COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1883CV00091

MATTHEW D. LANZA AND JEANNETTE S. LANZA,
as Trustees of the Lanza Trust

vs.

ROBERTA J. TONSBERG AND FREDERICK W. TONSBERG

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S SPECIAL MOTION TO DISMISS

This is a case involving a real estate dispute between neighbors. This court denied a special motion to dismiss brought by the defendants, Roberta and Frederick Tonsberg, pursuant to G. L. c. 231, § 59H, a statute designed to curb "Strategic Lawsuits Against Public Participation" and known as the anti-SLAPP statute. The Tonsbergs appealed. The Appeals Court affirmed the denial of the special motion to dismiss the claims brought against Frederick Tonsberg but reversed the denial of the special motion to dismiss the claims brought against Roberta Tonsberg. It remanded for this court to determine, with respect to those latter claims, whether the plaintiffs, Matthew and Jeannette Lanza, had met their burden of proof at the second stage of the burden-shifting framework established by the Supreme Judicial Court to evaluate special motions to dismiss brought pursuant to the anti-SLAPP statute.

In light of the parties' arguments and filings, the court concludes that its previous analysis treated the Tonsbergs collectively. Examining solely the Lanzas' claims against Roberta, the court concludes that the Lanzas have not met their burden of proof with respect to the claims brought against her and therefore **ALLOWS** Roberta Tonsberg's special motion to dismiss those claims.

FACTS

The core facts were described by the Appeals Court:

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 [or Subdivision]), 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), live next door to Matthew D. (Matthew) and Jeannette S. Lanza (collectively, the Lanzas). [On October 31, 2017,], 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 [on December 4, 2017] 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 [on or about December 7, 2017] 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 [which was filed on January 25, 2018]. 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) [on March 21, 2018.]. After hearing, a judge of the Superior Court (motion judge) denied the special motion by margin endorsement. The Tonsbergs appealed. ...

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, 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 unrebutted affidavit of Matthew. 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.

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. 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.

Lanza v. Tonsberg, 98 Mass. App. Ct. 1106 (2020) (footnotes omitted) (hereinafter, "Appeals Dec.") at *1-3. Further facts are discussed below.

DISCUSSION

The anti-SLAPP statute enables a litigant to secure expedited dismissal of a SLAPP suit through a "special motion to dismiss." Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 157 (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 a burden-shifting framework designed to 'distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal.' Blanchard I, 477 Mass. at 157." Appeals Dec. at *4, citing 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 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514 (2019) (Harrison II).

In the first iteration of this case, the undersigned conducted a hearing on the Tonsbergs' special motion to dismiss 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 I, 477 Mass. at 159-161. As noted above, this court assessed the Tonsbergs' claims collectively. The Appeals Court affirmed this court's denial of the special motion to dismiss regarding the claims against Frederick but reversed the denial of the motion with respect to the claims against Roberta. As to her, the Lanzas allege that she brought the Land Court action "for the ulterior purpose of coercing the Plaintiffs with respect to Mr. Tonsberg's objectives" with respect to the

Subdivision in which all parties live and not to enforce restrictions or covenants preventing the Lanzas from installing a swimming pool on their property. Complaint, ¶¶ 33, 38. They further contend that Frederick offered to drop Roberta's Land Court complaint to coerce Matthew into supporting Frederick's land use objectives with respect to the Subdivision. Id. at ¶ 36.

To determine whether the claims brought against Roberta by the Lanzas should be dismissed under § 59H, the court must review the complaint "count by count." Blanchard I, 477 Mass. at 153. In their Complaint, the Lanzas brought the following claims against Roberta: abuse of process (Count I), which alleged that Roberta abused process by bringing the Land Court claim for an ulterior purpose; Civil Conspiracy (Count III) with Frederick, which alleged that the defendants determined to abuse process through Roberta's Land Court action, and a Civil Rights Act claim asserted under G. L. c. 12, § 11I (Count IV), which alleged that the defendants used the Land Court action to interfere with Matthew's free speech rights.

