 (2014).

However, any such protected statements still must constitute petitioning activity under the statute. For the first time on appeal, the Tonsbergs contend that Frederick's two statements to Matthew constituted petitioning activity because the first statement was made in an effort to garner public support for matters under consideration by the board, and the second statement was his offer to settle the Land Court action. See G. L. c. 231, § 59H (defining "a party's exercise of its right of petition").

We reject this contention because it sidesteps the "overall context in which" the Lanzas allege Frederick's statements were made. Blanchard I, 477 Mass. at 149. First, Frederick's two statements, respectively, were made after the board meeting and after the Land Court hearing for a preliminary injunction had ended. Thus, neither statement was "reasonably geared to reaching" the government. Id. at 152. Second, Frederick's offer to drop the Land Court action and permit the Lanzas to construct their pool, in exchange for Matthew's withdrawal of his opposition to Frederick's development plan, was not "likely to encourage consideration" by the Land Court whether the Lanzas' pool violated a restrictive covenant. Hanover, 467 Mass. at 593. Finally, we are unpersuaded that Frederick's second alleged statement was a mere settlement offer where (1) Frederick was not a party to the Land Court action, and (2) the

court record is silent with respect to both Frederick's authority to withdraw that action or his intentions when he made the statement. Because Frederick is not alleged to have engaged in any protected petitioning activity, the judge did not err when he denied the special motion to dismiss the aiding and abetting claim against Frederick.

3. Remaining claims. The Lanzas' remaining claims are against both Tonsbergs, for civil conspiracy and violation of civil rights, and are grounded in the same facts supporting their abuse of process claim. For the same reasons discussed above with respect to the abuse of process claim, Roberta has met her threshold burden of showing that the civil conspiracy and violation of civil rights claims are based solely on her petitioning activity. Remand is required, however, for the judge to determine whether the Lanzas met their second-stage burden with respect to these claims. The special motion to dismiss the claims as against Frederick was properly denied because Frederick is not alleged to have engaged in any petitioning activity.

Conclusion. So much of the order as denies the special motion to dismiss the abuse of process, civil conspiracy, and civil rights violations claims against Roberta is reversed, and

the matters are remanded for further proceedings consistent with this memorandum and order. The order is otherwise affirmed.⁹

So ordered.

By the Court (Neyman, Shin &
McDonough, JJ.¹⁰),

Clerk

Entered: July 30, 2020.

⁹ The Tonsbergs' request for appellate attorneys' fees and costs is denied.

¹⁰ The panelists are listed in order of seniority.