COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2019-P-0105

Plymouth, ss.

C. A. No. 18H83SP02511BR

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Allen H. Davis, Appellee

Plaintiff

V.

William Comerford and Gina Comerford, Appellants

Defendants

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DEFENDANTS WILLIAM COMERFORD AND GINA COMERFORD'S PETITION TO THE APPEALS COURT PURSUANT TO G.L. C. 231, § 118 (FIRST PARAGRAPH)

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# Brief of Defendants-Appellants

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Date: March 11, 2019

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## STATEMENT OF ISSUES

(1) In Massachusetts, is an order for tenants to make "use and occupancy" payments lawful when there is no statute providing for such payments?

(2) Did the Housing Court err in granting the Landlord's motion for "use and occupancy" payments when the Landlord failed to meet the apposite standard for injunctive relief?

## STATEMENT OF THE CASE

Appellants Gina and William (Tenants) Comerford are employed as a bus driver and school bus monitor, respectively, and are of limited financial means. On or about June 11, 2018, the Appellee (Landlord) commenced a summary process action in the Housing Court seeking to evict the Appellants. [See, R.A. p.8 "Summons and Complaint"]. The retaliatory eviction action was brought by the Appellee after the he received, and thereupon disregarded, two (2) separate requests for documentation in connection with the Appellants' security deposit.

Heretofore, each month, the Appellants have timely paid "use and occupancy" into the IOLTA account of their undersigned counsel. Notwithstanding the foregoing, subsequent to the filing of this eviction action, on

precisely October 24, 2018 the Appellee moved for an injunction ordering the Appellants to pay the Appellee monthly "use and occupancy" payments throughout the summary process action. [R.A. p. 18 "Plaintiff's Untitled Motion"]. Quite egregiously, counsel for the Appellee failed to provide the Appellants with sufficient time to respond to the aforesaid motion, and inexplicably failed to provide the requisite seven (7) days to respond thereto.

On or about October 31, 2018, the Housing Court granted the Appellee's motion and ordered the Appellants to make monthly "use and occupancy" payments to the Appellee prior to trial [R.A. p. 140 "Order"].

## STATEMENT OF THE FACTS

Appellants William and Gina Comerford are tenants of the Appellee Allen H. Davis [R.A p. 8] On June 11, 2018 Appellee commenced an eviction against [R.A. p. 8 "Summons and Complaint"]. The Appellants answered with a number of defenses and counter claims and defenses [R.A. p. 10 "Answer and Counterclaims"]. On October 24, 2018 Appellee through his attorney requested use and occupancy be deposited into his account [R.A. p. 18 "Untitled Motion"]. Said motion

requested to be heard on October 30, 2018 [R.A. p. 19]. Further, the motion did not contain an affidavit attested facts alleged in the motion were true [R.A. p. 18-19]. The Appellants through counsel opposed the motion for use in occupancy [R.A. p. 24 "Defendant's Opposition to Plaintiff's Motion"]. On October 31, 2018 the Judge allowed Appellee's motion for use and occupancy [R.A. p 140 "Order"]

## SUMMARY OF THE ARGUMENT

COME NOW Defendant-Appellants Gina and William Comerford (hereinafter, "Appellants" or "the Tenants"), and hereby respectfully submit the instant Memorandum of Law in support of their petition for relief pursuant to Mass. Gen. Laws ch. 231 § 118 ¶ 1. Through the instant appeal to this Honorable Court, the Tenants respectfully request relief from an interlocutory order of the Housing Court improperly ordering the Tenants to pay Plaintiff-Respondent Allen H. Davis (hereinafter, "Respondent" or "the Landlord") certain monthly "use and occupancy" fees throughout the trial.

In support hereof, the Appellants state that the financial burden and hardship placed on them by the improper injunctive order of the Housing Court has

caused, and continues to cause, undue prejudice and irreparable financial harm. Accordingly, the Appellants pray for relief from this Court, and respectfully request that the aforesaid order entered on October 31, 2018 be reversed.

## STANDARD OF REVIEW

On a petition for interlocutory review, "[t]he focus of appellate review of an interlocutory matter is 'whether the trial court abused its discretion[,] that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions.' The judge's 'conclusions of law are subject to broad review and will be reversed if incorrect.'" Caffyn v. Caffyn, 441 Mass. 487, 490 (2004), quoting Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25-26 (1981). The legal errors asserted herein are all subject to *de novo* review. See, e.g., Vranos v. Franklin Medical Center, 448 Mass. 425, 437-40 (2007).

## ARGUMENT

### I. A JUDGE OF THE HOUSING COURT MAY NOT LAWFULLY ENTER A PREJUDGMENT ORDER FOR USE AND OCCUPANCY PAYMENTS PAYABLE DIRECTLY TO THE LANDLORD IN A SUMMARY PROCESS ACTION

In this Commonwealth, there is no legal basis or authority whatsoever providing for "use and occupancy"

payments — or any other such preliminary injunction — by a tenant to a landlord during a summary process action. Because there is no such authority, the Housing Court squarely abused its discretion by entering such an order against the Tenants.

In HSBC Bank USA, N.A. v. Galebach, 2012 Mass. App. Div. 155, the Appellate Division wisely reversed the pre-trial order of the Somerville District Court for so-called "use and occupancy" payments, stating in footnote 13:

> "The [tenants] admitted to the trial court that they defaulted on their mortgage payments and that they now live at the premises rent free. However, recovery for use and occupancy in a summary process action requires a judgment. G.L. c. 239, §§ 2, 3. See Lowell Hous. Auth. v. Save-Mor Furniture Stores, Inc.,346 Mass. 426 (1963). Neither in its pretrial motion for use and occupancy, nor in its brief, has HSBC cited any statute that provides

> for a pretrial order for such relief pending the trial of a summary process action, presumably because none exists." (Emphasis supplied).

As the HSBC Bank court unambiguously stated, "[t]he pretrial order for use and occupancy was issued without statutory authority, and is accordingly vacated." Id. at 161-162. Wherefore, this Honorable Court should uphold its decision in HSBC Bank, *supra*, and reverse the unlawful order of the Housing Court.

## II. THIS COURT SHOULD REVERSE THE ORDER OF THE HOUSING COURT, AS THE LANDLORD HAS FAILED TO MEET THE LEGAL STANDARD FOR INJUNCTIVE RELIEF.

*Arguendo*, even if a legal basis for "use and occupancy" payments existed, *quod non*, the Landlord has not met the legal standard for such pre-judgment injunctive relief. Here, the Appellee has not submitted any affidavit whatsoever in support of the Appelle's motion for "use and occupancy" payments. Furthermore, as explained hereinabove, the Appellants were egregiously denied their right to seven (7) days' time in order to respond to the motion.

Mass.R.Civ.P. 6(c) expressly provides, in pertinent part:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing."

The said Rule 6(d) further provides as follows:

> "Whenever a party has the right or is required to some act [ . . . ] within a prescribed period after the service of notice or other papers upon him the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

The Appellants objected to the timeliness of the Appelle's motion because it was filed on October 24, 2018 with a request for hearing on October 30, 2018 — a mere six (6) days later. Upon filing, the Landlord thereupon mailed a copy of the motion to counsel for the

Appellants; accordingly, the motion should not have been heard until at least ten (10) days after service by mail. The Appellants' understandable objection to the untimeliness of the motion was unfortunately ignored by the Housing Court.

The appropriate legal standard through which the Landlord's motion should be analyzed is the standard for injunctive relief. See, Wells Fargo Bank v. Sheldon Mciver, 11H79SP004597, Housing Court Department, Western Division, (Fields, J.) (March 12, 2012). In Wells Fargo Bank, the plaintiff sought "use and occupancy" for a property it allegedly owned after foreclosure. The Wells Fargo court wisely held that a motion for "use and occupancy" should be analyzed through the lens of injunctive relief. In the case at bar, the Housing Court erred by failing to apply the injunctive relief standard to the Landlord's untitled motion for "use and occupancy" payments [see, R.A. p. 18].

The legal standard for the issuance of a preliminary injunction such as "use and occupancy" payments was reiterated in Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609 (1980). As the Supreme Judicial Court explained, the moving party must

demonstrate a substantial likelihood of success on the merits of the underlying complaint, that failure to issue the injunction subjects the moving party to a substantial risk of irreparable harm in the absence of injunctive relief, and that the threatened injury to the moving party outweighs the damage an injunction may cause to opposing party. "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." Id. at 617.

Here, it is immediately clear that the Appelle's motion for "use and occupancy" payments [R.A. p. 18] conspicuously fails to meet that high standard for injunctive relief as set forth in Packaging Industries, *supra*. Furthermore, as stated hereinabove, the Appelle's untitled motion asserted numerous facts with no affidavit. Without an affidavit, there were no facts for the Housing Court to reasonably rely on when ruling on the motion for "use and occupancy" payments.

## CONCLUSION

WHEREFORE, on the above-mentioned grounds and premises, the Appellants pray for relief and respectfully request that this Honorable Court reverse the order of the

Housing Court for "use and occupancy" payments to the Landlord.

Respectfully submitted,

/s/ Arthur D. Hardy-Doubleday

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Date: 03/11/19

## CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) pertinent findings or memorandum of decision);
Rule 16(d) (References in Briefs to Parties);
Rule 16(e) (references to the record);
Rule 16(f) (reproduction of statutes, rules, regulations);
Rule 16(h) (length of briefs);
Rule 16(m) (References to Impounded Material);
Rule 18 (appendix to the briefs); and
Rule 20 (typesize, margins, and form of briefs and appendices).

Respectfully submitted,

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Date: 03/11/19

**CERTIFICATE OF SERVICE**

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on March 11, 2019, I have made service of this Brief and Appendix upon the attorney of record for each party, by Email on March 11, 2019 per agreement of the parties.

Respectfully submitted,

/s/ Arthur D. Hardy-Doubleday

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# ADDENDUM

## Order of the Court



## Statutes



## Cases

COMMONWEALTH OF MASSACHUSETTS

Plymouth, SS

Southeast Housing Court
Brockton Division
18H83SP02511BR

Allen H. Davis )
Plaintiff )
)
v. )
)
William Comerford and )
Gina Comerford )
Defendants )

2018 OCT 24 AM 9:32

Now comes the Plaintiff Allen H. Davis in the above numbered summary process action and moves this Honorable Court to order that the defendants pay use and occupancy to the landlord during the pendency of this action. As reasons therefor the plaintiff states the following:

1. The plaintiff brought this summary process action for failure to pay rent and the original date for hearing was June 27, 2018.
2. On July 11, 2018 the original matter was heard by Judge Edwards who ordered that the defendants pay rent for the month of July, and pay the defendant's attorney rent each month. Such rent was to be deposited in the defendant's IOLTA account and proof of payment sent to plaintiff's counsel. (attached)
3. This case has not yet been scheduled for trial. The defendants have elected a jury trial.
4. The defendant's motion for partial summary judgment was denied by Judge Horan after hearing on August 17, 2018.
5. The plaintiff has not been paid any rent for the months of June, August, September or October 2018, and continues to pay his monthly mortgage from his savings.

Wherefore the plaintiff respectfully moves this Honorable Court to order the defendants to tender to the plaintiff the rental payments now in their attorney's IOLTA account and to pay reasonable use and occupancy each month while this case awaits trial.

RULES OF CIVIL PROCEDURE

# Civil Procedure Rule 6: Time

EFFECTIVE DATE:
07/01/1974



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## (a) Computation

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c)(/rules-of-civil-procedure/civil-procedure-rule-77-courts-and-clerks#-c-filing-date-of-all-papers-received-by-clerk), "legal holiday" includes those days specified in Mass. G.L. c. 4, § 7(https://malegislature.gov/Laws/GeneralLaws/PartI/TitleI/Chapter4/Section7) and any other day appointed as a holiday by the President or the Congress of the United States or designated by the laws of the Commonwealth.

## (b) Enlargement

When by these rules or by a notice given thereunder or by order or rule of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; or (3) permit the act to be done by stipulation of the parties; but it may not extend the time for taking any action under Rules **50(b)**(/rules-of-civil-procedure/civil-procedure-rule-50-motion-for-a-directed-verdict-and-for-judgment#-b-motion-for-judgment-notwithstanding-the-verdict), **2(b)**(/rules-of-civil-procedure/civil-procedure-rule-52-findings-by-the-court#-b-courts-other-than-district-court-amendment), **59(b)**(/rules-of-civil-procedure/civil-proce **(d)**(/rules-of-civil-procedure/civil-procedure-rule-59-new-trials-amendment-of-judgments#-d-on-initiative-of-court), and **(e)**(/rules-of-civil-procedure/civil-procedure-rule-59-new-trials-amendment-of-judgments#-e-motion-to-alter-or-amend-a-judgment), and **60(b)**(/rules-of-civil-procedure/civil-procedure-rule-60-relief-from-judgment-or-order#-b-mistake-inadvertence-excusable-neglect-newly-discovered-evidence-frau except to the extent and under the conditions stated in them.

## (c) For motions-affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 7 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in **Rule 59(c)**(/rules-of-civil-procedure/civil-procedure-rule-59-new-trials-amendment-of-judgments#-c-time-for-serving-affidavits), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

## (d) Additional time after service by mail

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other papers upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

## Reporter's notes

**(1996)**: Prior to the merger of the District Court Rules into the Massachusetts Rules of Civil Procedure, the District Court version of Rule 6(b) contained no reference to Rule 50(b) regarding motions for judgment notwithstanding the verdict. This difference has been eliminated in the merged set of rules.

**(1973)** Rule 6(a) does not significantly alter Massachusetts law. **G.L. c. 4, § 9**(https://malegislature.gov/Laws/GeneralLaws/PartI/TitleI/Chapter4/Section9) provides:

"Except as otherwise provided, when the day or the last day of the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

At the common law, if the limited time was less than a week, Sundays were excluded in calculating the time. Cunningham v. Mahan(http://masscases.com/cases/sjc/112/112mass58.html), 112 Mass. 58 (1873); Stevenson v. Donnelly(http://masscases.com/cases/sjc/221/221mass161.html), 221 Mass. 161, 108 N.E. 926 (1915). If however, the time limit exceeded one week, Sundays were included in the calculation of the time, even where the last day for doing the act fell on a Sunday. Haley v. Young(http://masscases.com/cases/sjc/134/134mass364.html), 134 Mass. 364 (1883).

Rule 6(a) liberalizes the common law, excluding not only Sundays but Saturdays and legal holidays as well, and slightly liberalizes G.L. c. 4, § 9(https://malegislature.gov/Laws/GeneralLaws/PartI/TitleI/Chapter4/Section9) by excluding holidays.

G.L. c. 4, § 9(https://malegislature.gov/Laws/GeneralLaws/PartI/TitleI/Chapter4/Section9) extends the expiration date of a statute of limitations from a Sunday to the following Monday. See Smith v. Pasqualetto(http://scholar.google.com/scholar_case?case=3905114889620423513), 246 F.2d 765 (1st. Cir. 1957). Federal Rule 6(a) has been held to extend a federal statute of limitations where the last day fell on a Sunday. See Rutledge v. Sinclair Refining Co., 13 F.R.D. 477 (S.D.N.Y.1953).

With certain exceptions, Rule 6(b) permits the court to extend the time for doing acts required under the Rules. The exceptions are governed by the language of the specific applicable rules:

50(b) – a motion for judgment notwithstanding the verdict;

52(b) – motion to amend findings;

59(b) – motion for a new trial;

59(d) – new trial on court's initiative;

59(e) – motion to alter or amend a judgment;

60(b) – a motion for relief from a judgment.

Rule 6(b) applies: (a) where the time period has already expired, as well as (b) where the time period has not expired, although in the former situation the failure to act within the time period must have been the result of excusable neglect.

Rule 6(b) does not change Massachusetts practice. The power of the courts in Massachusetts to allow extension of time applies also to permission for late filing. See Whitney v. Hunt-Spiller Mfg. Corp.(http://masscases.com/cases/sjc/218/218mass318.html), 218 Mass. 318, 105 N.E. 1054 (1914); Prunier v. Schulman(http://masscases.com/cases/sjc/261/261mass417.html), 261 Mass. 417, 158 N.E. 785 (1927); Hill v. Trustees of Glenwood Cemetery(http://masscases.com/cases/sjc/323/323mass388.html), 323 Mass. 388, 82 N.E.2d 238 (1948).

Federal Rule 6(c) was rescinded in 1966 and is not included in Rule 6. Rules 6(c) and 6(d) are the same as Federal Rules 6(d) and 6(e). They do not substantially affect prior law.

## Downloads

Massachusetts Rules of Civil Procedure (https://www.mass.gov/files/documents/2016/12/vu/civil-rules.pdf) (PDF 1.93 MB)

## Contact

### Trial Court Law Libraries

**Online**

**Part III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

**Title II** ACTIONS AND PROCEEDINGS THEREIN

**Chapter 231** PLEADING AND PRACTICE

**Section 118** TEMPORARY APPELLATE RELIEF FROM INTERLOCUTORY ORDERS; APPEALS TO APPEALS COURT OR SUPREME JUDICIAL COURT

Section 118. A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department, the juvenile court department or the probate and family court department may file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen. If the petition is filed with respect to a discovery order and is denied, the single justice may, after such hearing as the single justice in his discretion deems appropriate, require the petitioning party or the attorney advising the petition or both of them to pay to the party who opposed the petition the reasonable expenses incurred in opposing the petition, including

attorney's fees, unless the court finds that the filing of the petition was substantially justified or that other circumstances make an award of expenses unjust.