Count I: Abuse of Process: The Appeals Court concluded that Roberta's institution of the Land Court action constituted petitioning activity that is protected under § 59H, see Harrison I, 477 Mass. at 169, and that it was "the only conduct complained of" in the Lanzas' abuse of process count. Appeals Dec. at *4. The burden thus shifted to the Lanzas under the Duracraft framework. As the Appeals Court noted, while that burden could be satisfied through one of two paths, the Lanzas acknowledged that they made no showing under the 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, but rather rely solely on the second path, under which they can defeat a special motion to dismiss if they show, 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." Id. at 205.

"Fair assurance" means that this court must:

> assess the "totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim," and to determine whether the nonmoving party's claim constitutes a SLAPP suit. We ask the judge to be "fair[ly] assur[ed]" in his or her conclusion. This requires the judge to be confident, i.e., sure, that the challenged claim is not a "SLAPP" suit. ... In an anti-SLAPP context, the motion judge considers "[t]he course and manner of proceedings, the pleadings filed, and affidavits 'stating the facts upon which the liability or defense is based.' " If the judge determines that the nonmoving party's claim "was not primarily brought to chill the special movant's legitimate petitioning activities," but instead was brought to seek redress for harm caused by the moving party's ... conduct, then the anti-SLAPP motion to dismiss the nonmoving party's ... claim properly is denied.
>
> In making that determination, the judge may consider whether the case presents as a "classic" or "typical" SLAPP suit, i.e., whether it is a "lawsuit[ ] directed at individual citizens of modest means for speaking publicly against development projects." Although we recognize that the anti-SLAPP statute is not limited in application to "typical" cases, the presence or absence of the classic indicia may be considered.
>
> Other factors that may be helpful in distinguishing an ordinary lawsuit from a SLAPP suit include, by way of example, whether the lawsuit was commenced close in time to the petitioning activity [a suit filed close in time to protected petitioning activity supporting a finding of retaliation]; whether the anti-SLAPP motion was filed promptly; the centrality of the challenged claim in the context of the litigation as a whole, and the relative strength of the nonmoving party's claim; evidence that the petitioning activity was chilled; and whether the damages requested by the nonmoving party, such as attorney's fees associated with an abuse of process claim, themselves burden the moving party's exercise of the right to petition.
>
> We recognize that these factors are not exhaustive; that no single factor is dispositive; and that not every factor will apply in every case. We leave it to the motion judge to consider and weigh these and other factors as appropriate, in light of the evidence and the record as a whole. It rests within the exercise of the judge's sound discretion to determine, based on that assessment, whether he or she is fairly assured that the challenged claim is not a SLAPP suit. If the claim is not a SLAPP suit, then, under the augmented Duracraft framework, the claim "will not be dismissed."

Blanchard II, 483 Mass. at 204–07 (citations, footnotes omitted).

For the reasons that follow, I conclude that the Lanzas have not met their second stage burden with respect to the abuse of process claim brought against Roberta.

a. Colorability: "'SLAPPs are by definition meritless suits.' Therefore, '[a] necessary but not sufficient factor in this analysis will be whether the nonmoving party's claim at issue is 'colorable or ... worthy of being presented to and considered by the court.' In essence, this requires consideration whether the claim ''offers some reasonable possibility' of a decision in the party's favor.' [and] ... not one which is sure of success[.]' ... It is a 'lighter, less technical burden' of presenting a claim where threshold considerations are implicated, at a stage in the litigation when discovery typically has not yet occurred. It properly balances the parties' respective rights with the Legislature's purpose in expediting dismissal of 'meritless' SLAPP suits." Blanchard II, 483 Mass. at 207–08 (citations omitted).

On the merits, Roberta argues that the Lanzas' abuse of process count is not colorable because the attorneys' fees incurred in defending the Land Court action that they claim as damages cannot be awarded as a matter of law and that they claim no other damages. Both arguments are in error. Attorneys' fees can be awarded as damages to a successful plaintiff in an abuse of process claim, as can other types of damages, which the Lanzas also seek in the Complaint. See Complaint, at ¶ 45 and pages 11-12 (seeking damages "including but not limited to" attorneys' fees arising from the alleges abuse of process); see also Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 645 (2010) (the costs of defending against the improper action and damages for emotional harm and harm to reputation are all "compensable categor[ies] of damages for an abuse of process claim so long as the specific damages are affirmatively proved"). Accordingly, the Lanzas' abuse of process claim against Roberta is colorable.[1]

