No. 2022-P-0919

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

COLUMBIA PLAZA ASSOCIATES
Plaintiff-Appellant

vs.

NORTHEASTERN UNIVERSITY
Defendant -Appellee

On Appeal From A Judgment
Of The Superior Court For Suffolk County

* *

BRIEF of the PLAINTIFF - APPELLANT

* *

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III. STATEMENT OF ISSUES PRESENTED ON APPEAL

Plaintiff-Appellant Columbia Plaza Associates (hereinafter CPA) raises the following issues on this appeal:

1. Did the Superior commit error under Mass. R. Civ. P. 56 by denying CPA's motion for partial summary judgment on liability for breach of contract, breach of implied covenant of good faith, and violations of M.G.L. c.93A, and/or entering summary judgment of dismissal on those issues for Northeastern?

2. Did the Superior Court commit clear error under M.G.L. c.231, §59H, in granting Northeastern's special motion to dismiss part of CPA's claims under c.93A, and for common law fraud, and then awarding attorneys' fees and costs to Northeastern?

3. Did the Superior Court commit error under Mass. R. Civ. P. 12(b)(6) in dismissing CPA's common law claims for unjust enrichment, and interference with advantageous economic relations?

IV. STATEMENT OF THE CASE

This case involves repudiation and breach of contract by Defendant-Appellee Northeastern University and subsequent unfair and deceptive acts by Northeastern, in violation of M.G.L. c.93A, §11, including common law counts for fraud, interference with advantageous economic relations and unjust enrichment in furtherance of the statutory violations.

On 03/15/2021, CPA filed its by-right Amended Verified Complaint under Mass. R. Civ. P. 15, naming only Northeastern as a Defendant (*Dkt.#31. App-I, p. 15*),[1] upon filing a stipulation of dismissal, with prejudice, of all claims as initially pleaded against the City of Boston, Mayor Walsh, the BPDA and BPDA Chairman Golden. (*Dkt.#32. App-I, p. 11*),

On 06/02/2021, Northeastern filed a motion to dismiss the Amended Verified Complaint, pursuant to Superior Court Rule 9A, under Mass. R. Civ. P. Rule 12(b)(6), with a special motion invoking M.G.L. c.231, §59H, and supporting Memorandum of Law (*Dkt. #34 and #35, App-I, p. 33, 35*).

Northeastern's Rule 9A package included: CPA's Memorandum in Opposition to Northeastern's Motion to Dismiss (*Dkt. #36, App-I, p. 59*); Northeastern's Reply Memorandum to CPA's Opposition (*Dkt. #37, App-I, p. 80*); CPA's Cross Motion for Summary judgment under Rule 12(b)(6) and Rule 56 (*Dkt. #38, App-I, p. 86*); CPA's Memorandum in Support of Cross Motion for Summary Judgment (*Dkt. #39, App-I, p. 89*); CPA's Statement of Incontrovertible Material Facts in Support of Cross Motion for Summary Judgment (*Dkt. #40, App-I, p. 108*); and Northeastern's Opposition to CPA's Cross Motion for Summary Judgment (*Dkt. #41, App-I, p. 119*).

[1] Reference is to the Appendix, Volume I.

On 10/29/2021, the Superior Court, Connolly, J., heard argument on the pending cross-motions and took the matter under advisement, and on 03/28/2022, the Court issued its Memorandum and Order denying CPA's Cross motion for summary judgment, ordering summary judgment for Northeastern on CPA's contract and c.93A claims; and granting Northeastern's special motion to dismiss under c.231, §59H, in part, as to CPA's c.93A and common law fraud claims, granting attorneys' fees and costs, and dismissing under Rule 12(b)(6) the remainder of CPA's common law claims (*Dkt. #43, c.231, App-I, p. 140*);