A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department, granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction, or a party aggrieved by an interlocutory order of a single justice of the appellate court granting a petition for relief from such an order, may appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the supreme judicial court, which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate order as may be just under the circumstances. An appeal under this paragraph shall be taken within thirty days of the date of the entry of the interlocutory order and in accordance with the Massachusetts rules of appellate procedure. Pursuant to action taken by the appellate court the cause shall be remanded to the trial court for further proceedings.

The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by a single justice of the appellate court.

# LESLIE A. CAFFYN vs. BRIAN E. CAFFYN.

## 441 Mass. 487

February 5, 2004 - April 20, 2004

Norfolk County

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

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Divorce and Separation, Jurisdiction, No-fault divorce. Jurisdiction, Divorce proceedings. Domicil. Statute, Construction.

This court concluded that a plaintiff in a divorce action who had not complied with the one-year residency requirement of G. L. c. 208, s. 5, nevertheless could satisfy the alternative jurisdictional requirements of s. 5 by asserting domicil after a brief period of residence and claiming that the "cause" for the divorce, namely "an irretrievable breakdown of the marriage" under G. L c. 208, s. 1B, occurred within Massachusetts. [490-498]

COMPLAINT for divorce filed in the Norfolk Division of the Probate and Family Court Department on October 15, 2002.

A motion to dismiss was heard by David H. Kopelman, J.

A proceeding for interlocutory review was heard in the Appeals Court by Fernande R.V. Duffly, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David H. Lee (Robert J. Rivers, Jr., with him) for Brian E. Caffyn.

Paul M. Kane (Courtney Vore with him) for Leslie A. Caffyn.

**IRELAND, J.** This case raises the first impression question whether a plaintiff in a divorce action who has not complied with the one-year residency requirement of G. L. c. 208, § 5, may, nevertheless, satisfy the alternative jurisdictional requirements of § 5, by asserting domicil after a brief period of residence and claiming that the "cause" for the divorce, namely "an irretrievable breakdown of the marriage" under G. L. c. 208, § 1B, occurred in Massachusetts. Brian E. Caffyn (husband) appeals from an order of the Probate and Family Court denying his motion to dismiss a

complaint for divorce filed by Leslie A. Caffyn (wife) based on lack of subject matter jurisdiction. After



a single justice of the Appeals Court entered an order granting the husband leave to file an interlocutory appeal "as to the issue of subject matter jurisdiction," we transferred the case on our own motion. Because we conclude that a plaintiff domiciled in Massachusetts may satisfy the jurisdictional requirements of § 5 by making a subjective determination that the marriage became irretrievably broken (pursuant to § 1B) within the Commonwealth, we affirm the Probate and Family Court's denial of the husband's motion to dismiss.

Facts.

The parties were married in Brookline, Massachusetts, on May 30, 1987. After the marriage, the parties resided in Stamford, Connecticut, for approximately one year. Between 1988 and 1990, the husband and the wife lived in Massachusetts for approximately one and one-half years. The parties then moved to Chicago, Illinois, where they resided for approximately six years and where their two children were born. Thereafter, the family relocated to San Diego, California, where they lived for approximately one and one-half years. In approximately 1996 or 1997, the parties and their children moved to Italy, where they resided as a family through the end of June, 2002, when the wife moved to Massachusetts with the children.

Throughout the marriage, the husband and the wife maintained a joint bank account in Massachusetts. The parties also retained pediatricians for their children and came to Massachusetts twice a year for the children to be seen by "their" doctors. The wife alleges (and the husband does not dispute) that each year, the family spent Christmas holidays and a portion of summer vacations in Massachusetts.

Before leaving Italy, the wife arranged for the family's personal belongings to be shipped to Massachusetts, discharged hired help, canceled the children's tutors and therapist, and caused the children's educational records to be sent to Massachusetts. After moving to Massachusetts in June of 2002, the wife opened a bank account in her own name. In late August of 2002, the wife and the husband

purchased a residence in Wellesley, with title taken jointly in both their names. They jointly investigated private schools in Massachusetts for the children. The husband purchased, and the wife registered, a

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vehicle in Massachusetts for the use of the wife and the children. The husband also visited the children in Norwood, where they resided temporarily with their mother and grandparents. [Note 1]

Procedural background.

The wife filed a complaint for divorce in the Norfolk County Probate and Family Court on June 28, 2002. Due to procedural flaws, however, that complaint was dismissed. The wife filed a second, essentially identical, complaint on October 15, 2002, in which she sought, inter alia, a dissolution of the marriage pursuant to G. L. c. 208, § 1B, [Note 2] and alleged that "an irretrievable breakdown of the marriage" occurred on or about June 26, 2002, within the Commonwealth. [Note 3]

The husband's counsel filed a special appearance and a motion, pursuant to Mass. R. Dom. Rel. P. 12 (b), [Note 4] to dismiss the wife's complaint for divorce due to lack of subject matter and personal jurisdiction, insufficient service of process, and failure to state a claim on which relief can be granted. [Note 5] The husband also submitted an affidavit disputing the validity of service of

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process, which was countered by the process server's affidavit. The wife filed an opposition to the motion. A judge in the Probate and Family Court issued a memorandum of decision and order denying the husband's motion. The husband filed a petition pursuant to G. L. c. 231, § 118, first par., requesting leave to take an interlocutory appeal from the denial. A single justice of the Appeals Court entered an order granting the husband leave to file an interlocutory appeal "as to the issue of subject matter jurisdiction." We transferred this case from the Appeals Court on our own motion.

Discussion.

1. Standard of review. The focus of appellate review of an interlocutory matter is "whether the trial court abused its discretion -- that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions." Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 25 (1981). The judge's "conclusions of law are subject to broad review and will be reversed if incorrect." Id. at 26.

2. Subject matter jurisdiction under G. L. c. 208, § 5. This case presents us with the question of the meaning of "an irretrievable breakdown of the marriage" [Note 6] (the so-called "no-fault" divorce provisions under G. L. c. 208, §§ 1A and 1B [Note 7]) as a "cause" for divorce in the context of interpreting G. L. c. 208, § 5, one of the statutes conferring subject matter jurisdiction on the Probate and Family Court Department. [Note 8] Section 5 provides:

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"If the plaintiff has lived in this commonwealth for one year last preceding the commencement of the action if the cause occurred without the commonwealth, or if the plaintiff is domiciled within the commonwealth at the time of the commencement of the action and the cause occurred within the commonwealth, a divorce may be adjudged for any cause allowed by law, unless it appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce."

Specifically, we must decide whether a spouse who has not complied with a statutory one-year residency requirement may satisfy the jurisdictional requirements of § 5 by asserting domicil after a brief period of residence and claiming that the "cause" for the divorce, namely "an irretrievable breakdown of the marriage," "occurred within" Massachusetts. [Note 9]

a. Burden of proof. Because the husband filed a motion to dismiss due to lack of subject matter jurisdiction under Mass. R. Dom. Rel. P. 12 (b) (1), the burden fell on the wife to prove jurisdictional facts. Williams v. Episcopal Diocese of Mass., 436 Mass. 574, 577 n.2 (2002), and cases cited. See Brown v. Tobyne, 9 Mass. App. Ct. 897 (1980).

At the time she filed the complaint for divorce, the wife had not yet satisfied the one-year residency requirement, and thus could not establish jurisdiction on that prong of § 5. [Note 10] Therefore, to establish subject matter jurisdiction under the alternative prong of § 5, the wife had to prove that she was domiciled in Massachusetts when she filed the complaint, that the "cause"

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for divorce "occurred within" Massachusetts, and that she had not "removed into" Massachusetts to obtain a divorce.

b. Domicil. Domicil has been defined as "the place of one's actual residence with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode." Fiorentino v. Probate Court, 365 Mass. 13, 17 n.7 (1974), quoting Tuells v. Flint, 283 Mass. 106, 109 (1933). Whether a person has established a domicil in a State is a question of fact for the trial judge. See id. at 21-22. The judge can make "a reasonably accurate determination" of the plaintiff's claim of Massachusetts domicil based on numerous factors, including, without limitation, whether the plaintiff has "a Massachusetts driver's license and automobile registration; whether he or she has purchased a home or has leased an apartment in the Commonwealth; . . . whether any children have been brought to live in Massachusetts; whether personal property, including household goods, has been brought here; . . . whether there is evidence of abandonment of previous domicil, e.g., cancellation of bank accounts, leases, memberships, and so forth, sale of property, and issuance of change of address notices." Fiorentino v. Probate Court, supra at 22 & n.12. [Note 11] The length of residence in the State is "one, but only one, relevant consideration" in determining domicil. Id. at 22. See Kennedy v. Simmons, 308 Mass. 431, 434-435 (1941) (domicil established in Massachusetts where person intended to remain permanently but died in hospital one week after arriving in Massachusetts from Florida); Winans v. Winans, 205 Mass. 388, 391-392 (1910) (domicil established in Massachusetts even though person had stayed in Massachusetts for less than two weeks living in hotel while looking for more permanent accommodations).

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The facts of this case amply support the judge's conclusion that the wife established domicil in the Commonwealth. The husband's actions, such as joining in the purchase of a residence in Massachusetts, paying for the children's private schooling in the Commonwealth, purchasing a motor vehicle for the wife's use and registering the vehicle in Massachusetts, strengthen, rather than contradict, the wife's allegations of domicil. Furthermore, we are of the opinion that the evidence supports the judge's finding that the wife had not "removed into" Massachusetts for the purpose of obtaining a divorce. See Lycurgus v. Lycurgus, 356 Mass. 538, 540-541 (1969).

c. "An irretrievable breakdown of the marriage" as "cause" for divorce under § 5. The subject matter jurisdiction statutes were enacted long before the no-fault divorce statutes, and the term "cause" referred, at first, only to the fault grounds that had to be proved to obtain a divorce. [Note 12] In 1975, the Legislature added "an irretrievable breakdown of the marriage" as a ground for divorce. St. 1975, c. 698, amending G. L. c. 208, § 1, and inserting G. L. c. 208, §§ 1A and 1B, effective January 1, 1976. It never saw fit, however, to rewrite the statute to accommodate the new concept of "an irretrievable breakdown of the marriage" within the jurisdictional scheme that was premised on being able to determine, with a reasonable degree of certainty, where the "cause" for divorce occurred.

We now examine the language of § 5. [Note 13] Section 5 does not distinguish between fault and no-fault grounds for divorce. It provides that "a divorce may be adjudged for any cause allowed



by law," which logically includes "an irretrievable breakdown of the marriage" under the no-fault provisions, §§ 1A and 1B. See C.P. Kindregan, Jr. & M.L. Inker, Family Law and Practice § 27:3 n.6 (3d ed. 2002) (grounds for divorce are set forth in G. L. c. 208, §§ 1, 1A, 1B, and 2). Neither § 1A nor § 1B contains a requirement that a spouse plead or enumerate any objective factors that would lead a court to the conclusion that a marriage is irretrievably broken. [Note 14] In light of the foregoing, we reject the husband's contention that § 5, properly interpreted in the context of §§ 1A and 1B, requires "the occurrence of an objective factual event in Massachusetts which gives rise to the cause of the divorce." [Note 15] As a "cause"

for divorce, "an irretrievable breakdown of the marriage" is inherently subjective and, contrary to the husband's contention, need not be "objectively documented, tested and proven." [Note 16] The decision that a marriage is irretrievably broken need not be

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based on any identifiable objective fact; it is sufficient that a party or parties subjectively decide that their marriage is over and there is no hope of reconciliation. [Note 17] In adopting no-fault divorce, the Legislature implicitly recognized that the parties to a marriage should be able to make personal and unavoidably subjective "decisions about marriage and divorce free from overwhelming state control." [Note 18] See Developments in the Law

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-- The Law of Marriage and Family, 116 Harv. L. Rev. 2075, 2089 (2003), quoting E.S. Scott & R.E. Scott, A Contract Theory of Marriage, in The Fall and Rise of Freedom of Contract 201, 204 (F.H. Buckley ed., 1999) (no-fault divorce "is the hallmark of the law's retreat from regulating marriage").

The husband argues that the wife's claim that the marriage suffered "an irretrievable breakdown in Massachusetts" is based entirely on an "ethereal" event. We disagree. There is support for the wife's assertion that the marriage became irretrievably broken in Massachusetts. In his memorandum of law in support of the motion to dismiss the wife's divorce action, the husband admitted that the parties attempted reconciliation in Massachusetts during the summer of 2002. [Note 19] By September of 2002, however, the parties' reconciliation attempts failed. The reconciliation having failed, the "irretrievable breakdown" that the wife alleged occurred on or about July 26, 2002, continued as set forth by the wife in her second complaint for divorce. [Note 20]

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In addition, contrary to the husband's argument, subject matter jurisdiction under § 5 would not be based solely on a spouse's subjective determination of when and where his or her marriage suffered "an irretrievable breakdown." The Legislature

has set forth additional safeguards designed to prevent the Commonwealth from becoming a "divorce mill for unhappy spouses," Sosna v. Iowa, 419 U.S. 393, 407 (1975): the requirements that a plaintiff establish domicil in the State (an objective determination, discussed supra) [Note 21] and convince the court that he or she had not "removed into" Massachusetts solely to obtain a divorce, and a six-month waiting period before a hearing on a divorce complaint filed pursuant to § 1B can be obtained. [Note 22] The Legislature easily could have limited the invocation of § 5 to parties filing for divorce on fault grounds, or imposed a mandatory residency requirement on all spouses alleging "an irretrievable breakdown of the marriage," but it did not do so. That the Legislature did not impose any additional restrictions on plaintiffs seeking no-fault divorces lends support to our conclusion that it considered existing safeguards sufficient to prevent potential forum shopping abuses.

Conclusion.

For the foregoing reasons, we conclude that the judge did not abuse his discretion in concluding that the wife satisfied the jurisdictional requirements of G. L. c. 208, § 5, so as to survive the husband's motion to dismiss based on lack of subject matter jurisdiction. Accordingly, we affirm the Probate and Family

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Court's denial of the husband's motion to dismiss the wife's complaint for divorce.

So ordered.

FOOTNOTES

[Note 1] The wife was born in Massachusetts. Her parents are lifelong residents of the Commonwealth.

[Note 2] General Laws c. 208, § 1B, along with G. L. c. 208, § 1A, comprise the two Massachusetts "no fault" divorce statutes. Section 1A permits both parties jointly to petition the court for a divorce on the ground of "an irretrievable breakdown of the marriage"; a judgment of divorce nisi is entered thirty days after the hearing. The judgment of divorce absolute is entered ninety days after that. See G. L. c. 208, § 21 ("Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of ninety days from the entry thereof . . .").

Section 1B permits a party to file a complaint for divorce. It further provides that "[n]o earlier than six months after the filing of the complaint, there shall be a hearing and the court may enter a judgment of divorce nisi if the court finds that there has existed, for the period following the filing of the complaint and up to the date of the hearing, a continuing irretrievable breakdown of the marriage." G. L. c. 208, § 1B. The judgment of divorce absolute is entered ninety days later.

[Note 3] On the same day, October 15, 2002, the husband was served with a copy of the complaint, in hand, while visiting the parties' minor children in Massachusetts.

[Note 4] Rule 12 (b) of the Massachusetts Rules of Domestic Relations Procedure (2004) is identical to Mass. R. Civ. P. 12 (b), 365 Mass. 754 (1974).

[Note 5] The husband also raised the Hague Convention on the Civil Aspects of International Child Abduction. At the hearing on his motion to dismiss, the husband's attorney stated that within several days of the hearing, the husband was planning to file a complaint with the Federal District Court for the District of Massachusetts under the Hague Convention. The Hague Convention issue is not before us on appeal.

[Note 6] The statute itself does not specify what constitutes "an irretrievable breakdown of the marriage." See G. L. c. 208. The term has been defined as meaning that either or both spouses are unable or unwilling to cohabit and there are no prospects for reconciliation. C.P. Kindregan, Jr. & M.L. Inker, Family Law and Practice § 33:9 (3d ed. 2002), citing Black's Law Dictionary 830 (6th ed. 1990).

[Note 7] See note 2, supra.

[Note 8] The other jurisdictional statute, G. L. c. 208, § 4, provides:

"A divorce shall not, except as provided in the following section, be adjudged if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another jurisdiction, unless before such cause occurred the parties had lived together as husband and wife in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred."

Because we conclude that subject matter jurisdiction over this action exists under § 5, we need not decide whether it also exists under § 4.

[Note 9] The wife asserts that she has been domiciled in Massachusetts since June of 2002, and that her subjective assertion that the marriage became irretrievably broken on or about June 26, 2002, is not only sufficient to confer subject matter jurisdiction, but also comports with the intent of the Legislature in enacting G. L. c. 208, §§ 1A and 1B, the so-called "no fault" divorce statutes.

[Note 10] Although the wife has now fulfilled the one-year residency requirement, and presumably may now file a proper divorce complaint under § 5 even if the "cause" for divorce did not occur in Massachusetts, we nevertheless shall proceed to a decision

because of the importance and recurring nature of the issue presented. See Lockhart v. Attorney Gen., 390 Mass. 780, 782-783 (1984).