[1] Roberta also contends that no law supports the authority of trustees of a trust, as the Lanzas are here, to assert claims as they do in this case. But as no law prohibits the Lanzas from pursuing their claims, the court concludes colorability turns on the merits of each claim.

b. Non-Retaliatory: This prong of the analysis requires that the court determine that the suit "is not 'retaliatory,' i.e., that it is not a strategic suit 'primarily brought to chill the special movant's legitimate petitioning activities.'" Blanchard I, 477 Mass. at 160. As the Court in Blanchard II found,

> [t]his requires the nonmoving party to establish that the "primary motivating goal in bringing its claim, viewed in its entirety, was 'not to interfere with and burden [the movant's] ... petition rights, but to seek damages for the personal harm to [the non-movant] from [the movant] defendants' alleged ... [legally transgressive] acts." Blanchard I, supra ...
>
> Although the standard is expressed in subjective terms, a party's intent ordinarily may be inferred from objective facts and circumstances. To determine the "primary motivating goal" of the [non-movants], the motion judge was required to evaluate their "asserted primary purpose in bringing [their] claim," Blanchard I, 477 Mass. at 160, in light of the objective facts presented and any reasonable inferences that may be drawn from them, see id. at 149. This includes consideration of the "course and manner of proceedings," the pleadings filed, and the affidavits providing "objective indicia of a party's intent." Id. at 149, 160. If the judge, considering each claim as a whole, and holistically in light of the litigation, is fairly assured that "each challenged claim does not give rise to a 'SLAPP' suit," then the special motion to dismiss the plaintiff['s] ... claim properly is denied. See Blanchard I, supra at 160 & n.25.

Blanchard II, 483 Mass. at 209–10 (citations omitted).

The Lanzas' abuse of process claim was initially brought as a counterclaim in Roberta's Land Court case. The Lanzas voluntarily dismissed those claims to address potential jurisdictional concerns raised by the Land Court and refiled it in this court. Thus, while the claims are not now styled as counterclaims, they remain so in substance. Because that is so, Blanchard II is directly on point. In that case, an abuse of process counterclaim was alleged in which defendant-abutters to a development project sued the developer for abuse of process, in which the abutters sought damages in the form of attorneys' fees and "for the individual defendant's 'emotional stress and suffering as a result" of the lawsuit. 483 Mass. at 529. Here, the Lanzas sue on the same theory and for the same type of damages. Under such circumstances,

the Blanchard II Court found that a counterclaimant could not demonstrate that its counterclaim was not retaliatory under the second path of the Duracraft framework, the path at issue here. As the Court wrote:

> As the Duracraft framework was augmented in Blanchard I, an anti-SLAPP motion to dismiss may be defeated if the nonmoving party ... establishes, such that the motion judge can conclude with fair assurance, that the "primary motivating goal" in bringing the challenged claim was "not to interfere with and burden [the] defendant['s] ... petition rights, but to seek damages for the personal harm to [it] from [the] defendant['s] alleged ... [legally transgressive] acts.' " Blanchard I, 477 Mass. at 160 ... **This is an insurmountable burden in a case, such as this, where the "damages for the personal harm" are inextricably entwined with the contemporaneous conduct of the litigation itself. In that circumstance, the counterclaim objectively burdens the opposing party's contemporaneous petitioning rights by, among other things, raising the specter of mounting liability for defense costs and other damages associated with the ongoing litigation.**
>
> **Viewed objectively, a defendant's primary motivation in that circumstance is to burden the plaintiff's petitioning rights by hanging the possibility of ever-increasing liability, like the sword of Damocles, over the plaintiff's head. That is precisely the scenario presented here.**
> ...
>
> [The non-movants] sought damages, including attorney's fees and costs associated with defending the litigation, as well as for the individual defendant's "emotional stress and suffering as a result of being individually named as a defendant in this action."
>
> **Pragmatically, a counterclaim that is solely "based on" petitioning activity in the same action, and that seeks damages for injury caused by that same petitioning, may not be defeated by following the augmented second path established in Blanchard I. In that circumstance, a party cannot establish, such that the "motion judge may conclude with fair assurance," that the claim does not give rise to a SLAPP suit.** Blanchard I, 477 Mass. at 160. The [movant] established that the counterclaims were solely based on its petitioning activities, as G. L. c. 231, § 59H, requires, and that there was no substantial nonpetitioning basis for them. At the second stage, because the [non-movants] ... cannot establish that their counterclaims do not have a retaliatory purpose, as the second path provides, the developer's special motion to dismiss must be allowed. ...
>
> [The anti-SLAPP statue] is not properly used ... as a shield to protect claims that, although colorable, were brought primarily to chill another party's legitimate petitioning activity. Applying that principle here, we conclude that a counterclaimant asserting damages caused by the conduct of the same proceeding, e.g., attorney's fees and costs, cannot establish that its counterclaim is not a SLAPP suit for purposes of the second