On 04/22/2022, Northeastern, filed its Notice of Motion, and on 05/19/2022, pursuant to Superior Court Rule 9A, Northeastern filed its Petition for award of costs and attorney's fees under M.G.L. c.231, §59H, with supporting affidavits, with CPA's Opposition and Northeastern's Reply (*Dkt. #48, #49, #50, #51 and #52, App-I, p. 162-198*);

On 08/16/2022, the Superior Court, Cowin, J., endorsed Northeastern's Petition for costs and attorney's fees, and issued its Order awarding costs and attorneys' fees, directing that judgment should enter thereon. (*Dkt. #55, App-I, p. 199-200*);

On 08/16/2022, the Superior Court, entered Judgment, dismissing CPA's Amended Complaint in its entirety, and awarding costs and attorneys' fees to Northeastern (*Dkt. #56, App-I, p. 201*); and on 08/22/2022, CPA filed its Notice

of Appeal, with notice re. No Transcript Ordered (*Dkt. #57, App-I, p. 202, and Dkt. #58. App-I, p. 204*).

V. STATEMENT OF MATERIAL FACTS

The following facts are material to the issues on this appeal, and they are stated as put before the Superior Court as undisputed on Plaintiff-Appellant's motion for partial summary judgment.

1. In the 1980s, the City of Boston, acting through the BRA, adopted a parcel-to-parcel Linkage Program which linked the development of high-end real estate in the city's financial district, with minority participation, to the commercial development of less valuable real estate in the Roxbury area, Boston's Southwest Corridor, to be developed by minority investors. (*Amended Verified Complaint (hereinafter AVC), page 1, and ¶¶ 3-6, App-I, p. 18; and Findings of Fact, Rulings of Law & Order of Judgment, Sanders, J., Tab B, App-II, p. 26*)

2. The area in Roxbury to be developed by minority enterprise under the Linkage Program was designated as Planned Development Area (PDA) No. 34, and identified as Parcel 18. (*AVC, ¶¶ 8-9, App-I, pp. 19; Tab B, App-II. P. 26*

3. Parcel 18 consists of five sub-parcels identified as: 18-1A, 18-1B, 18-2, 18-3A and 18-3B, which are designated as "Acquired Parcels," and also as "phase parcels." (*AVC, ¶¶ 9, 11-14, App-I, pp. 19-20; and Second Amended and*

Restated Sale and Construction Agreement, Sect. 102(a) and (kk), Tab G, App-II, pp. 231 and 238).

4. Pursuant to the Linkage Program, CPA been designated as the minority developer on the phase parcels within PDA No. 34, and it had partnered with Metropolitan Structures to form the Ruggles Center Joint Venture (RCJV) for that purpose." (*AVC ¶¶ 1, 3-4 and 8-10, App-I, pp. 18-19*).

5. On May 31, 1991, RCJV and the BRA entered into a Sale and Construction Agreement, which identified RCJV or any affiliated entity, and its successors, as the "Developer" of Parcel 18. (*1991 Sale and Construction Agreement, p. xxx, §101(p), Tab D, App-II, p. 67*)

6. The 1991 Sale and Construction Agreement provided that any party acquiring the property in foreclosure could sell title to a purchaser who must assume "all covenants, agreements and of the Developer" (*AVC, ¶¶ 15-16, App-I, p. 20; Exhibit E, Quitclaim Deed, App-II, p. 200*).

7. In December 1996, 1135 Tremont Corp. acquired the property through fore-closure, after it had been condemned by the City (*AVC, ¶11, App-I, p. 19*).

8. Northeastern acquired phase parcels 18-1A, 18-1B, 18-3A and 18-3b, by Quitclaim Deed dated 11/13/1997. (*AVC, ¶¶ 15 -16, App-I, p. 20; and Exhibit E, Quitclaim Deed, App-II, p. 200*).

9. The Quitclaim Deed expressly states that the "Real Estate is further conveyed together with all the Grantor's rights arising under that certain Sale and Construction Agreement, dated May 31, between Boston Redevelopment Authority and Ruggles Center Joint Venture," and, by its execution of the deed as Grantee, Northeastern University "agrees to assume the obligations set forth in such Sale and Construction Agreement arising from and after the date thereof." (*Exhibit E, Quitclaim Deed, App-II, p. 200*).