[Note 11] The husband's contention that the definition of domicil "is clearly a rather elusive relationship between person and place" is without merit. We have stated before, and now reiterate: "[W]e do not believe that . . . fraudulent claims of domicil can be perpetrated so effectively as to defy detection by judges who act affirmatively to prevent such fraud." Fiorentino v. Probate Court, 365 Mass. 13, 21 (1974). There exist "a myriad of tangible [objective] criteria" that are "highly relevant" to the determination of domicil. Id. at 22, quoting Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 222 (D. Haw. 1973).

[Note 12] In 1975, the year in which it enacted the no-fault statutes, the Legislature amended both subject matter jurisdiction statutes to conform to the Massachusetts Rules of Civil Procedure, and it further amended G. L. c. 208, § 5, to reduce from two years to one year the time that a plaintiff was required to live in Massachusetts before filing for divorce. See St. 1975, c. 400, §§ 9, 10. Since then, the Legislature has amended G. L. c. 208, § 1A, twice, reducing the waiting period for obtaining a divorce nisi from ten months to six months to thirty days. See St. 1977, c. 531, § 2; St. 1986, c. 189. The Legislature also has amended G. L. c. 208, § 1B, twice to reduce the waiting period for obtaining a hearing on the complaint from twenty-four months to twelve months to six months. See St. 1977, c. 531, § 1; St. 1985, c. 691, § 2.

[Note 13] The parties have not supplied, and we have not been able to locate, any legislative history that would aid us in discerning the legislative intent of that section.

[Note 14] In contrast, a plaintiff seeking a divorce on fault grounds must plead and prove objective acts as to fault. See G. L. c. 208, § 1.

[Note 15] The cases cited by the husband in support of this position are either Massachusetts cases decided prior to the enactment of the no-fault divorce statutes, or cases from other jurisdictions, distinguishable from this case on their facts.

[Note 16] An analysis of California's no-fault divorce statute, Cal. Fam. Code § 2310 (West 1994) (formerly Cal. Civ. Code § 4506), is instructive. Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 UCLA L. Rev. 1306, 1319, 1322-1323 (1970) ("irreconcilable differences which have caused the irremediable breakdown of the marriage" is fundamentally subjective unilateral standard). According to the author, "irreconcilable differences" need not "exist in the form of observable acts and occurrences such as marital quarrels or separation of the parties." Id. at 1319. Rather, the term "irreconcilable differences" is "descriptive of the frame of mind of the spouses in a marriage which is no longer viable." Id., quoting The Report of the Assembly Committee on the Judiciary, in J. of the Cal. Assembly at 8057 (Aug. 8, 1969). To satisfy the "irreconcilable differences" test, it is sufficient if only one spouse feels "that the marriage cannot be salvaged." Comment, supra.

The California no-fault divorce statute does not explicitly state whether a "petitioner's self-serving testimony about his or her state of mind" is sufficient evidence to establish irreconcilable differences, or whether it must be "corroborated by evidence of actual facts and occurrences." Id. at 1320. Reading the statutory provisions regarding "irreconcilable differences" together with the provisions generally prohibiting receipt of fault evidence in divorce cases brought on no-fault grounds, it becomes clear that "demonstrative evidence is not required to corroborate state-of-mind testimony" and "the prima facie case for dissolution should be satisfied by the declaration of petitioner that he or she sincerely believes that the marriage has irreparably broken down." Id. at 1321, 1322. See id. at 1324 (irreconcilable differences is "proved solely with reference to petitioner's state of mind"). Similar to the California no-fault divorce statute, G. L. c. 208, § 34, also prohibits a judge "from inquiring into or considering any evidence of individual marital fault of the parties" in determining whether the parties' separation agreement in § 1A divorces is fair and reasonable. See Freedman, Irretrievable Breakdown of the Marriage: An Additional Ground for Divorce, 20 B.B.J. 3, 5 (No. 1 1976).

[Note 17] Our conclusion finds support in the reasoning of other courts. See, e.g., In re Marriage of Walton, 28 Cal. App. 3d 108, 117 (1972), quoting In re Marriage of McKim, 6 Cal. 3d 673, 680 (1971) (in deciding whether evidence supports findings "that irreconcilable differences do exist and that the marriage has broken down irremediably and should be dissolved," the court must necessarily "depend to a considerable extent upon the subjective state of mind of the parties"); Joy v. Joy, 178 Conn. 254, 255 (1979) (there need not be "objective guidelines" for determination that marriage is irretrievably broken); Mattson v. Mattson, 376 A.2d 473, 475 (Me. 1977) ("The term 'irreconcilable marital differences' is one that necessarily lacks precision and should not be circumscribed by a strict definition"); Matter of the Marriage of Dunn, 13 Or. App. 497, 501-502 n.1 (1973) (explaining necessity of subjective standard of marital failure in context of no-fault divorce).

[Note 18] See Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79, 83-91 (1991). A "review of legal literature advocating or discussing the adoption of no-fault divorce grounds in the 1960s and 1970s," id. at 91, revealed that one of the major arguments in favor of adopting no-fault divorce grounds was that basic notions of marriage and divorce had changed, and "no-fault divorce more accurately reflected modern conceptions of terminating marital relations than did the prior laws." Id. at 95. Specifically, the advocates of no-fault divorce asserted that "divorce was a private matter that the state had no legitimate interest to restrict when the marriage was irretrievably broken and the parties to the marriage had agreed to terminate the marriage." Id. at 96. The main thrust of this privacy argument was to protect the parties from "unnecessary distress and embarrassing public disclosures." Id. The proponents of no-fault divorce claimed that requiring the parties to disclose " 'the most intimate and often embarrassing details of marital life' [was] 'abhorrent to the community,' violated the spirit of family privacy, and worked only to 'demean the marriage relationship, humiliate the parties, and damage the residual family

relationships.' " Id. at 96, quoting Goldstein, On Abolition of Grounds for Divorce: A Model Statute and Commentary, 3 Fam. L.Q. 75, 82-83 (1969). The shift to the no-fault divorce was, thus, prompted in part by the belief that "[t]he state's interest in protecting marriages did not justify requiring disclosure of the marriage's failings if it was undisputed by the parties that the marriage was irretrievably broken." Wardle, supra at 96.

No-fault divorce laws represent a "cultural rise of individual liberty within the family" and "allow the parties involved to assess the viability of the marriage." Note, Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences, 40 B.C. L. Rev. 611, 614 (1999). Judges, thus, "do not contest the viability of a marriage." Id.

[Note 19] The husband's memorandum of law reads, in pertinent part:

"In the late summer of 2002, [the wife] reported to [the husband] that she would be amenable to a reconciliation. The terms of such reconciliation, however, were conditioned upon [the husband's] agreeing to assist [the wife] with the purchase of a temporary residence in the Boston area while she assessed the prospect of resuming living together. In specific reliance on [the wife's] overtures with respect to reconciliation, and in an effort to save the marriage, [the husband] agreed to assist [the wife] with the purchase of a home in Wellesley in late August/early September, 2002."

[Note 20] The fact that the wife moved to Massachusetts, while the husband remained in Italy, does not, by itself, establish that the parties' marriage had already become irretrievably broken in Italy. Many married couples do not reside together, or temporarily occupy residences in separate locations, for employment or other reasons. It would defy common experience to conclude from this fact alone that their marriages must have broken down prior to the time they took up separate residences.

[Note 21] As we noted in Fiorentino v. Probate Court, 365 Mass. 13, 17 (1974), "State courts [constitutionally] may exercise divorce jurisdiction based solely" on the domicil of the plaintiff, even if the defendant "neither appears nor is personally served and even though the parties never resided as husband and wife in the forum State." See C.P. Kindregan, Jr. & M.L. Inker, Family Law and Practice § 8:4, at 297 (3d ed. 2002) ("Divorce subject matter jurisdiction in the United States is generally . . . based on the domicile of at least one of the parties . . .").

[Note 22] These "statutory restrictions on the divorce powers of Massachusetts courts were presumably intended to prevent the bringing of migratory causes of action in Massachusetts" and limit divorce proceedings to "situations where the Commonwealth has some substantial connection with the dispute being adjudicated." Fiorentino v. Probate Court, supra at 17. We conclude that the trial judge did not abuse his discretion in concluding that this case is neither a migratory cause of action nor a

situation where the Commonwealth does not have a substantial connection with the dispute.

# EDWIN R. SAGE COMPANY vs. JOAN L. FOLEY & another, trustees. [Note 1]

## 12 Mass. App. Ct. 20

March 16, 1981 - June 2, 1981

Suffolk County

Present: HALE, C.J., GREANEY, & KASS, JJ.

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On a petition brought under G. L. c. 231, Section 118, first par., for relief from a Superior Court order denying a preliminary injunction, a single justice of this court has the authority to modify the order to grant the requested injunction. [22-25]

In an action by the operator of a retail food store to enforce a provision in its lease which prohibited the lessor from renting any other space to a lessee whose principal business was selling retail food products unless the space was leased "for the operation of a single supermarket by a . . . company which operates ten (10) or more outlets," a single justice of this court, acting on a petition brought by the plaintiff under G. L. c. 231, Section 118, first par., for relief from a Superior Court order denying a preliminary injunction, properly enjoined the lessor from leasing space for a supermarket to a company which operated nine outlets and which planned to make the leased space its tenth store. [25-30]

CIVIL ACTION commenced in the Superior Court Department on September 5, 1980.

A petition filed in the Appeals Court on November 4, 1980, was heard by Perretta, J.

Robert M. Gault (Elizabeth B. Burnett with him) for the defendants.

Robert T. Harrington for the plaintiff.

**GREANEY, J.** Edwin R. Sage Company (Sage) operates a retail food store in Belmont in premises leased from the defendant trustees. Sage's lease contains a covenant which



prohibits the trustees, as long as the lease remains in effect, from renting or leasing any other space to another tenant or lessee whose principal business is

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selling retail food products unless the space is leased "for the operation of a single supermarket by a so-called `chain' supermarket company which operates ten (10) or more outlets . . . ." Other tenants or lessees are permitted, however, to sell food or food products for on-premises consumption or as an incidental part of their main business. Sage alleged in its amended complaint in the Superior Court, in applying for a preliminary injunction, that the trustees intended to commit a breach of the covenant by leasing certain premises (recently vacated by First National Stores) to a chain (Foodmaster Supermarkets, Inc.) which currently operates nine stores. The complaint also alleged that the trustees had executed or were about to execute, certain documents with Foodmaster in contemplation of a formal lease. The trustees argued in the Superior Court that the covenant's provisions allowed them to lease to a chain which plans to make Belmont its tenth store, while Sage claimed that the covenent requires a prospective lessee to have ten stores in operation before executing a lease for Belmont. A judge of that court denied Sage's application for a preliminary injunction which would have restrained the Foodmaster lease pending a trial on the merits. A single justice of this court, acting on Sage's petition under G. L. c. 231, Section 118, first par., modified the Superior Court's order to enjoin the trustees "from renting or leasing any of the premises . . . to Foodmaster Supermarkets, Inc., or any other person or entity who or which intends to use said premises for the principal business of selling at retail fish, meat, groceries, provisions or other related products, unless the prospective tenant is operating at least ten other supermarket outlets for the retail sale of such products, exclusive of an outlet at the premises . . . ." The single justice authorized the trustees to pursue an interlocutory appeal from her order. Corbett v. Kargman, 369 Mass. 971 (1976), and cases cited. There are two questions raised on this appeal: (1) whether a single justice of this court may, on a



petition brought under G. L. c. 231, Section 118, first par., for relief from a Superior Court order denying a preliminary injunction, modify the order to grant the requested injunction, and if so, (2) whether the single justice's order in this case was proper. We answer both questions in the affirmative. [Note 2]

1. The question of authority. On a petition filed pursuant to G. L. c. 231, Section 118, first par. (as appearing in St. 1977, c. 405, and as read in conjunction with G.

L. c. 231, Section 117, as appearing in St. 1973, c. 1114, Section 202), a single justice possesses "broad discretion" to modify, annul or suspend the execution of any interlocutory order entered in the Superior Court. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 614 (1980). See also Rollins Environmental Servs., Inc. v. Superior Court, 368 Mass. 174, 181 (1975). Section 117, which formulates the substantive basis for a single justice's authority under Section 118, first par., continued in force all the material aspects of the power which had been previously conferred upon a single justice under the provisions of G. L. c. 214, Section 22 (as amended by St. 1948, c. 309), read in conjunction with G. L. c. 214, Section 26 (as in effect prior to St. 1973, c. 1114). See Demoulas Super Mkts., Inc. v. Peter's Mkt. Basket, Inc., 5 Mass. App. Ct. 750, 752 n.3 (1977); Schlager v. Board of Appeal of Boston, 9 Mass. App. Ct. 72, 76 n.10 (1980). Under prior equity practice, Section 22 and the rules supplementary thereto were viewed as a source of authority for an order of the nature entered in this case. See Boston Edison Co. v. Sudbury, 356 Mass. 406, 409 (1969); Rule 2:01 of the Appeals Court,



1 Mass. App. Ct. 896 (1972), as in effect until July 1, 1974, although not formally amended until February 27, 1975, 3 Mass. App. Ct. 801 , 805. See also Lowell Bar Assn. v. Loeb, 315 Mass. 176, 189-190 (1943); Carlson v. Lawrence H. Oppenheim Co., 334 Mass. 462, 465 (1956); Stow v. Marinelli, 352 Mass. 738, 744 (1967); Brown v. Massachusetts Port Authy., 371 Mass. 395, 402 (1976); Reed, Equity Pleading and Practice Section 1077 (1952); Henn, Civil Interlocutory Appeals in the Massachusetts State Courts, 62 Mass. L. Q. 225, 227-228 (1977). Reported cases directly discussing the subject are, as would be expected, rare, undoubtedly because the single justices have exercised their discretion sparingly and only in situations where a petitioner has shown clear entitlement to relief. Nevertheless, an examination of pertinent dockets in this court reveals that our single justices have consistently and uniformly interpreted both Section 118, first par., and the predecessor statutes, together with any coordinating rules (see now Rule 2:01 of the Appeals Court, 3 Mass. App. Ct. 805 [1975]) as conferring the authority to modify lower court orders pertaining to preliminary injunctions in the same respect as was done here. We think it would be anomalous for an appellate court to have the power to suspend or annul an order granting injunctive relief, but not to have

the power to order it, when the underlying purpose and effect in either case is to avoid an irremediable change in the status quo pendente lite. Even apart from statute and rule, the power to make necessary changes in interlocutory lower court injunctive orders under a system of informal expedited review would appear to be an inherent power of an appellate court if it is to discharge its functions properly. Cf. Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464, 469 (1975).

Additional support for the existence of this power can be found in Mass.R.A.P. 6(a) and (b), as appearing in 378 Mass. 930 (1979), and in the Legislature's recent amendment of Section 118 (see St. 1981, c. 84, approved April 13, 1981), to make its provisions applicable to interlocutory orders, including



orders disposing of preliminary injunction applications, entered in a Probate Court. Rule 6(a) provides that a party who has claimed an appeal may apply to the appellate court or to a single justice thereof "for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal." 378 Mass. 930 (1979). Thus, a party who considers himself aggrieved by an order issuing or denying an injunction in the lower court can claim an appeal under the second paragraph of Section 118 and Mass.R.A.P. 3(a), as amended by 378 Mass. 927 (1979), and immediately move for relief from the order pending appeal before a single justice by bringing a motion under rule 6(a). Considering that orders granting or denying preliminary injunctions are often dispositive of a case, we do not think that the right to prompt review of those orders should turn on whether a piece of paper (i.e., notice of appeal) has been filed in the trial court. Moreover, the passage of St. 1981, c. 84, broadening the scope of Section 118, is indicative of a legislative view that the practical administration of justice requires an efficient informal remedy for the review of interlocutory orders disposing of injunction requests made in all of the departments of the Trial Court empowered to grant injunctions. See also St. 1980, c. 539, Section 11, amending G. L. c. 262, Section 4. The statutes and rules regulating appellate procedure and rights "should be read with the aim of finding consistency rather than conflict" in light of "the background of cooperation between the judiciary and the Legislature." Boston Seaman's Friend Soc., Inc. v. Attorney Gen., 379 Mass. 414, 416 (1980). We believe that the intended purpose of

the first paragraph of Section 118, to provide "expeditious relief when circumstances warrant" (Packaging Indus. Group, Inc. v. Cheney, 380 Mass. at 615), is best served by a construction which equips the single justice with the necessary tools to deal with a meritorious petition. [Note 3] As for the notion that the single

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justice sessions will be turned into morning after motion sessions, we need only repeat that the explicated power will be exercised in a stinting manner with suitable respect for the principle that the exercise of judicial discretion circumscribes the scope of available relief. [Note 4]

2. The merits. A trial court's decision to issue or deny a preliminary injunction requires "an evaluation in combination of the moving party's claim of injury and its chance of success on the merits. If there is a substantial risk of irreparable harm to the moving party, it must be balanced against any similar risk to the other party in the light of the chance of each party to succeed on the merits." Commonwealth v. County of Suffolk, 383 Mass. 286, 288 (1981), citing Packaging Indus. Group, Inc. v. Cheney, supra at 617. See Westinghouse Bdcst. Co. v. New England Patriots Football Club, Inc., 10 Mass. App. Ct. 70, 72 (1980). "Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." Packaging Indus. Group, Inc. v. Cheney, supra at 617.