> stage of the Duracraft framework, as augmented in Blanchard I. Viewed objectively, the primary motivation of such a claim is to burden the opposing party's petitioning rights. See Blanchard I, 477 Mass. at 160.

Harrison II, 483 Mass. at 528–30 (footnote omitted, emphasis added).

The Lanzas attempt to avoid the teaching of Blanchard II by arguing that any claim such as theirs alleging abuse of process could chill an opponent's own litigation, but that the issue is one of fact, and here the facts show that the Lanzas' action was not primarily motivated by any desire to chill Roberta's petitioning or had that effect. That argument ignores the teaching of Blanchard II cited above and the objective facts here. The Lanzas are correct that Roberta submitted no evidence to support a contention that the Lanzas' counterclaim and claim here had any actual chilling effect on her litigation of the Land Court action, whereas Matthew confirmed that it was neither his intention to interfere with Roberta's right to petition nor his expectation that it would, and that his countersuit did not (in his view) have that effect. Affidavit of Matthew D. Lanza, dated April 2, 2017, at ¶¶ 3, 5, 9; Supplemental Affidavit of Matthew D. Lanza, dated March 26, 2021, at ¶¶ 4, 5, 6, 7. But as Blanchard II concluded, the objective facts show that an abuse of process counterclaim brought under facts like these creates the "sword of Damocles, [hanging] over the plaintiff's head" in the form of mounting attorneys' fees (as well as other damages), which in this case Roberta faces because the Lanzas pursued an abuse of process claim immediately in response to, and solely because of, the Land Court action Roberta filed. The Lanzas further argue that this is not a "classic" or "typical" SLAPP suit, brought by a powerful plaintiff against individual citizens of modest means for speaking publicly against development projects. But Roberta is not a developer. Moreover, even if the court accepted the

assertion that Roberta's motivations are tied to Frederick's[2] such that this case is in some general sense the opposite of the classic case,[3] the same was also true in Harrison II and still the special motion to dismiss was allowed.

Like was the case in Blanchard II, the court concludes that the Lanzas have not met their burden of proof under the second path of the Duracraft framework. Roberta's special motion to dismiss the abuse of process claim must be allowed.[4]

Count III: Civil Conspiracy: In Count III, the Lanzas argue that "[t]he Defendants determined to engage in abuse of process by having Mrs. Tonsberg file a complaint in the Land Court for the illegitimate purpose of coercing the Plaintiffs." Complaint, ¶ 53.

a. Colorability: To make out one form civil conspiracy, a plaintiff would have to show (1) a combination of two or more persons to accomplish an unlawful purpose, or a purpose not unlawful by unlawful means, and (2) some peculiar power of coercion of the plaintiff possessed by the defendants in combination which any individual standing in like relation to the plaintiff would not have had, and (3) damage. DesLauries v. Shea, 300 Mass. 30, 33 (1938).

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[2] The Appeals Court found in applying the first stage of the Duracraft framework, which asks whether Roberta's conduct concerned solely petitioning activity, any alleged ulterior motives on her part or on Frederick's part were irrelevant. Appeals Dec. at 11-12. That determination was focused on the first stage of the analysis and does not foreclose this court from considering Roberta's alleged motivations in this second stage.

[3] The Lanzas' argument on the relative power of the parties is only true if the court accepts the Lanzas' claim that Roberta was motivated to bring the Land Court suit for the ulterior purpose of "coercing the Plaintiffs with respect to Mr. Tonsberg's objectives to make the Subdivision's roadways public and to accomplish the LLC's continued development ... not by a genuine interest to enforce the restrictions and./or covenants of the Subdivision," Complaint, ¶ 44, and that she allowed Frederick to represent her interests at the preliminary injunction hearing in the Land Court action, after which Frederick allegedly made the offer to Matthew to exchange the Tonsbergs' withdrawal of the Land Court action for Matthew's support of Frederick's goals for the Subdivision. Complaint, ¶ 36.