10. In June 1999, Northeastern and CPA entered into a tri-partite contract with the BRA titled "Second Amended and Restated Sale and Construction Agreement" the "1999 Agreement." (*AVC, ¶ 18. App-I, p. 20; and Tab G, App-II, p. 224*).

11. As did the 1991 Sale and Construction Agreement, the 1999 Agreement recognizes RCJV as designated by the BRA for undertaking to develop "a parcel of land designated as Parcel 18 in Roxbury." (*AVC, ¶ 18, App-I, p. 20; and Tab G, page 1, App-II, p. 228*).

12. As did the 1991 Sale and Construction Agreement the 1999 Agreement states its purpose and intent to be developed as a "Planned Development Area. pursuant to Section 3-1A of the Boston Zoning Code. (*AVC, ¶ 18, App-I, p. 20; and Tab G, page 1, App-II, p. 228*).

13. By entering into the 1999 Agreement with the BRA, Northeastern and CPA intended specifically "to further amend and *restate* the Original Sale Agreement . . . *"* (*Tab G, page 3, emphasis added. AppI-I, p. 230*).

14. By reason of such amendment and restatement, the Original Sale Agreement was deemed to be null and void and of no further effect. (*Tab G, Sect. 101, page 4. App-II, p. 231*).

15. The 1999 Agreement controls the rights and obligations of *both* North-eastern and CPA for development of the "Acquired Parcels" within Parcel 18, specifically including "*Parcels18-1A*, 18-1B, 18-3A and 18-3B." (*AVC, ¶ 18, App-I, p. 22; and Tab G, Sect. 101, Definition (a), page 4, App-II, p. 231, emphasis added*).

16. Said "Acquired Parcels" are defined, for purposes of the 1999 Agreement *qua* contract, to be: "the Acquired Parcels collectively, and after the delivery of a Phase Parcel Designation Notice, any parcel of land, . . . designated in such Phase Parcel Designation Notice . . .*designated by the Developer, and approved by the Authority* . . . ." (*Tab G, Sect. 101, Definition (kk), page 11, emphasis added, App-II, p.238).*

17. For all purposes of the 1999 Agreement, *qua* contract, the "Developer," for "every phase . . . *shall be* Northeastern or an affiliated entity of Northeastern,

specifically including co-ventures with CPA, . . . " ." (*AVC, ¶ 20, . App-I, p. 21; and Tab G, Sect. 101, Definition (r), App-II, p. 236, emphases added*).

18. For all improvements on any of the phase parcels, the 1999 Agreement requires that they be "amended and revised *by the agreement of the parties* thereto, and to the terms and conditions of this Agreement." (AVC ¶*17, App-I, p. 21; and Tab G, Sect. 302(a), page 27, App-II, p. 254, emphasis added*

19. Pursuant to such contractual obligations and reciprocal rights as stated in the 1999 Agreement, Northeastern and CPA entered into June 30, 1999, non-binding agreement to form a partnership to develop an office building or hotel on Parcel 18-3A. (*AVC, ¶17, App-I, p.20*).

20. The Parties did not subsequently form a partnership for the commercial development of Parcel 18-3A as contemplated, but instead, on January 11, 2007, Northeastern submitted to the BRA an "Amended and Restated Development Plan" for PDA No. 34, purportedly by agreement with CPA as required by Sect. 302(a) of the 1999 Agreement. (*AVC, ¶¶ 23-24. App-I, p. 22; and Tab H, . App-II, p. 300*).

21. On that Amended and Restated Development Plan, Northeastern represented to the BRA that CPA had agreed to release Parcels 18-3A and 18-3B from the

Development Parcels, allowing those parcels to be developed by Northeastern for its own institutional use, i.e. a dormitory. (*AVC, ¶¶ 23, App-I, p.31; and Tab H, App-II, p. 300*).