Appellate review of a trial court order disposing of a preliminary injunction application, either by a panel of this court or by a single justice acting on a petition under the first paragraph of G. L. c. 231, Section 118, focuses on whether the trial court abused its discretion -- that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions. Id. at 615-616. This analysis calls for an examination of the same factors properly considered by the judge in

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the trial court in the first instance. His conclusions of law are subject to broad review and will be reversed if incorrect. While weight will be accorded to his exercise of discretion, an order predicated solely on documentary evidence permits

the appellate court to draw its own conclusions from the record. Id. at 616. As stated earlier, however, since our commissions do not authorize us to sit as trial judges, we must exercise special care not to substitute our judgment for that of the trial court where the records disclose reasoned support for its action. Nevertheless, the Packaging Indus. opinion makes clear that the appellate court's powers are not limited to "the rare cases when a [trial] judge has misunderstood the law or transcended the bounds of reason" (id. at 615, quoting from Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1197 [2d Cir. 1971]), that the appellate function calls for the exercise of independent judgment, and that relief should be granted if the aggrieved party is in justice entitled thereto.

Sage's application for a preliminary injunction was heard in the trial court on its amended complaint, which included a copy of the lease, an affidavit of one of the trustees, copies of correspondence between the parties, memoranda of law, and arguments and representations of counsel. These materials summarize the commercial setting for Sage's lease and the insertion of the restrictive covenant. They indicated that Sage has been a tenant in the premises for over forty years, that the restrictive covenant was first introduced in a 1966 lease, and that it was continued in subsequent leases to protect Sage from a prescribed level of competition which would be generated by the location of a food market nearby which is operated by a smaller chain. Since Sage had originally sought a covenant which would prohibit rental to any owner-operated supermarket, it can be inferred that the existing covenant was the result of negotiated compromise between the parties. The submissions before the Superior Court also described the hasty and unanticipated closing of all the First National outlets in Massachusetts, including the one in Belmont Center, the course of unsuccessful



efforts between Sage and the trust to conclude a lease for the vacant store, and the fruitful negotiations between the trust and Foodmaster. The affidavit of one of the trustees expressly represented that the vacant store would not "be opened by a tenant to the public as a food store until that tenant is operating that store as part of a chain of at least ten stores." It went on to state: "[A]ny lease into which [the trust] enters with a tenant will effectuate that policy and will preclude the tenant from operating the store in derogation of that intent. This procedure carries out the

full purpose and spirit of the restrictive covenant and affords Sage the protection it bargains for and seeks." The trial court issued a written order which expressly predicated its denial of a preliminary injunction on the foregoing statement from the trustees' affidavit.

Neither party appears to have argued below (nor does either claim here) that the covenant suffers from any ambiguity which would justify disregarding its integration clause to admit parol evidence of the circumstances in which the lease was negotiated (see Stoops v. Smith, 100 Mass. 63, 65-67 [1868]; National Paper & Cordage Co. v. Atlantic Carton Corp., 332 Mass. 651, 653-654 [1955]; Robert Indus., Inc. v. Spence, 362 Mass. 751, 753-754 [1973]) or of any special construction placed on it by the parties themselves (see Pittsfield & No. Adams R.R. v. Boston & Albany R.R., 260 Mass. 390, 397-398 [1927]; Cooley v. Bettigole, 1 Mass. App. Ct. 515, 520-521 [1973]). In these circumstances, we believe that the trial court's written order expressed preliminary rulings of law that the covenant was unambiguous and that the trustees' interpretation of it was the correct one. These rulings were subject to broad review by the single justice. Furthermore, since the matter was heard by her on essentially the same documentary record as was considered below, [Note 5] she was entitled to draw her



own conclusions. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. at 615. See Hiller v. Submarine Signal Co., 325 Mass. 546, 549, 551 (1950); Brophy v. School Comm. of Worcester, 6 Mass. App. Ct. 731, 733 (1978). Her determinations that the covenant appears at this stage to be unambiguous, that the materials submitted by the trustees offered no independent basis for its interpretation, and that the relevance of those materials was dependent on the adoption of the trustees' meaning of the covenant, were proper. It is settled that interpretation of unambiguous language in a written contract is a question of law for the court. See, e.g., Sparks v. Microwave Associates, Inc., 359 Mass. 597, 600 (1971), and if the words of a contract are plain and free from ambiguity, they must be construed in accordance with their ordinary and usual sense. Ober v. National Cas. Co., 318 Mass. 27, 30 (1945). Beal v. Stimpson Terminal Co., 1 Mass. App. Ct. 656, 659 (1974). The fact that the covenant's dispositive language ("which operates ten [10] or more outlets") is framed in the present and not the future tense supports Sage's

construction, and indicates probable error in the trial court's threshold ruling to the contrary. Compare Forte v. Caruso, 336 Mass. 476, 479-480 (1957); Freelander v. G. & K. Realty Corp., 357 Mass. 512, 515-516 (1970). We realize, of course, that this picture might change when the issues are studied in the context of a full trial and that the trustees might ultimately prevail on the equitable construction they presently urge. Our determination, like that of the single justice, is not to be taken as foreclosing further consideration of the case on the merits. Nevertheless, there is enough in the present record to establish that Sage's chances of success on the merits are good and to indicate a likelihood that Sage will obtain a permanent injunction which enforces the covenant according to its terms for the life of the lease. See R. M. Sedrose, Inc.



v. Mazmanian, 326 Mass. 578, 581 (1950); Schwartz, Lease Drafting in Massachusetts Section 4.3, at 95 n.3 (1961).

The question of hardship involved balancing competing hardships between the parties. It appears that the Superior Court judge did not reach this issue because of his construction of the covenant. The single justice might have remanded the matter to the judge below for his consideration of the question, but because the case was before her on documentary evidence and because Foodmaster's occupation of the store seemed imminent, she was not required to do so. We believe that the determination that the balance of hardships cut in Sage's favor is justified. The preservation of legitimate economic expectations pending the opportunity for trial is a basis for granting preliminary injunctive relief. See Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205-1206 (2d Cir. 1970). Sage bargained for competition from a large chain and not from a smaller enterprise which might have many product lines like its own, and the potential competitor's number of outlets in actual operation divided the permissible from the impermissible. A remedy which leaves Sage to remove an on-going business and to seek damages for diminished profits, if it is ultimately determined that the injunction was wrongfully withheld, is of dubious efficacy. Any harm that the trustees might incur is primarily of the sort that can be adequately redressed by an order under Mass.R.Civ.P. 65(c), 365 Mass. 833 (1974), requiring Sage to post security. [Note 6] In these circumstances, the preferred remedy is one which will

not require "costly changes in existing operations" of the parties (Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d at 1197) and which preserves in so far as possible the existing state of affairs pending a full trial. [Note 7] See Packaging Indus. Group,



Inc. v. Cheney, 380 Mass. at 616. We conclude that Sage was entitled to a preliminary injunction and that the single justice's action in modifying the trial court's order denying that injunction was proper.

Order affirmed.

FOOTNOTES

[Note 1] Richard G. Mintz. The defendants are the trustees of the Albert J. Locatelli Realty Trust.

[Note 2] We can eliminate at this point Sage's contention that the appeal should be dismissed because an order by a single justice passing on an interlocutory order of the lower court is not reviewable. The single justice's certification of an interlocutory appeal properly brings the enumerated questions before us. We also reject the trustees' argument that Sage's recourse to the single justice amounted to an appeal under the second paragraph of Section 118 which was not seasonable because it was not claimed within thirty days of the entry of the order of the Superior Court. The papers leave no doubt that Sage was proceeding at all pertinent times under the first paragraph of Section 118.

[Note 3] It is worth noting that the opportunity for review of injunctive orders in the single justice session under the first paragraph of Section 118 will make the most efficient use of the limited judicial resources available to the appellate courts by avoiding in many cases an unwarranted appeal to a panel under the second paragraph. Conservation of judicial resources is important in view of the continuing increase in the number of appeals entered in this court and the corresponding increase in the number of interlocutory appeals entered under the 1977 amendment of G. L. c. 231, Section 118, authorizing panel review of those orders. See Demoulas Super Mkts., Inc. v. Peter's Mkt. Basket, Inc., 5 Mass. App. Ct. at 753 n.5.

[Note 4] The single justice has ample power to impose sanctions on a party who presents a groundless or frivolous petition under the first paragraph. See G. L. c. 231, Section 6F, inserted by St. 1976, c. 233, Section 1; Compugraphic Corp. v. DiCenso, 11 Mass. App. Ct. 1020 (1981).

[Note 5] No testimony was taken in the trial court and the only added material before the single justice was excerpts from a deposition of a representative of Foodmaster which confirmed the undisputed facts that it intended to lease the store immediately, and that certain documents had been executed by the trustees and Foodmaster confirming a formal lease which were being held in escrow pending the disposition of the Section 118 petition.

[Note 6] It appears, as well, that First National remains liable to the trustees for payments under the existing lease.

[Note 7] The risk that a party will suffer irreparable harm between the preliminary injunction stage and entry of final judgment may be avoided by consolidating the trial on the merits with the preliminary hearing on the application for an injunction. See Mass.R.Civ.P. 65(b)(2), 365 Mass. 833 (1974). There was no request for consolidation made in this case. Furthermore, a claim of irreparable harm may be minimized if the merits of the case can be disposed of before any injury occurs. See generally 11 Wright & Miller, Federal Practice and Procedure Section 2948, at 431-441 (1973). The parties gave no indication here that the case could be resolved quickly, and, for all that appears in the record, the litigation will proceed along the usual track to a full trial on its merits. There was no basis, therefore, for concluding that an expedited disposition might occur, and even if there were such a basis it would not be sufficient in our opinion to justify altering the present status quo.

# HSBC BANK USA, NATIONAL ASSOCIATION [Note 1] v. STEPHEN GALEBACH and others [Note 2]

## 2012 Mass. App. Div. 155

January 17, 2012 - August 15, 2012

Appellate Division Northern District

Court Below: District Court, Somerville Division

Present: Greco, P.J., Coven & Swan, JJ.

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Serge Georges, Jr. for the plaintiff.

Stephen H. Galebach for the defendants.

**SWAN, J.** The plaintiff, HSBC Bank USA, National Association as Trustee for MANA 2007-F1 (HSBC), is the grantee of a mortgage foreclosure deed of real estate, located at 9-11 Touro Avenue, Medford (Premises), from Central Mortgage Company (Central Mortgage). HSBC commenced this summary process action against the mortgagors, Stephen Galebach and Diane Galebach [Note 3] (collectively,the Galebachs), and another, Diane Caress (Caress), who were still occupying the Premises after foreclosure. In their answer, the Galebachs claimed that HSBC did not have good title to the Premises because of defects in the foreclosure. After discovery was conducted, HSBC first obtained a pretrial order for use and occupancy payments, and then filed and prevailed on a motion for summary judgment for possession and damages for use and occupancy of the Premises. The Galebachs have appealed that judgment. While neither denying the default in mortgage payments nor challenging the propriety of the content or serving of the notice to quit, the Galebachs contend that genuine issues of fact exist as to the validity of HSBCs title, with respect both to the documents evidencing the

foreclosure sale and to the conduct of the sale itself, including the payment of consideration by the highest bidder and the decision of the foreclosing mortgagee not to postpone the auction due to inclement December weather and the paucity of bidders.

Challenging a plaintiffs entitlement to possession has long been considered a valid defense to a summary process action for eviction where the property was purchased at a foreclosure sale. See New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 195 (1906) (in summary process action by the purchaser at a mortgagees sale, the legal title may be put in issue,

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and it therefore became incumbent upon the plaintiff to establish its right of possession to the land demanded). See also Sheehan Constr. Co. v. Dudley, 299 Mass. 51, 53 (1937) (in summary process action available to purchaser at foreclosure sale it is incumbent upon such purchaser to establish his right of possession. The legal title in those circumstances plainly may be put in issue).

Bank of N.Y. v. Bailey, 460 Mass. 327, 333 (2011). While the Galebachs and Caress argue that the trial court declined to consider the issue of title, the fact is that HSBCs motion for summary judgment addressed that very issue. In ruling on the motion, the court did consider it. [Note 4]

To prevail on its motion for summary judgment, HSBC

had the burden of showing that there are no material facts in dispute regarding its legal title to the property. Metropolitan Credit Union v. Matthes, 46 Mass. App. Ct. 326, 330 (1999), citing Mass. R. Civ. P. 56(c), 365 Mass. 824 (1974), and Sheehan Constr. Co. v. Dudley, [ 299 Mass. 51, 53-54 (1937)]. . . . In a summary process action for possession after foreclosure by sale, the plaintiff is required to make a prima facie showing that it obtained a deed to the property at issue and that the deed and affidavit of sale, showing compliance with statutory foreclosure requirements, were recorded. See Lewis v. Jackson, 165 Mass. 481, 486-487 (1896); G.L. c. 244, § 15.

Bailey, supra at 334-335. [Note 5] In support of it Rule 56 motion, HSBC submitted the affidavit



of its attorney, Courtney C. Shea (Shea Affidavit), to which were attached copies of pleadings and recorded documents. [Note 6] The test for this motion, as with any motion for summary judgment, is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law, Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991), and we analyze the documents attached to the Shea affidavit in accordance with that principle.

On September 29, 2006, the Galebachs executed a promissory note to Quicken Loans, Inc. and, as security for the loan, a mortgage of the Premises to Mortgage Electronic Registration Systems, Inc. (MERS) [Note 7] as nominee for Quicken Loans, Inc. The mortgage was recorded at the Middlesex South District Registry of Deeds. In January, 2009, Central Mortgage informed the Galebachs in writing that they were in default in payments under the note and that they had a right to cure the default by payment of past due moneys owed to Central Mortgage on or before April 5. By a document dated August 12, 2010, and recorded August 27, MERS assigned the mortgage to Central Mortgage. [Note 8] On August 26, Central filed a complaint to foreclose the mortgage in the Land Court, which, on December 14, 2010, entered judgment in accordance with the Servicemembers Civil Relief Act authorizing entry and the exercise of the statutory power of sale. According to an affidavit of Janice Davis, Vice President of Central Mortgage (Davis affidavit), a notice of sale of the Premises was sent to the Galebachs and published; at the scheduled auction on December 21, 2010, Central Mortgage was the highest bidder for $450,000.00; and Central Mortgage assigned the bid to HSBC. The Land Court judgment, the foreclosure deed from Central Mortgage to HSBC, and the Davis affidavit were later recorded.

The operative title documents attached to the Shea affidavit are attested public records, in compliance with summary judgment requirements that [s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be

attached thereto or served therewith. Mass. R. Civ. P. 56(e). The substance of those

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attached documents must then be examined to determine whether there is no genuine issue as to any material fact, Mass. R. Civ. P. 56(c), as to the proper execution of the statutory power of sale in compliance with G.L. c. 244, § 14. The foreclosure deed itself appears without defect, as does the fact that the highest bidder assigned its position to HSBC. The actual doings of the mortgagee, here Central Mortgage, in exercising the power of sale must be reflected in an affidavit to be recorded with the foreclosure deed. The content of the affidavit is prescribed by statute, G.L. c. 244, § 15:

The person selling, or the attorney duly authorized by a writing or the legal guardian or conservator of such person, shall, after the sale, cause a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county or district where the land lies, with a note or reference thereto on the margin of the record of the mortgage deed, if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and of the statute have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

The Davis affidavit was proffered for that purpose and states:

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I, Janice Davis, Vice President (name and title) of Central Mortgage Company, based upon information contained in our books and records as they are kept in the ordinary course of business and certain information provided to us by our attorneys for this matter, make oath and state as follows:

1. The principal and interest obligation mentioned in the mortgage referred to in the attached Exhibit A were not paid or tendered or performed when due or prior to the sale.

2. Central Mortgage Company, by and through its attorneys, caused a notice, of which the following is a true copy, to be published on November 25, 2010, December 2, 2012 and December 9, 2010, in the Medford Transcript, a newspaper having a general circulation in Medford. (See attached Exhibit A)

3. Central Mortgage Company, by and through its attorneys, also complied with Chapter 244, Section 14 of the Massachusetts General Laws, as amended, by mailing the required notices certified mail, return receipt requested.

4. Pursuant to said notice at the time and place therein appointed Central Mortgage Company sold the mortgaged premises at public auction by W. Todd Finn, a duly licensed auctioneer, to Central Mortgage Company for FOUR HUNDRED FIFTY THOUSAND AND 00/100 ($450,000.00) DOLLARS bid by Central Mortgage Company, being the highest bid made therefor at said auction. Said bid was then assigned by Central Mortgage Company to HSBC Bank USA, National Association as Trustee for MANA 2007-F1, as evidenced by assignment of bid to be recorded herewith as Exhibit B.