[4] The court need not reach Roberta's argument that the Land Court decision foreclosed the Lanza's arguments under collateral estoppel principles.

However, "[t]he element of coercion has been required only if there was no independent basis for imposing tort liability—where the wrong was in the particular combination of the defendants rather than in the tortious nature of the underlying conduct. [A]nother form of civil conspiracy, reflected in the Restatement (Second) of Torts § 876 (1979), derives from 'concerted action,' whereby liability is imposed on one individual for the tort of another." Kurker v. Hill, 44 Mass. App. Ct. 184, 188–189 (1998) (citations omitted). For much the same reasons as expressed above, the Lanzas have made out a colorable claim on this second form of civil conspiracy with respect to Roberta's alleged abuse of legal process.

b. Non-Retaliatory: The only conduct Roberta is alleged to have engaged in to facilitate the alleged conspiracy is the filing of the abuse of process claim. This is equivalent to a Chapter 93A claim sought by the abutters in Harrison II which was also based on the alleged abuse of process. 483 Mass. at 526. The Harrison II court dismissed the Chapter 93A claim when it dismissed the abuse of process claim on the grounds that the non-movant abutters could not show an absence of a retaliatory motive. Id. at 529-530. So it is here; for the reasons expressed above, the civil conspiracy claim must be dismissed as against Roberta because the Lanzas have not met their burden of showing that it is not retaliatory.

Count IV: Civil Rights Violation: The Lanzas allege that "[t]he [Tonsbergs] have interfered and/or attempted to interfere with the [Lanzas'] right to refrain from speaking or otherwise taking a public position on a matter by filing the Land Court action, the illegitimate purpose of which is intended to coerce the [Lanzas] to publicly support Mr. Tonsberg's objectives to make the Subdivision's roadways public and to accomplish its continued development," which constituted a violation of G. L. c. 12, § 11I. Complaint, ¶ 58.

a. Colorability: "To establish a claim under [§ 11I], the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by 'threats, intimidation or coercion.'" Swanset Dev. Corp. v. City of Taunton, 423 Mass. 390, 395 (1996).

The parties dispute whether filing a lawsuit constitutes coercion under the statute. The Civil Rights Act does not define "coercion," but the Supreme Judicial Court has found that it is "'the application to another of such force, either physical or *moral,* as to constrain him to do against his will something he would not otherwise have done' " ... Whether conduct constitutes coercion is examined from an objective, reasonable person standard." Currier v. Nat'l Bd. of Med. Examiners, 462 Mass. 1, 12–13 (2012) (citations omitted, emphasis in original). Roberta argues that pursuing litigation cannot be coercion as a matter of law, citing Brunelle v. Lynn Pub. Sch., 433 Mass. 179 (2001) and Benevolent & Protective Ord. of Elks, Lodge No. 65 v. Plan. Bd. of Lawrence, 403 Mass. 531, 559-560 (1988). But neither case stands for the proposition that abusive litigation can never serve as a form of coercion under § 11I, and at least one Appeals Court case identified the filing of a lawsuit for an improper purpose as constituting a form of coercion. See Wodinsky v. Kettenbach, 86 Mass. App. Ct. 825, 835 (2015) (coercion supported by evidence of, among other things, the defendants' "instituting litigation" against plaintiff in alleged bad faith); see also Cohen v. Hurley, 20 Mass. App. Ct. 439, 442 (1985) (citation omitted) (abuse of process is a "form of coercion [or] ... extortion"). The court thus concludes that the Lanzas' civil rights claim against Roberta is colorable.

c. Non-Retaliatory: For the same reasons as expressed regarding the abuse of process and civil conspiracy claims, the court concludes that the civil rights claim must be

dismissed as against Roberta because the Lanzas have not met their burden of showing that it is not retaliatory.

ORDER

Roberta's special motion to dismiss is **ALLOWED**. Accordingly, the Lanzas' complaint against her is **DISMISSED.**

SO ORDERED.

M.D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: May 30, 2021

A TRUE COPY ATTEST
Clerk of Courts

6, 2 cc
KB
RRB
EFNJR