Central Mortgage Company

By:/s/ Janice Davis

Janice Davis (name)

Vice President (title)

The signature is followed by an oath before a notary public. [Note 9] The acts recited in the Davis affidavit show strict compliance with the requirements of G.L. c. 244, § 14, including recitation of default in the payment of principal and interest; notice to the Galebachs by certified mail; [Note 10] the publication, accurately describing the Premises as set forth in the mortgage, for three successive weeks in a newspaper with general circulation in the town where the land lies, id.; and the conduct of the auction, sale to the highest bidder (Central Mortgage), and subsequent assignment of the bid to HSBC. Those acts, however, appear to have been done by someone other than Davis herself. Section 15 of G.L. c. 244 requires that the affidavit be executed by the person selling or that persons attorney stating *his acts*, or the acts of his principal or ward (emphasis added). The statutory model

form for a foreclosure affidavit set out as Form 12 of the Appendix to G.L. c. 183 [Note 11] reflects this requirement of an affiant describing his or her acts in the first person. The Davis affidavit describes not her own acts as Vice President of Central Mortgage, but recites what Central Mortgage or its attorneys did. Inasmuch as, [i]n construing statutes . . . [the terms] Person or whoever shall include corporations, societies, associations and partnerships, G.L. c. 4, § 7, Twenty-third, the acts of a corporation may well be narrated in the third person by one of its officers with knowledge of those actions. But the Davis affidavit does not indicate such personal knowledge.

The deficiencies in the Davis affidavit under G.L. c. 244, § 15 are compounded when viewed for its compliance with the summary judgment requirements of Mass. R. Civ. P. 56. A Rule 56 motions supporting affidavit must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Mass. R. Civ. P. 56(e).

A useful rough test for evaluating the evidentiary sufficiency of any affidavit is simple: If the affiant were in court, testifying word-for-word in accordance with the contents of the affidavit, would the judge sustain an objection on any ground whatsoever? If the answer is Yes or even Probably, the affidavit is at risk. J.W. Smith & H.B. Zobel, Rules Practice § 56.6, at 281 (2d ed. 2007). Another way to examine the admissibility of an affidavit is to ask whether the testimonial competency of the affiant is established through the circumstances. T & S Wholesale, Inc. v. Kavlakian, 1998 Mass. App. Div. 99, 100, citing Stanton Indus., Inc. v. Columbus Mills, Inc., 4 Mass. App. Ct. 793, 794 (1976).

Duffy v. Commerce Ins. Co., 2009 Mass. App. Div. 196, 198.



In this case, the Davis affidavit falls short. [Note 12] She relies upon information contained in [Central Mortgages] books and records as they are kept in the ordinary course of business. While the foundation for the admissibility of a business record does not need to be established through the testimony of the preparer or . . . the

transmitter of the record, McLaughlin v. CGU Ins. Co., 445 Mass. 815, 819 (2006), Davis fails to state that she is the keeper of those records or that she is familiar with them or that the records comply with G.L. c. 233, § 78. Pursuant to § 78, a document is admissible as a business record if the judge finds that it was (1) made in good faith; (2) made in the regular course of business; (3) made before the action began; and (4) the regular course of business to make the record at or about the time of the transaction or occurrences recorded. Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005). See Mass. G. Evid. § 803(6)(A), at 253 (2012); Citibank (South Dakota) N.A. v. Van Buskirk, 2010 Mass. App. Div. 198, 199 (though of questionable weight, affidavit found to support summary judgment where affiant stated that her affidavit was based on personal knowledge and review of business records maintained in the ordinary course of Citibanks business and that she was authorized to make this affidavit on behalf of Citibank and share[d] custodianship and [had] access to all of the documents in the possession of Citibank germane to this case  though of questionable weight, affidavit found to support summary judgment for liability). Even less so can Davis competently testify as to certain information provided to us by [Central Mortgages] attorneys, whatever such information may be. For that, only Central Mortgages attorneys can testify, either as to their own actions or matters set forth in their business records.

The inadequacy and resulting inadmissibility of the Davis affidavit under G.L. c. 244, § 15, however, does not void the sale to HSBC. While a § 15 affidavit is evidence that the power of sale was duly executed, id., the statute does not make it the exclusive form of such evidence. It is no objection to the validity of the sale that no affidavit of the sale was ever recorded. Learned v. Foster, 117 Mass. 365, 372 (1975). The provision is intended to secure the preservation of evidence that the conditions of the power of sale named in the deed have been complied with. It is for the protection of those claiming under the sale, and to prevent litigation. Field v. Gooding, 106 Mass. 310, 312 (1871). Simply stated, it is further litigation that HSBC has failed to prevent by summary judgment.

Accordingly, HSBC has not shown by competent evidence that it complied with the statutory power of sale, and the Rule 56 burden never shifted to the Galebachs and Caress to raise issues of fact, including whether a snow storm chilled the sale, to

defeat summary judgment. The matter must, therefore, be returned to the Somerville District Court for trial. The pretrial order for use and occupancy was



issued without statutory authority, [Note 13] and is accordingly vacated.

So ordered.

FOOTNOTES

[Note 1] As Trustee of MANA 2007-F1.

[Note 2] Diane Galebach and Diane Caress.

[Note 3] The Galebachs are referred to as Stephen H. Galebach and Diane W. Galebach in the mortgage and foreclosure documents.

[Note 4] With respect to the jurisdiction of the District Court to determine the validity of title arising from a foreclosure deed, we note that while Bank of N.Y. v. Bailey dealt specifically with the jurisdiction of the Housing Court, the main premise of that decision was that the plaintiffs title is always an issue in summary process, and that the Housing Courts jurisdiction in summary process is concurrent with both the Superior Court and the District Court. As we have in the past, see Bank of N.Y. v. Apollos, 2009 Mass. App. Div. 55, we thus view the District Court as having like jurisdiction over the issue of title. The pursuit of speedy and inexpensive summary process actions is compromised if the Housing Court [and the District Court by concurrent jurisdiction] must stay summary process proceedings while litigation on the validity of the foreclosure proceedings continues in another court. This creates precisely the type of unnecessary delay and inefficiency that the Legislature intended to eliminate when it reorganized the trial courts in the Commonwealth. Bailey, supra at 334.

[Note 5] The parties agree that no hearing on the motion for summary judgment was heard in the trial court. While the applicable rules of procedure do not expressly require a hearing on motions for summary judgment, repeated references to such a hearing would suggest at least a strong preference that one be held. Vaks v. Ryan, 2012 Mass. App. Div. 17, 19. The issues on the motion, however, were fully joined; the motion was decided with all issues before the court. Accordingly, we review that decision on the basis of the issues presented.

[Note 6] Copies of the recorded documents attached to the Shea affidavit were all attested or certified by the register of the Middlesex South District Registry of Deeds.

[Note 7] As stated by the Supreme Judicial Court, Mortgage Electronic Registration Systems acts as nominee and as mortgagee of record for its members and appoints itself nominee, as mortgagee, for its members successors and assigns. See Mortgage Elec. Registration Sys. v. Saunders, 2 A.3d 289, 294 (Me. 2010), quoting MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 100 (2006) (Kaye, C.J., dissenting in part). Bailey, supra at 328 n.3.

[Note 8] The record contains a loan modification agreement between the Galebachs and Central Mortgage as lender. The modification agreement is signed by the Galebachs and MERS as nominee for Central Mortgage. The date of the agreement is March 3, 2009, some seventeen months prior to the assignment of the mortgage from MERS to Central Mortgage. The modification agreement may be an indication that the mortgage note, or other evidence of debt (as opposed to the mortgage deed itself), was conveyed by Quicken Loans, Inc. to Central Mortgage, for which MERS remained as nominee. However, the assignment of mortgage, executed, as noted, seventeen months after the loan modification agreement, still lists the assigning mortgage holder as MERS as nominee for Quicken Loans, Inc. Whether during the interim Central Mortgage conveyed the mortgage note back to Quicken Loans, Inc. or whether a scriveners error occurred somewhere, cannot be determined. In any event, the discrepancy is immaterial for two reasons. First, there is no authority, and the Galebachs have cited none, that the identity, or change of identity, of the beneficiary (Quicken Loans, Inc. or Central Mortgage) of the lending nominee (MERS) at any given time be correctly stated on the record. Second, until the assignment of the mortgage, as opposed to the note, the mortgage holder of record continued to be MERS as nominee for Quicken Loans, Inc. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106, 114 (1889). United States Bank Natl Assn v. Ibanez, 458 Mass. 637, 652 (2011). Moreover, while the Supreme Judicial Court has recently concluded that a mortgagee exercising the statutory power of sale must be the person or entity then holding the mortgage and also either holding the mortgage note or acting on behalf of the note holder (emphasis added), Eaton v. Federal Natl Mtge. Assoc., 462 Mass. 569, 571 (2012), the record indicates -- and the Galebachs have not suggested otherwise -- that at the time of the foreclosure, the mortgagee was Central Mortgage and that either Central Mortgage itself was the note holder or was acting on behalf of Quicken Loans, Inc. Further, the holding in Eaton was pronounced as prospective to foreclosure sales conducted after June 22, 2012, and has no application to this case. Id. at 588-589.

[Note 9] Exhibit A is a copy of the published notice and exhibit B the assignment of bid.

[Note 10] While G.L. c. 244, § 14 calls for notice by registered mail, G.L. c. 4, § 7, Forty-fourth, allows for certified mail, stating: Registered mail when used with

reference to the sending of notice or of any article having no intrinsic value shall include certified mail.

[Note 11] (12) Affidavit of Sale under Power of Sale in Mortgage.

[To be filled in] named in the foregoing deed, make oath and say that the principal [to be filled in] interest [to be filled in] obligation [to be filled in] mentioned in the mortgage above referred to was not paid or tendered or performed when due or prior to the sale, and that I published on the [to be filled in] day of [to be filled in] in [to be filled in], in the [to be filled in], a newspaper published or by its title page purporting to be published in [to be filled in] aforesaid and having a circulation therein, a notice of which the following is a true copy:

(Insert advertisement.)

Pursuant to said notice at the time and place therein appointed, I sold the mortgaged premises at [to be filled in] public auction by [to be filled in] an auctioneer, to [to be filled in], above named, for [to be filled in] dollars, bid by him, being the highest bid made therefor at said auction.

Sworn to by the said [to be filled in] 19 [to be filled in], before me.

[Note 12] A motion to strike is the proper device for raising an insufficiency in an affidavit. Duffy, supra at 198. The Galebachs did not move to strike the affidavit, but, as indicated in note 5, supra, no hearing was conducted on the motion for summary judgment, thus precluding such an opportunity.

[Note 13] The Galebachs admitted to the trial court that they defaulted on their mortgage payments and that they now live at the Premises rent free. However, recovery for use and occupancy in a summary process action requires a judgment. G.L. c. 239, §§ 2, 3. See Lowell Hous. Auth. v. Save-Mor Furniture Stores, Inc., 346 Mass. 426 (1963). It may also be ordered as a condition of the appeal bond after judgment. G.L. c. 239, §§ 5, 6. Neither in its pretrial motion for use and occupancy, nor in its brief, has HSBC cited any statute that provides for a pretrial order for such relief pending the trial of a summary process action, presumably because none exists.

# WILLIAM VRANOS [Note 1] vs. FRANKLIN MEDICAL CENTER & others. [Note 2], [Note 3]

448 Mass. 425

December 6, 2006 - February 27, 2007

Franklin County

Present: MARSHALL, C.J., IRELAND, SPINA, COWIN, & CORDY, JJ.

Libel and Slander. Practice, Civil, Discovery. Privileged Communication. Doctor, Privileged communication. Evidence, Privileged record. Hospital, Peer review.

In a defamation action brought by a physician, the judge, in ordering the production of certain documents as a part of discovery, erred in designating credentialing communications between the defendants and third parties as outside the scope of the medical peer review privilege [435-436], and in concluding that other peer review documents fell within the narrow exception for peer review activities not undertaken in good faith, where the plaintiff's conclusory and unverified statements did not constitute evidence to support his discovery claims, and where the plaintiff failed to point to any evidence of misconduct within the peer review process [436-440].

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CIVIL ACTION commenced in the Superior Court Department on March 3, 2005.

A motion to compel discovery was heard by John A. Agostini, J., and a motion for reconsideration was heard by him.

Leave to prosecute an interlocutory appeal was allowed in the Appeals Court by Mark V. Green, J. The Supreme Judicial Court granted an application for direct appellate review.

Francis D. Dibble, Jr. (Gaston de los Reyes with him) for the defendants.

Thomas T. Merrigan (Paul W. Shaw with him) for the plaintiff.

The following submitted briefs for amici curiae:

Carl Valvo & John R. Hitt for Massachusetts Medical Society.

Colin J. Zick & Kalah E. Auchincloss for Massachusetts Hospital Association.

**MARSHALL, C.J.** In this defamation action brought by a physician, the defendant hospital and hospital administrators appeal from an interlocutory order of a

Superior Court judge ordering production of documents and responses to interrogatories the defendants claim are protected from discovery under the "medical peer review privilege." See G. L. c. 111, §§ 204 (a)-(b) and 205 (b). [Note 4] The information ordered to be produced included credentialing communications between the defendants and third parties and materials related to the physician's summary suspension from the hospital after an incident of alleged verbal and physical threatening behavior and the consequent activities of the hospital's medical peer review committee. [Note 5]

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In ordering discovery of the disputed documents, the judge concluded that the credentialing communications fell outside the ambit of privileged medical peer review materials, and that the other information requested, while within the privilege, must nevertheless be produced under the statutory exception for peer review activities not undertaken in good faith. See G. L. c. 111, §§ 204 (b), 205 (b); G. L. c. 231, § 85N. Thus, we are asked once again to examine the extent to which communications for the purpose of medical peer review may be kept confidential and for what purposes the privilege may be pierced. See Pardo v. General Hosp. Corp., 446 Mass. 1 (2006). For the reasons discussed below, we conclude that the order must be vacated and the case remanded for further proceedings consistent with our opinion.

1. Background. We summarize the relevant facts from the judge's memorandum of decision and from the record, reserving the recitation of other relevant facts for later discussion. The defendant Franklin Medical Center (FMC) is a licensed Massachusetts hospital. As such, it is required by stringent Federal and State laws and regulations to maintain quality assessment and risk management programs. Among these programs are policies and procedures to report and address behavior by hospital staff that might be inconsistent with or harmful to good patient care or safety. G. L. c. 111, § 203 (a)-(d). Accordingly, FMC established medical staff bylaws that provided, among other things, for the summary suspension of a physician's membership or clinical privileges when necessary to "reduce the substantial likelihood of injury or damage to the health or safety of any patient, employee, or other person at the Medical Center; or . . . [f]or the continued

effective operation of the Medical Center." [Note 6] FMC also established a separate policy on

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medical staff "disruptive behavior" that specifies the targeted behavior [Note 7] and set out detailed procedures for documentation, investigation, notice to the physician with the opportunity to respond, and "corrective" actions. [Note 8]

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The incident that precipitated this litigation occurred at approximately 7 A.M. on October 28, 2004, at a regularly scheduled meeting of FMC's surgical support services committee. In attendance was the plaintiff, William Vranos, an orthopedic surgeon who was a partner in Franklin Orthopedic Group in Greenfield, a member of the medical staff of FMC, and, since January, 2002, chief of FMC's department of surgery. Also attending were Henry K. Godek, FMC chief of anesthesia; the defendant Kenneth Gaspard, director of surgical and material services; and Kim Cotter, Gaspard's assistant.

During the meeting, Vranos and Gaspard exchanged heated words over a new policy that would restrict the availability of surgical services. The parties agree that the argument quickly escalated, although they offer differing accounts of who used inappropriate and threatening verbal and body language to whom. It is uncontested that approximately ten days before the meeting, forty-nine members of the department of surgery, including Vranos, signed a "memorandum of concern" (memorandum) expressing doubts about the judgment of Gaspard and Cotter in managing the surgical department.

Shortly after the meeting, Gaspard reported to the defendant Michael D. Skinner, FMC's president, that he had been physically threatened and verbally abused by Vranos at the meeting. Gaspard told Skinner that Vranos raised his voice repeatedly, slammed charts and documents down on the table, grabbed a chair and threw it aside, and angrily demanded that Gaspard remain in the meeting when Gaspard wanted to leave. Gaspard told Skinner that he was afraid during the incident that Vranos might hit him, and that he still felt unsafe.

Skinner and Vranos had had previous dealings concerning Vranos's relationship to FMC. Specifically, for nearly six months prior to October 28, 2004, Skinner attempted to recruit Vranos to leave the Franklin Orthopedic Group and establish a competing orthopedic practice at FMC. Vranos had declined Skinner's offer and instead, in September, 2004, accepted a position at Brattleboro Memorial Hospital in Vermont, less than twenty miles from FMC, effective January 1, 2005.



At approximately 8:30 A.M. on the day of the altercation, Skinner met with Cotter and John Brady, FMC's director of human resources. Cotter corroborated Gaspard's version of events, and said she had been frightened during the encounter between Vranos and Gaspard. At one point during her meeting with Skinner and Brady, Cotter began to tremble and cry. Subsequent to these meetings, Skinner arranged for the vice-president of hospital operations and the director of employee relations to interview Gaspard and Cotter to confirm their accounts.

On October 29, 2004, Skinner called Vranos to his office. During the meeting, Skinner handed Vranos a notice of a summary suspension, effective immediately. [Note 9] The notice stated in part that Vranos "used intimidating, abusive, and hostile language and exhibited threatening behavior, including picking up a stack of papers and slamming them down on the table, picking up a chair and slamming it down in the conference room, and placing [himself] physically close to one or more individuals while speaking in loud, angry, and confrontational manner [during the October 28 meeting]." The notice also stated that Vranos had "a history of disruptive behavior . . . [and] unprofessional conduct . . . at FMC," and that Vranos's behavior and conduct "has been perceived to be intimidating, abusive, hostile, and physically threatening." [Note 10]

The judge determined, for purposes of the discovery order, that, prior to issuing the notice to Vranos, Skinner did not give Vranos the opportunity to explain himself. Nor did Skinner contact Godek prior to issuing the summary suspension or consult with the patient care assessment coordinator as provided in FMC's policy addressing disruptive physician behavior. However, pursuant to its medical staff bylaws, within three business days of the suspension, on November 3, 2004, FMC convened a

medical staff summary suspension review committee (review committee) to consider the terms of Vranos's suspension and to advise FMC's



board of trustees whether to continue, modify, or terminate the suspension. The bylaws provided that the review committee be composed of various officers and staff, including the president or a designated representative. Skinner was a member of the review committee that considered Vranos's suspension on November 3.

After reviewing submissions by Vranos, Godek, Gaspard, Cotter, Skinner, and several other physicians, the committee recommended that Vranos's suspension be lifted provided that he (1) resign as chief of surgery; (2) apologize to Gaspard and Cotter; and (3) seek anger management counseling or its equivalent. The FMC board of trustees (trustees) accepted the recommendation on November 9. Vranos agreed to the terms, and the suspension was lifted that day. Vranos waived his right to a hearing to challenge his suspension and returned to work on November 10, with full medical staff membership and clinical privileges.

On March 3, 2005, Vranos filed his unverified complaint for defamation against FMC, Skinner, and Gaspard. [Note 11] The gravamen of Vranos's complaint is that, in the course of the summary suspension investigation and review, Skinner and Gaspard published untrue statements about Vranos's professional conduct that were motivated by their animus toward Vranos as a result of their prior interactions with him, as recounted above. [Note 12] In the course of discovery, Vranos requested production of two categories of information: (1) documents and responses to interrogatories



concerning credentialing communications between FMC and other hospitals, State regulators, and other credentialing organizations (credentialing materials) [Note 13]; and (2) material prepared for the summary suspension of Vranos in connection with the peer review committee, including incident reports, memoranda, narrative statements, committee minutes, and other documents submitted to the review committee and the board of trustees (disputed peer review documents). [Note 14]

The defendants objected to the majority of the requests on the basis of the medical peer review privilege, and Vranos subsequently moved to compel discovery, which the judge allowed in relevant part. [Note 15] Simultaneously, the hospital petitioned for reconsideration and



for interlocutory review by a single justice of the Appeals Court pursuant to G. L. c. 231, § 118. The motion for reconsideration was denied on April 24, 2006, and on May 11, 2006, the single justice granted FMC's petition. On July 19, 2006, we granted Vranos's application for direct appellate review.

2. Discussion. Because our opinion involves the complex regulatory scheme governing health care facility quality assessment and risk management, we begin with a brief summary of that scheme, which we have described at some length in prior cases. See, e.g., Carr v. Howard, 426 Mass. 514 , 517-526 (1998); Beth Israel Hosp. Ass'n v. Board of Registration in Med., 401 Mass. 172 , 177-182 (1987).

a. Medical peer review. Strong public policy mandates the highest quality of care in our health care facilities. That public policy finds voice in, among others, a strict regulatory scheme covering virtually all aspects of hospital operations. Integral to this regulatory scheme is an effective process for self-scrutiny, manifest most prominently in the medical peer review process. For more than twenty years, both Federal and State laws have required and regulated medical peer review committees in hospitals, and for that same length of time, laws have protected the confidentiality of medical peer review proceedings. See generally Carr v. Howard, supra at 517-518. The Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (2000), first enacted in 1986, codified Federal standards for medical peer review that provided limited immunity to committee members and made confidential documents submitted to a national physicians' data bank. See id. Following passage of the Health Care Quality Improvement Act, the Legislature enacted laws and the Board of Registration in Medicine (board) promulgated regulations that progressively offered increased immunity for medical peer review committee members and witnesses and privilege against subpoena, discovery, and the use in

evidence of documents related to medical peer review. See id. at 518- 519. We have recognized that the intent of these confidentiality provisions is "[t]o 'promote candor and confidentiality' in the peer review process . . . and to 'foster aggressive critiquing of medical care by the provider's peers.' " Pardo v. General Hosp. Corp., 446 Mass. 1 , 11 (2006), quoting Carr v. Howard, supra at 518, and Beth Israel Hosp. Ass'n v. Board of Registration in Med., supra at 182. To advance the Legislature's purpose, we have reviewed the statutory medical peer review privilege broadly. See, e.g., Beth Israel Hosp. Ass'n v. Board of Registration in Med., supra (G. L. c. 111, § 204 [a], establishes "a broad privilege").

Taken together, G. L. c. 111, §§ 204 (a) and 205 (b), provide weighty protection to a medical peer review committee's work product and materials. They express the Legislature's considered judgment that the quality of health care is best promoted by favoring candor in the medical peer review process. Necessarily, the interests of the general public in quality health care are elevated over the interest of individual health care professionals in unfettered access to information about peer review of their actions. See Carr v. Howard, supra at 532 ("the peer review privilege imposes some hardship on litigants seeking to discover information from hospital records, but the Legislature has clearly chosen to impose that burden on individual litigants in order to improve the medical peer review process generally").

Nevertheless, the staff member at the center of the medical peer review process is not without recourse to ensure fairness. Medical peer review committees are required by Federal and State laws and regulations to provide medical personnel with notice and an opportunity to be heard about decisions of a peer review committee affecting them. See G. L. c. 111, § 203 (b); 42 U.S.C. § 11112(a)(3). Testimony from members of, or witnesses before, a medical peer review committee may be obtained "as to matters known to such persons independent of the committee's proceedings." G. L. c. 111, § 204 (c). See 243 Code Mass. Regs. § 304(4) (1994). Information "otherwise available from original sources" may be discoverable even if presented to a peer review committee. G. L. c. 111, § 204 (b). See also G. L. c. 111, §§ 204 (a), 205 (b).

The Legislature has permitted the subject of a medical peer review to pierce the statutory privilege to establish a cause of action against the member of a peer review committee for the member's failure to act in good faith pursuant to G. L. c. 231, § 85N. We have recognized that the exception for failure to act in good faith must be construed narrowly to preserve the purposes of the peer review privilege to promote good health care. See Pardo v. General Hosp. Corp., supra at 10-11. Therefore, the exception operates to invade the peer review privilege only "on some threshold showing that a member of a medical peer review committee did not act in good faith in connection with his activities as a member of the committee, for example did not provide the medical peer review committee with a full and honest disclosure of all the relevant circumstances, but sought to mislead the committee in some manner." Id at 11-12.

We now consider whether the judge properly ordered production of the disputed communications.

b. Credentialing communications. The judge ruled that credentialing communications concerning Vranos between the defendants and the board, the Vermont Board of Medical Practice, Brattleboro Memorial Hospital, and other credentialing organizations were not covered by the medical peer review privilege and must be produced. This was error.

First, the defendants' communications to the board concerning Vranos's conduct, including peer review materials, were not voluntary but rather mandated as part of the hospital's obligation to participate in health care facility quality assessment and risk management programs. See, e.g., G. L. c. 111, § 53B; 243 Code Mass. Regs. § 2.07(17)(c) (1995) ("an essential element of a Patient Care Assessment Program pursuant to 243 [Code Mass. Regs. §§] 3.00, is that a reporting entity report any 'disciplinary action' to the Board relating to any employment practice, association for the purpose of providing patient care, or privileges"); G. L. c. 112, § 5F ("Any health care provider . . . shall report to the board any person who there is reasonable basis to believe is in violation of . . . any of the regulations of the board . . ."). These materials do not lose their character as "proceedings, reports and records" pursuant to

G. L. c. 111, § 204 (a), or information and work product "necessary" to meet the hospital's statutory risk management and quality assessment programs pursuant to G. L. c. 111, § 205 (b), merely because they are required to be furnished to the board. To hold otherwise would severely undermine the Legislature's carefully constructed scheme to promote systemwide good health care, for the statutory obligation to report incidents of unprofessional physician behavior would render meaningless the incentives confidentiality and privilege offer to peer review committee members and witnesses to proceed in all candor. A similar analysis pertains to the credentialing documents the hospital was required to send to Brattleboro Memorial Hospital in response to its credentialing inquiry. Carr v. Howard, supra at 524-525. See 243 Code Mass. Regs. §§ 3.05, 3.12(1)(d) (1994).

Finally, although Massachusetts laws and regulations do not expressly require a health care facility to provide credentialing information to another State's board of registration in medicine, we assume without deciding that applying the medical peer review privilege to such communications is also consistent with the Legislature's intent to provide broad protection for candid assessments of a physician's performance. See 243 Code Mass. Regs. § 3.01 (board regulations intended to promote "active self-scrutiny and reporting of adverse incidents in in-patient and out-patient settings to permit individual physicians, institutions and the Board to recognize patterns requiring corrective action"). See also Carr v. Howard, supra at 517-519; Beth Israel Hosp. Ass'n v. Board of Registration in Med., 401 Mass. 172 , 182 (1987).

In short, the judge erred in designating the credentialing communications outside the scope of the medical peer review privilege.

c. Peer review privilege. We next address the order to produce the disputed peer review documents. [Note 16] We consider only whether the judge erred in concluding that these documents



fell within the "single, narrow exception to the privilege 'to establish' that a member of a peer review committee did not act 'in good faith and in the reasonable belief that based on all of the facts the action or inaction on his part was warranted' during the peer review process." Pardo v. General Hosp. Corp., supra at 11, citing

G. L. c. 111, § 204 (b), and G. L. c. 231, § 85N. See id. at 12 n.24 (distinguishing claims for "bad faith" from claims for failure to act in "good faith"). [Note 17] The judge cited two pieces of "undisputed evidence" as "key" to his conclusion that the privilege should be abrogated. First, "there were circumstances attendant to the incident which *suggest* the *possibility* of ulterior motives on the part of Skinner" (emphases added), including the possibility of FMC losing revenue when Vranos switched hospitals, see note 12, supra, and Vranos's signature on the memorandum of concern. Second, "the nature and vigor" of Skinner's investigation of Vranos "*indicates* that Skinner *may* have used the peer-review process without the requisite good faith" (emphases added). These suspicions, as we shall explain, are insufficient to pierce the thick armor of the privilege.

As an initial matter, we note that Vranos did not in fact submit any evidence to support his discovery claims. His discovery argument rests on the claims that "[g]ood faith was missing because Skinner's animus was unrelated to [Vranos's] professional qualities, which caused Skinner to purposefully avoid exculpatory facts about the incident and to avoid investigating



the facts in a reasonable manner." However, Vranos's complaint was unverified, and unlike Skinner, he never submitted an affidavit to establish a factual foundation supporting his position. Thus, despite the judge's reference to "the collective weight of the evidence" in favor of Vranos, any evidence before the judge was submitted by and in support of the defendants; the only evidence on the record was the uncontested testimony proffered in Skinner's affidavit. In spite of this, the judge held in favor of the plaintiff's conclusory and unverified statements. This reliance alone would be a ground to vacate the order. [Note 18]

With specific reference to the medical peer review privilege, we have taken pains to emphasize that "mere inference" will not suffice to meet the movant's burden to pierce the medical peer review privilege. Pardo v. General Hosp. Corp., supra at 12; Carr v. Howard, supra at 531 (privilege may not be pierced where plaintiff has provided "no contradictory evidence" to show that documents at issue are not mandated by board regulations). We have stressed that, to break through the medical peer review process, the moving party must show that the medical review

process itself, and not the reasons for initiating it, was infected with lack of good faith. Pardo v. General Hosp. Corp., supra at 12 ("The focus must be on the committee member's actions within *the peer review committee process itself*, not on possible discriminatory reasons for initiating a review of the plaintiff's work" [emphasis added]). Thus, Vranos's theory that the desire for vengeance motivated Skinner's initiation of the investigation, which the judge accepted, is irrelevant. Vranos has failed to point to any evidence of misconduct within the peer review process (which, in fact, resulted in the lifting of Vranos's summary suspension). See Pardo v. General Hosp. Corp., supra at 12-13, quoting Doe v. St. Joseph's Hosp. of Fort Wayne, 42 Empl. Prac. Dec. (CCH) par. 36,973 (N.D. Ind. 1987) ("plaintiff must 'allege facts which create more than a mere inference that the actions of the peer



review committee were discriminatory, before the court will permit even an in camera inspection of the communications to, records of or determinations of the peer review committee' ").

Moreover, even if Vranos's speculations were sufficient to meet his burden, which they are not, the conclusions drawn by the judge are far from self-evident. The judge, for example, concluded that Skinner's initial investigation of the incident leading to Vranos's summary suspension was "inadequate and somewhat arbitrary" because, under FMC's bylaws, such a remedy (suspension) "seems to be intended" for "grave and immediate safety concerns." [Note 19] In fact, FMC's bylaws submitted to the judge as part of Skinner's affidavit provide that summary suspension is appropriate "[t]o reduce the substantial likelihood of injury or damage to the health or safety of any patient, employee, or other person at [FMC]" and "[f]or the continued effective operation of [FMC]." It is also evident that summary suspension proceedings are necessarily conducted quickly and without the time for a thorough review of all evidence. [Note 20] We do not consider indicative of lack of good faith that Skinner, as FMC's president, would act swiftly and decisively in response to a disruptive incident between two members of the FMC staff that had tremendous potential to disrupt the day-to-day operations of the entire institution. [Note 21] Finally, we note that Vranos

knowingly declined to exercise his right to contest his temporary suspension to the trustees and cannot now rely on speculation to obtain information that might otherwise have been available to him.

The exceptions to the privilege urged by Vranos would decimate the efficacy of confidentiality protections in G. L. c. 111, § 204 (a), any time a plaintiff asserts an allegation of bad faith, which undoubtedly more plaintiffs would do if we accepted Vranos's argument. "It does not seem reasonable that the Legislature would create a [peer review committee] privilege and through an exception undercut the confidentiality that that privilege allows." Beth Israel Hosp. Ass'n v. Board of Registration in Med., 401 Mass. 172 , 182 (1987).

3. Conclusion. For the foregoing reasons, the judge's order is vacated, and the case is remanded for further proceedings consistent with our opinion.

So ordered.

FOOTNOTES

[Note 1] The documents filed in this action were ordered temporarily impounded and unavailable for public inspection on March 8, 2005, as a result of a joint motion. On March 16, 2006, a Superior Court judge signed an impoundment order after hearing from both parties. Counsel agreed that impoundment was in the best interests of the parties and in the public interest to safeguard the confidentiality of statutorily protected peer review materials and documents. We conclude on inspection of the orders that the purpose of impoundment was to protect the confidentiality of documents, including the pleadings and the peer review materials at issue, excluding names of parties and facts of the case. Counsel for the plaintiff openly acknowledged at oral argument that "the purposes [for impoundment] have long since become superseded by the way in which this case has evolved in the court." The initial order was designed for very limited purposes to accommodate the needs of the parties at the time, and no real need for impoundment currently exists. In so holding, we reiterate our previous observation that "impoundment is always the exception to the rule, and the power to deny public access to judicial records is to be 'strictly construed in favor of the general principle of publicity.' " Republican Co. v. Appeals Court, 442 Mass. 218 , 223 (2004), quoting Commonwealth v. Blondin, 324 Mass. 564 , 571 (1949), cert. denied, 339 U.S. 984 (1950).

[Note 2] Michael D. Skinner and Kenneth Gaspard.

[Note 3] We acknowledge the briefs of amicus curiae filed on behalf of the Massachusetts Medical Society and the Massachusetts Hospital Association.

[Note 4] General Laws c. 111, § 204 (a), states in relevant part: "[T]he proceedings, reports and records of a medical peer review committee shall be confidential and . . . shall not be subject to subpoena or discovery, or introduced into evidence."

General Laws c. 111, § 205 (b), provides: "Information and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees, including incident reports required to be furnished to the board of registration in medicine . . . shall be deemed to be proceedings, reports or records of a medical peer review committee for purposes of [G. L. c. 111, § 204] . . . ."

[Note 5] "Medical peer review committee" is defined in G. L. c. 111, § 1, as "a committee of a state or local professional society of health care providers . . . or of a medical staff of a public hospital or licensed hospital . . . which committee has as its function the evaluation or improvement of the quality of health care rendered by providers of health care services, the determination whether health care services were performed in compliance with the applicable standards of care . . . [or] the determination of whether a health care provider's actions call into question such health care provider's fitness to provide health care services . . . ."

[Note 6] Section 2.1 of the FMC bylaws provides in full: "Summary suspension of a practitioner's Medical Staff membership or all or any portion of a practitioner's clinical privileges, or both, may be imposed whenever the failure to take such action may result in an imminent danger to the life, health, or safety of any individual or otherwise whenever a practitioner's acts or conduct require that immediate action be taken: (a) To protect the life of any patient; (b) To reduce the substantial likelihood of injury or damage to the health or safety of any patient, employee, or other person at the Medical Center; or (c) For the continued effective operation of the Medical Center."

[Note 7] "Disruptive behavior may include, but is not limited to, the following:

"Verbal (or physical) assaults that are personal, irrelevant, rude, insulting, or otherwise inappropriate or unprofessional.

"Inappropriate or unprofessional expressions of anger, destruction of property, or throwing items.

"Hostile, angry, abusive, aggressive, or confrontational voice or body language.

"Language or criticism directed to the recipient in such a way as to ridicule, intimidate, undermine confidence, or belittle.

"Derogatory, derisive, or otherwise inappropriate or unprofessional comments concerning other Members, FMC staff, health care providers, or caregivers made to patients, family members, or others.

"Malicious, arbitrary, or otherwise inappropriate or unprofessional comments made orally or noted in a medical record.

"Disregard for FMC or Medical Staff policies and procedures or the refusal to work cooperatively with others or to participate in committee or departmental affairs."

[Note 8] The American Medical Association (AMA) has published guidelines for treatment of and discipline for physicians with disruptive behavior. The AMA recommends that medical staff develop and adopt bylaw provisions or policies for intervening in situations where a physician's behavior is identified as disruptive. Suggestions for implementation of such policies include establishing a process to review or verify reports of disruptive physician behavior, establishing a process to notify a physician whose behavior is disruptive that a report has been made, providing the physician with an opportunity to respond to the report, monitoring improvement after intervention, providing for evaluative and corrective actions, and providing clear guidelines for the protection of confidentiality. See American Medical Association, Physicians and Disruptive Behavior (July 2004). See also 243 Code Mass. Regs. § 3.01 (1993): "[E]nhancement of patient care assessment will be accomplished through the strengthening and formalizing of programs of credentialing, quality assurance, utilization review, risk management and peer review in institutions and by assuring that these functions are thoroughly integrated and overseen by the institutions' corporation and physician leadership."

[Note 9] In his complaint, Vranos alleged that the notice was handed to him at the beginning of the meeting. Skinner averred in an affidavit that he handed the notice of summary suspension to Vranos only after hearing Vranos's versions of events and finding them not credible.

[Note 10] Skinner's affidavit states that, prior to summarily suspending Vranos, Skinner was aware of previous instances of disruptive behavior on Vranos's part, an allegation that Vranos in his unverified pleadings strenuously denies.

[Note 11] Vranos had filed an earlier action in the Superior Court that the defendants successfully removed to the United States District Court for the District of Massachusetts and that Vranos subsequently voluntarily withdrew.

Vranos's initial complaint in this action consisted of six counts, including defamation against Gaspard, Skinner, and FMC; breach of contract by FMC; violation of the duty of good faith and fair dealing by FMC; violation of the Massachusetts Civil Rights Act against Skinner and FMC; and interference with contractual and advantageous relations by Skinner. The defendants moved to dismiss all counts under Mass. R. Civ. P. 12 (b) (6), 364 Mass. 754 (1974), for failure to state a claim. A Superior Court

judge dismissed four of the six counts, and denied the motion to dismiss on the defamation counts.

[Note 12] Specifically, Vranos's complaint and subsequent pleadings allege that Gaspard and Cotter were seeking revenge for Vranos's signing the memorandum of concern about their leadership, and that Skinner was worried that, in light of Vranos's reputation in the community and the proximity of his new hospital to FMC, FMC would lose revenue as a result of Vranos's departure.

[Note 13] Request no. 14 of Vranos's first request for production of documents included: "All documents submitted to the Massachusetts Board of Registration in Medicine, the Vermont Board of Medical Practice, Brattleboro Memorial Hospital, and any other entity concerning plaintiff's summary suspension, including copies of reference letters sent by Drs. Blomstedt and Blacksin to Brattleboro Memorial Hospital." The judge ordered that this request be answered. The judge also ordered responses to related interrogatories, including, for example, no. 1: "In the ten years prior to October 29, 2004, how many summary suspensions were imposed on members of the FMC medical staff?"; no. 3: "In the two years prior to October 29, 2004, how many corrective actions were initiated against members of the FMC medical staff?" The judge grouped such material under the caption "Non-Peer Review Discovery," without further elaboration.

[Note 14] The judge found that Skinner's affidavit describes six categories of documents withheld on the ground of privilege: "(1) Physician incident reports prepared by Gaspard and Cotter; (2) a narrative statement describing the incident prepared by Godek; (3) memoranda to the file following the incident by Skinner 'or by others' and submitted to Skinner, concerning conversations with Gaspard, Cotter, and Vranos; (4) documents submitted to the committee convened pursuant to the bylaws to review the summary suspension and the minutes of a meeting of the summary suspension review committee; (5) documents submitted to the [trustees] concerning the [trustees'] review of summary suspension; and (6) correspondence to the plaintiff concerning the summary suspension, including 'special notice of summary suspension' and a 'notice of final action.' " FMC also produced a privilege log describing sixty-eight documents withheld from production and the privileges cited for each.

[Note 15] The judge first ordered production of various documents and interrogatories designated by the judge to be "Non-Peer Review Discovery," including those documents relating to credentialing communications. In this category, the judge also ordered FMC to produce Vranos's medical staff file, stating that if FMC contended that the documents in the staff file are protected by peer review, such documents shall be provided to the court for an in camera inspection. Second, the judge ordered production of a subset of documents requested by Vranos relating to the peer review process, but subject to the "single, narrow exception" to the prohibition against discovery. FMC subsequently filed a request for in camera inspection of itemized documents from Vranos's medical staff file. In his order on four posttrial motions, the

judge withheld a decision on the issue of in camera inspection pending any order of the Appeals Court. The judge denied FMC's motion for reconsideration, and allowed motions for protective orders for the credentialing documents and business documents.

[Note 16] There is no dispute that the documents falling in this category (e.g., proceedings, reports, and records) are peer review materials. Miller v. Milton Hosp. & Med. Ctr., Inc., 54 Mass. App. Ct. 495 , 499 (2002), instructs that a reviewing court first determine whether the records for which the privilege is claimed clearly fall within the privilege on their face. If the records are not facially privileged, the court should consider evidence proffered by the party asserting the privilege. The aim of the inquiry is to determine whether the document was created by, or otherwise as a result of a "medical peer review committee." See Carr v. Howard, 426 Mass. 514 , 531 (1998). For purposes of the present action, we will assume, without further inquiry, and in accordance with the judge's conclusion, that the records considered by the reviewing committee fall within the privilege. These include: memoranda following the incident by Skinner or others, documents submitted to the committee and the minutes of the suspension review committee, documents submitted to the trustees, and correspondence to the plaintiff concerning the summary suspension.

[Note 17] Pardo v. General Hosp. Corp., 446 Mass. 1 (2006), was issued while the judge was considering the parties' respective discovery motions and was discussed in the judge's memorandum of decision in a section entitled "Bad Faith Exception to the Peer Review Privilege."

[Note 18] Vranos argues that any insufficiency in evidence was remedied by an affidavit he submitted in response to FMC's motion for reconsideration. The affidavit was not included in the record before us, and is not specifically discussed in the brief denial of the motion to reconsider. In any event, we reject the argument that Vranos's affidavit provides ex post facto support for the judge's discovery order.

[Note 19] The judge properly held, and Vranos does not dispute, that Skinner "had the authority to issue a summary suspension in this case," where Vranos's conduct required immediate action to reduce the substantial likelihood of injury to an employee of FMC, or for its continued effective operation.

[Note 20] Vranos argues, and the judge concluded, that FMC's policy on disruptive behavior states that a complaint about such behavior should first be brought to FMC's patient care coordinator for corrective action. However, its policy on medical staff disruptive behavior states: "Notwithstanding any provision of [the disruptive behavior] policy, one or more incidents of disruptive behavior by a Member may be grounds for corrective action or other disciplinary action under the procedures set forth in the FMC Medical Staff Bylaws. *Nothing in this policy is intended to preempt, interfere with, or otherwise affect the procedures for corrective action and other disciplinary action set forth in the FMC Medical Staff Bylaws*" (emphasis added).

[Note 21] Skinner stated in his affidavit: "I did not make the decision to impose summary suspension against [Vranos] lightly. I understood that I had the option of imposing summary suspension or initiating a request for corrective action. After learning of the incident involving Vranos on the morning of October 28, I had to balance the competing needs of getting information and addressing the situation expeditiously. I discussed the situation generally with seasoned health care professionals who deal regularly with medical staff issues. . . .

"I made a final decision that summary suspension was not only warranted, but necessary because [Vranos] accepted no responsibility whatsoever for his role in a troubling incident and because at least some cooling off period was required before I could comfortably allow him to work again in our Surgery Department . . . ."

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# PACKAGING INDUSTRIES GROUP, INC. & another [Note 1] vs. PAUL E. CHENEY.

## 380 Mass. 609

January 10, 1980 - May 9, 1980

Barnstable County

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, & ABRAMS, JJ.

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Discussion of the availability of appellate review of interlocutory orders under G. L. c. 231, Section 118. [610-615]

Standard of review applicable to an appeal from the granting or denial of a preliminary injunction under G. L. c. 231, Section 118. [615-616]

Discussion of the factors to be considered with respect to a request for a preliminary injunction. [616-618]

A judge did not err in denying a request for a preliminary injunction nationwide in scope, barring the defendant from competing with the plaintiffs, or engaging in any way in the business of designing, engineering, manufacturing or selling packaging machinery where the evidence, when considered in light of the plaintiffs' chance of success on the merits, was insufficient to demonstrate that denial of the injunction would create any substantial risk of irreparable harm to the plaintiffs and where the risk of harm to the defendant far outweighed any risk of harm to the plaintiffs. [618-622]

CIVIL ACTION commenced in the Superior Court Department on January 5, 1979.

A motion for a preliminary injunction was heard by Keating, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

William J. Cheeseman for the plaintiffs.

Philip L. Berkeley for the defendant.

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**ABRAMS, J.** Packaging Industries Group, Inc. (P.I.Group), and its subsidiary, Packaging Industries Engineering, Inc. (P.I. Engineering), commenced this action

against P.I. Group's former vice president for engineering, Paul E. Cheney, [Note 2] seeking preliminary and permanent injunctive relief, as well as damages. The plaintiffs claim (1) that Cheney has established a competing business in derogation of the goodwill of a former business allegedly sold by Cheney to P.I. Group, (2) that Cheney has appropriated to his own use the plaintiffs' trade secrets, and (3) that Cheney has violated his fiduciary duties as a former officer of P.I. Group and director of P.I. Engineering by usurping the plaintiffs' corporate opportunities. [Note 3]

The Superior Court judge, after a hearing, denied the plaintiffs' request for a preliminary injunction, nationwide in scope, barring Cheney from competing with the plaintiffs, or engaging in any way in the business of designing, engineering, manufacturing or selling packaging machinery. Pursuant to G. L. c. 231, Section 118, second par., the plaintiffs appeal from this interlocutory order, arguing that the judge abused his discretion (1) in denying their request for a preliminary injunction, and (2) in refusing to hear certain additional testimony offered at the hearing. The case is before this court on our own motion. We affirm.

Availability of Appellate Review. Prior to the enactment of G. L. c. 231, Section 118, second par., as appearing in St. 1977, c. 405, [Note 4] parties were not entitled to interlocutory appeals as



of right from orders granting or denying preliminary injunctions. In Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464 , 468 (1975), we held that adoption of Mass. R. Civ. P. 65, 365 Mass. 832 -834 (1974), did not incorporate the "wholly statutory" Federal practice, see 28 U.S.C. Section 1292(a)(1), permitting interlocutory appeals as of right from orders granting or denying injunctive relief.

In enacting G. L. c. 231, Section 118, second par., after our decision in Foreign Auto, the Legislature employed language which closely tracks that of 28 U.S.C. Section 1292(a)(1) (1976). [Note 5] Where the Legislature in enacting a statute follows a Federal statute, we follow the adjudged construction of the Federal statute by the Federal courts. Poirier v. Superior Court, 337 Mass. 522 , 527 (1958). See Rollins Environmental Servs., Inc. v. Superior Court, 368 Mass. 174 , 179 (1975). We look, therefore, to the interpretation of 28 U.S.C. Section 1292(a)(1) to resolve

questions regarding interlocutory appellate review under our statute. See Demoulas Super

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Mkts., Inc. v. Peter's Mkt. Basket, Inc., 5 Mass. App. Ct. 750 , 752 (1977). See generally 9 Moore's Federal Practice par. 110.20-110.21, 110.25 (2d ed. 1980); 16 C.A. Wright & A.R. Miller, Federal Practice and Procedure Sections 3920-3924 (1977); [Note 6] 11 C.A. Wright & A.R. Miller, Federal Practice and Procedure Section 2962 (1973).

The Federal statute, like our own, creates an exception to the normal rule that only final judgments may be subject to appeals. See Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 178 (1955); Pollack v. Kelly, 372 Mass. 469 , 470-472 (1977). "The exception is a narrow one and is keyed to the `need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence.'" Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978), quoting from Baltimore Contractors, Inc. v. Bodinger, supra at 181. The statute thus creates only a narrow exception to our more general policy that interlocutory rulings may not be presented piecemeal to the Appeals Court or to this court for appellate review. Pollack v. Kelly, supra. Giacobbe v. First Coolidge Corp., 367 Mass. 309 , 312 (1975). "Ordinarily such appeal is possible only on the basis of a report by the judge who made the order. G. L. c. 231, Section 111." National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220 , 222 n.2 (1979). See G. L. c. 231, Section 112; Mass. R. Civ. P. 64, 365 Mass. 831 (1975). See also G. L. c. 211, Sections 3 & 4A. Therefore, G. L. c. 231, Section 118, second par., is limited to orders that "grant or protect at least part of the permanent

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relief sought as an ultimate result of the action." 16 C.A.Wright & A.R. Miller, Federal Practice and Procedure Section 3921, at 10 (1977).

Furthermore, failure to raise a given issue on an interlocutory appeal made available as of right by G. L. c. 231, Section 118, second par., in no way prejudices a party's ability to secure review of such an issue on appeal following final

judgment. Victor Talking Mach. Co. v. George, 105 F.2d 697 (3d Cir.), cert. denied, 308 U.S. 611 (1939). In this sense appeals pursuant to both our statute and the Federal statute, although available as of right, are not mandatory but permissive. Demoulas Super Mkts., Inc. v. Peter's Mkt. Basket, Inc., supra at 752-753. 16 C.A. Wright & A.R. Miller, supra Section 3921, at 11-13. Nor does the existence of an interlocutory appeal "divest the [trial court] of jurisdiction to proceed with the action on the merits." Demoulas Super Mkts., Inc. v. Peter's Mkt. Basket, Inc., supra at 753, and cases cited. [Note 7]

We also conclude, as a matter of Massachusetts practice, that appeals pursuant to G. L. c. 231, Section 118, second par., properly lie to the Appeals Court, or, in an appropriate case, to this court, rather than to a single justice of either court. Such a procedure gives full effect to the legislative judgment that orders regarding preliminary injunctions are so important as to justify a mandatory exception to the normal rule that only final judgments may be subject to appeals. [Note 8]

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While in the absence of exigent circumstances, appeals pursuant to G. L. c. 231, Section 118, second par., will not be heard on an expedited basis, see Demoulas Super Mkts., Inc. v. Peter's Mkt. Basket, supra, parties bringing such appeals may avail themselves of the procedures specified in Mass. R. A. P. 6(a), as amended, 378 Mass. 924 (1979), to request from the single justice in an appropriate case an order "suspending, modifying, restoring or granting an injunction" during the pendency of their appeal. See Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464 , 470 (1975). In the absence of a report by the single justice, any appeal from the decision reached by the single justice under Mass. R. A. P. 6 (a) must be consolidated with the appeal pending pursuant to G. L. c. 231, Section 118, second par. Finally, the fact that an appeal may be taken as of right pursuant to the second paragraph of G. L. c. 231, Section 118, does not prohibit a party from seeking discretionary relief from a single justice pursuant to G. L. c. 231, Section 118, first par. As Foreign Auto Import, Inc. v. Renault Northeast, Inc., supra, implied, and as our subsequent decisions in Rollins Environmental Servs., Inc. v. Superior Court, 368 Mass. 174 , 181 (1975), and Corbett v. Kargman, 369 Mass. 971 (1976), made clear, pursuant to G. L. c. 231, Section 118, first par., a party may petition a single justice for discretionary "relief" from any interlocutory order.

The single justice in such a situation enjoys broad discretion to deny the petition, or to "modify, annul or suspend the execution of the interlocutory order," Rollins, supra at 181, or, finally, to report the request for relief to the appropriate appellate court. See e.g., National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220 , 221-222 (1979). Absent such a report, the decision of the single justice cannot itself be appealed on an interlocutory basis. The existence of an alternative procedure under G. L. c. 231, Section 118, first par., available as to all interlocutory orders, may be particularly useful in those circumstances in which classification of the order at issue as a preliminary injunction is itself a matter of dispute. See 16 C.A. Wright & A.R. Miller, supra at

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Sections 3922-3924. In sum, the various avenues by which a party may challenge an interlocutory order granting or denying injunctive relief pursuant to G. L. c. 231, Section 118, should provide the flexibility necessary to assure full court review as of right, and expeditious relief when circumstances warrant.

Standard of Review. Federal appellate courts have consistently indicated that "[i]n reviewing the granting or denial of a preliminary injunction, the standard is whether the district court abused its discretion. An appellate court's role is to decide whether the [trial] court applied proper legal standards and whether there was reasonable support for its evaluation of factual questions." Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 229 (1st Cir. 1976). [Note 9] This approach corresponds to long-standing Massachusetts practice. Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464 , 473 (1975), and cases cited.

While our standard of review is thus framed in terms of abuse of discretion, the Legislature would not have exempted orders granting or denying preliminary injunctions from the final judgment rule "if it intended appellate courts to be mere rubber-stamps save for the rare cases when a [trial] judge has misunderstood the law or transcended the bounds of reason." Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1197 (2d Cir. 1971). Therefore, in assessing whether a judge erred in granting or denying a request for preliminary injunctive relief, we must look to the

same factors properly considered by the judge in the first instance. Evaluation of these factors turns on "mixed questions of fact and law. On review the [trial] court's . . . conclusions of law are subject to broad review and will be reversed if incorrect." Buchanan v. United States Postal Serv., 508 F.2d 259, 267 n.24 (5th Cir. 1975). Furthermore, while weight will be accorded to the exercise of discretion by the judge below, if the order was predicated solely on documentary evidence we may draw our own conclusions from the record. If, as is true in the instant case, testimony was heard, we follow the judge's resolution of issues of credibility, and consider the correctness of the order in light of the judge's assessment of credibility.

Standard for preliminary injunctions. By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law. On the basis of this record, the moving party must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits. Should the injunction issue, however, the enjoined party may suffer precisely the same type of irreparable harm. Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 541 (1978). Since the judge's assessment of the parties' lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment, the judge should seek to minimize the "harm that final relief cannot redress," id., by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party. Note, Developments in the Law, Injunctions, 78 Harv. L. Rev. 994, 1056 (1965). [Note 10]



Therefore, when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, [Note 11] the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably

suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue. [Note 12] See generally Leubsdorf, supra at

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540-544; Note, Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction, 71 Colum. L. Rev. 165 (1971); 11 C.A. Wright & A.R. Miller, Federal Practice and Procedure, Section 2948, at 453-454 (1973).

The Merits. Applying these principles to the present case, we turn first to the plaintiffs' claims of harm, and conclude that the judge could well have found that, on the record before him, the plaintiffs failed to demonstrate sufficient risk of irreparable harm to warrant injunctive relief, regardless of the effect such relief might have had on the defendant. Furthermore, if the risk of harm to the defendant is considered, we conclude that the balance of equities here cuts decisively in favor of the judge's denial of injunctive relief.

1. Plaintiffs' claims. In their principal argument, the plaintiffs assert that certain facts, which are not in dispute, establish that they purchased the defendant's former business, Cheney Design Engineering Co., Inc. (Cheney Design), or at least substantial assets of the business, including good will. [Note 13] Therefore, it is said, the judge was required as matter of law to enjoin Cheney from competing with the plaintiffs in derogation of the value of that which he had sold to them. See, e.g., Tobin v. Cody, 343 Mass. 716 , 722 (1962). Moreover, it is claimed, since the "business sold to the plaintiffs by Cheney was nationwide by its very nature . . . to protect the value of the business which plaintiffs acquired, the injunction should be as broad as the business," i.e., nationwide. [Note 14]

The facts on which the plaintiffs rely are as follows. As a result of several meetings with John Bambara, president of

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P.I. Group, Cheney in April, 1976, joined the company as vice president in charge of engineering, for an annual salary of $50,000. P.I. Group performed certain work

in fulfilment of Cheney Design's outstanding contracts. Furniture, drafting equipment and a truck were transferred from Cheney Design to P.I. Group. Cheney Design was paid $20,000, [Note 15] and, in early 1977, Cheney Design was formally dissolved. Cheney left the plaintiff's employment in December, 1978, and formed Cheney Engineering Co., Inc.

While these facts are undisputed, at the hearing there was considerable conflicting evidence as to the intent of the parties at the time they negotiated their business relationship. Bambara maintained that after proposing an initial price of $50,000 to $60,000, Cheney agreed to accept $20,000 for substantially all the assets of his business, including customer accounts not already billed, and to dissolve Cheney Design.

On the other hand, Cheney testified that two quite different proposals were suggested: first, the sale of the entire business and its attendant good will for between $75,000 and $100,000, and second, the sale of only certain of the company's assets, such as the furniture and drafting equipment, for approximately $25,000. Cheney testified that Bambara chose the second proposed alternative after he (Bambara) pointed out that selling only certain assets was to Cheney's "advantage because if for any reason it [i.e., working for P.I. Group] didn't work out, I [Cheney] could always start up the engineering company again with my own customers and my own people." Significantly, although P.I. Group had a standard security and noncompetition agreement, Cheney did not sign any such agreement.

The judge specifically stated that he did not believe Bambara's testimony and indicated that, in his view, there had been no sale of anything other than furniture, drafting equipment and a truck. The record before us amply supports



the judge's conclusion that there was no sale of good will. [Note 16] In any event, we will not displace the judge's assessment of the credibility of witnesses.

The plaintiffs also contend that Cheney has appropriated their trade secrets. Regarding this claim, the judge properly could have concluded that there was insufficient evidence [Note 17] that Cheney actually appropriated or was likely to use or disclose any trade secrets. While there was testimony from Bambara

regarding a confidential "Thermoforming" process, there was no evidence that Cheney was using or disclosing this process in any way, or that he was likely to do so. As to the plaintiffs' claim that Cheney had confidential customer, vendor, or supplier lists, the evidence could be viewed as insufficient to establish that such lists were trade secrets. See USM Corp. v. Marson Fastener Corp., 379 Mass. 90 , 97-99 (1979). The plaintiffs made no attempt to demonstrate at the hearing that Cheney's contacts with three of their customers stemmed from his use of any confidential customer list, and two of these accounts had been customers of Cheney before he was employed by the plaintiffs. See Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835 , 839-843

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(1972). See generally J.T. Healy & Son v. James A. Murphy & Son, 357 Mass. 728 , 736 (1970), citing Restatement, Torts Section 757, Comment b (1939).

The plaintiffs' final argument asserts that Cheney has usurped corporate opportunities belonging to them. See Barden Cream & Milk Co. v. Mooney, 305 Mass. 545 (1940). The plaintiffs allege that Cheney had done business, or is about to do business, with three accounts ("Tulox," "Swan Hose," and "Pharmasol") he developed while employed as their officer and director. However, two of these accounts, Tulox and Swan Hose, were former customers of Cheney Design. The judge could have concluded therefore that these accounts were subject to the express agreement testified to by Cheney under which he could reinstate his former business and service his previous customers at any time.

Cheney had had no contact with Pharmasol prior to working for the plaintiffs. However, the record reveals no reason why money damages would not adequately redress any harm the plaintiffs might suffer prior to a final judgment should they prevail on the merits regarding their Pharmasol claim. Damages were the exclusive remedy afforded in Barden Cream & Milk Co. v. Mooney, supra, and in other cases relied on by the plaintiffs, such as Universal Elec. Corp. v. Golden Shield Corp., 316 F.2d 568 (1st Cir. 1963), injunctive relief was granted only after irreparable harm was specifically shown. The plaintiffs offered no evidence that Cheney would be unable to pay any damages which they might be awarded. Where the moving party has failed to demonstrate that denial of the injunction would create any substantial

risk that it would suffer irreparable harm, the injunction must be denied, no matter how likely it may be that the moving party will prevail on the merits. See Sampson v. Murray, 415 U.S. 61, 88 (1974).

2. Balancing the risks of harm. Even if the judge found that the plaintiffs had demonstrated some risk of irreparable harm, the judge could easily have concluded that this risk was offset by the risk Cheney would have faced had the plaintiffs been granted their requested relief. In assessing



the equities in favor of a party opposing an injunction, we once again look not to the degree of injury alone, but rather to the risk of harm in view of the party's chance of success on the merits. The judge found Cheney to be a more credible witness than Bambara, and, in view of the record before him, the judge could have assessed favorably Cheney's chance of success on the merits in regard to each of the plaintiffs' three claims. Furthermore, even if the judge concluded that regarding at least certain of their claims the plaintiffs were more likely to prevail then Cheney, this conclusion alone would not have required the judge to issue an injunction. It is the combination of likelihood of success and degree of irreparable injury that matters. The judge could well have concluded that "the granting of a preliminary injunction would most seriously disrupt and probably wipe out defendant['s] business, while plaintiff[s'] established structure should have been able to weather the feeble assault upon it pending the outcome of this litigation without serious damage." Eutectic Welding Alloys Corp. v. Zeisel, 11 F.R.D. 78, 80 (D.N.J. 1950). In sum, the risk of harm to Cheney far outweighed any risk of harm to the plaintiffs.

Conclusion. For the foregoing reasons, we conclude that the judge's denial of the plaintiffs' request for a preliminary injunction was based on the application of proper legal standards, and that the record amply supports the judge's resolution of the factual questions before him.

Order denying preliminary injunction affirmed.

FOOTNOTES

[Note 1] The additional plaintiff is Packaging Industries Engineering, Inc.

[Note 2] The plaintiffs also sought damages and injunctive relief against one Betsy Lynne David. David, who had been employed by the plaintiffs as Cheney's secretary, resigned to work with Cheney in a new business, in alleged violation of a security and noncompetition agreement. Subsequent to the hearing in this case, at which the plaintiffs refused the judge's suggestion that they dismiss David as a defendant, she has been rehired by the plaintiffs, and has therefore been dismissed as a defendant by stipulation.

[Note 3] Cheney denied these allegations, and counterclaimed for damages, arguing that the plaintiffs violated the terms of an oral employment contract.

[Note 4] Since the entire section is relevant to our decision, we set out G. L. c. 231, Section 118, in full:

"A party aggrieved by an interlocutory order of a justice of the superior court or the judge of the housing court of the city of Boston or the judge of the housing court of the county of Hampden, may file a petition in the appropriate appellate court seeking relief from such an order. The appellate court may, in its discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen.

"A party aggrieved by an interlocutory order of a justice of the superior court or the judge of the housing court in the city of Boston or the judge of the housing court of the county of Hampden granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction may appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven, to the supreme judicial court, which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate order as may be just under the circumstances. Pursuant to action taken by the appeals court the cause shall be remanded to the trial court for further proceedings.

"The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by the appellate court."

[Note 5] Under 28 U.S.C. Section 1292(a)(1) (1976), Federal courts of appeal have jurisdiction of appeals from "[i]nterlocutory orders of the district courts . . .or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

[Note 6] Our procedure does differ from that of the Federal courts in one respect. Federal judges "granting or refusing interlocutory injunctions" are specifically required by Fed. R. Civ. P. 52 (a) to "set forth findings of fact and conclusions of law which constitute the grounds of [their] action." Our analogous rule, Mass. R. Civ. P. 52 (a),

365 Mass. 816 (1974), omits any such requirement. In the absence of compelling evidence of the need for such a requirement, we decline to require findings. However, we do suggest that the Standing Advisory Committee on Civil Rules consider whether rule 52 (a) might be amended to require findings of fact where conflicting testimony is the basis for an order granting or denying a preliminary injunction.

[Note 7] We are therefore unable to understand why, in light of their claims of irreparable injury, plaintiffs have neither pressed for an expeditious trial on the merits, nor proceeded to complete discovery, but have instead allowed proceedings in the trial court to come to a virtual standstill.

[Note 8] This construction also creates a procedural difference between the first and second paragraphs of G. L. c. 231, Section 118, which gives effect to corresponding differences in statutory language. Challenges to interlocutory orders pursuant to the first paragraph consist of "petitions for relief," which must be brought to a single justice. Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464 , 470 (1975). In contrast, the second paragraph speaks of "appeals." Additionally, the relief available under the first paragraph is defined by a reference to G. L. c. 231, Section 117, and we have therefore said that the procedure pursuant to the first paragraph is "substantially the same" as that under Section 117, whereby relief must be sought from a single justice. Id. The second paragraph, again by way of contrast, omits any reference to G. L. c. 231, Section 117.

[Note 9] Consistent with this standard of review, the scope of Federal appellate review is also limited. "The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review." 16 C.A. Wright & A.R. Miller, supra at Section 3921, at 16. Therefore, while "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the [appellate court] without further trial court development," id. at 17, our role will normally be to "review only that part of the order which related to the injunctive relief afforded or denied and only those questions basic to and underlying the specific order which supports the appeal." 9 Moore's Federal Practice par. 110.25 [1] (2d ed. 1980).

[Note 10] The risk that a party will suffer irreparable harm during the time between the hearing on the preliminary injunction and final adjudication on the merits may be minimized by consolidating the trial on the merits with the preliminary hearing, as authorized by Mass. R. Civ. P. 65 (b) (2), 365 Mass. 833 (1965). Our rule derives from Fed. R. Civ. P. 65 (a) (2), added to the Federal rules to encourage consolidation. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 81 Harv. L. Rev. 591, 610 (1968). See generally 11 C.A. Wright & A.R. Miller, Federal Practice and Procedure Section 2950 (1973). The plaintiffs in the present case claim, without support in the record, to have requested a consolidated hearing. This request was apparently made at the time of the hearing on the request for injunctive relief. If the judge did deny consolidation, his decision was

correct. The plaintiffs' request was not timely made. While consolidation is generally desirable in an appropriate case, it is reversible error to order consolidation in such a manner as to deprive a party of "clear and unambiguous notice" and "a full opportunity" to present its case. Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1057 (7th Cir. 1972). Cf. Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974) (motion for summary judgment must be served ten days before hearing). However, had the plaintiffs made a proper motion in a timely manner, it would have been appropriate for the judge to have ordered consolidation.

[Note 11] In the context of a preliminary injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity. See Radio Hanover, Inc. v. United Utils., Inc., 273 F. Supp. 709, 713 (M.D. Pa. 1967) (preliminary injunction denied in light of equitable relief available after trial on the merits). Irreparable harm is absent if trial on the merits can be conducted before the injury occurs. See generally 11 C.A. Wright & A.R. Miller, supra Section 2948, at 431-441.

[Note 12] Since the goal is to minimize the risk of irreparable harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977), and cases cited.

[Note 13] Plaintiffs concede that they did not purchase all of the business' assets, and did not acquire the business' name.

[Note 14] Employing approximately eight persons, Cheney's former company designed, engineered, and sold special application or "custom-designed" packaging machinery and equipment. The company manufactured some, but not all, of the equipment it sold. P.I. Group is a major manufacturer of packaging equipment, with headquarters in Hyannis and other locations in Connecticut, Rhode Island and California. The company employs approximately 500 persons and markets its packaging machines throughout the United States and in foreign countries.

[Note 15] The record also refers to this payment as amounting to $25,000, but the parties generally refer to a $20,000 payment.

[Note 16] Bambara arranged the supposed purchase of Cheney's business without advice of counsel, and characterized his discussion with Cheney as "such a simple thing . . . I was hiring a man." Bambara, furthermore, evidenced little concern for the specific assets purchased, and the judge could well have viewed the $20,000 paid to Cheney Design as simply a means of inducing Cheney to join P.I. Group, regardless of the actual value of the transferred assets. For this reason, we also find without merit the plaintiffs' additional argument that the judge abused his discretion by refusing to allow further questioning of Cheney as to the value of the equipment and furniture

transferred to P.I. Group. Having found that there was no independent sale here at all, but rather only a package deal aimed at hiring a key executive, the judge could reasonably have decided that it was unnecessary to hear further testimony as to whether the value of the transferred assets did or did not equal the $20,000 paid to Cheney Design.

[Note 17] The plaintiffs' attempt to solicit further testimony from the defendant Cheney and possibly other witnesses, see note 16, supra, related only to the claim that P.I. Group had purchased the good will of Cheney Design. Therefore, regarding the trade secrets and corporate opportunity claims, we have before us the complete record on which the plaintiffs were content to rely below.

HOUSING COURT
WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2001-B, ASSET-BACKED CERTIFICATES SERIES 2001-B, Plaintiff, V. SHELDON McIVER, Defendant.

Western Division

*Docket #* **No. 11-SP-4597**

*Parties:* **WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2001-B, ASSET-BACKED CERTIFICATES SERIES 2001-B, Plaintiff, V. SHELDON McIVER, Defendant.**

*Judge:* **/s/ Robert Fields, Associate Justice**

*Date:* **March 12, 2012**

ORDER

This matter came before the court on January 26, 2012 on the plaintiff's motion for an order that the defendant make monthly escrow payments for use and occupancy pending final adjudication of this summary process matter. After hearing, at which both sides were represented by counsel, the following order shall enter:

1. Plaintiff s motion is predicated on its assertion that because it holds title to the property vis-a-vis purchase of the subject premises at a foreclosure action, the defendant is a tenant at sufferance in accordance with G.L. c. 186, s.3. A such, the defendant would be liable for use and occupancy.

2. The defendant's claims and defenses to this summary process action challenge the

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legality of the foreclosure proceedings and, therefore, whether the plaintiff is the rightful owner of the premises. As such, the defendant asserts that he is not a tenant at sufferance but that he is still the owner of the property.

3. Whether or not the defendant is a tenant at sufferance is at the heart of this litigation and is a factual and legal matter to be determined at trial.

4. Additionally, the appropriate legal standard through which the plaintiff's motion is to be analyzed is an injunctive one. See, Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617-18 (1980). In accordance with that standard, I find that the plaintiff failed to meet its burden on all four prongs; specifically, the plaintiff did not even make
any argument that it would suffer irreparable harm if the order was not entered.

5. Based on the foregoing, the plaintiff's motion for use and occupancy pending final adjudication of this summary process matter is DENIED without prejudice.

- Add p. 73 -

So entered this 12th day of March, 2012.



End Of Decision