22. Such agreement with CPA for changing the plan for developing Parcel 18-3A was contractually required by Sect. 302(a) of the 1999 Agreement, as North-eastern clearly recognized, because CPA owned valuable rights on that parcel thereunder, as the designated minority developer for PDA No. 34. (*AVC, ¶¶ 16-18, App-I, p. 20; and Tab G, §101, Definition (r) App-II, p. 236*).

23. On that Amended and Restated Development Plan, Northeastern represented to the BRA that CPA had agreed to taking Parcels 18-3A and 18-3B out of the Development Parcels in return for Northeastern's promise to build a commercial building on Parcel 18-1A instead, in partnership with CPA. *AVC, ¶¶ 24-23-24, . App-I, p. 21;, and Tab H, App-II, p. 301-302*).

24. That Amended and Restated Development Plan refers to CPA as the "Developer" on Parcel 18-1A for a commercial building , together with Northeastern, consistent with the 1999 Agreement. (*AVC, ¶ 23, App-I, p. 21; and Tab H,, page 2. App-II, p. 301-302*).

25. As found by Superior Court Judge Janet Sanders in a prior action involving a dispute over Parcel 18-3A, that Amended and Restated Development Plan: *made it*

clear that Northeastern would construct that a (sic) building on that parcel "in partnership" with CPA, expressly identified in that document as the "Developer" together with Northeastern. (*Findings of Fact, Rulings of Law and Order of Judgment, Sanders, J., at page 7, Tab B, App-II, p. 31*).

26. As found by Judge Sanders in that prior action:

> Northeastern stated that both CPA and Northeastern would be the "Developer" for any hotel located on Parcel 1-A.

(*Findings of Fact, Rulings of Law and Order of Judgment, at page 12, emphasis added. Tab B, App-II, p. 36*).

27. In that prior action, Judge Sanders found that CPA had forfeited its rights on Parcel 18-3A only, not on Parcel 18-1A or Parcel 18 generally. (*Findings of Fact, Rulings of Law and Order of Judgment, at pp. 11-12. App-II, pp. 35-36*)

28. In May 2017, CPA had petitioned the Boston Planning & Development Authority (BPDA), successor to the BRA, to compel Northeastern to submit join with CPA in developing Parcel 18-1A. At that time, Northeastern opposed CPA's petition, and CPA had no knowledge then that Northeastern planned to develop the parcel on its own. (*AVC, ¶¶ 25-26, App-I, p. 22).*

29. At that time, Northeastern wrote to the BPDA stating, falsely, that the Superior Court had voided CPA's development rights on Parcel 18-1A and

all of Parcel 18. (Letter, R. Martin II, to B. Golden, 05/25/2017, Tab L, *App-II, p. 335*).

30. On or about June 4, 2019, CPA approached Northeastern to proceed with partnership deal for a hotel on Parcel 18-1A, as Northeastern had agreed to in return for CPA's agreement to release Parcel 18-3A. (*AVC, ¶ 26, App-I, p. 22*).

31. At that time, Northeastern rebuffed CPA's request expressly repudiating CPA's rights under the Agreement, claiming falsely that Judge Sanders had voided CPA's rights on Parcel 18 entirely in the prior action. (*AVC, ¶ 26. App-I, p. 26; E-mail 06/19/2019, R. Martin II to H. Owens III, App-II, p. 331*).

32. On or about November 12, 2019, Northeastern filed a letter of intent with the Boston Planning & Development Authority (BPDA), as successor to the BRA, for a dormitory/student apartment project on Parcel 18-1A, in partnership with an entity known as American Campus Communities, for Northeastern's sole institutional use. (*AVC, ¶ 27, App-I, p. 22; and Tab I, App-II, p. 319*).

33. CPA filed this action on or about December 15, 2020, seeking damages, *inter alia,* for Northeastern's breach of contract, on both the 1999 Agreement and the 2007 Agreement for developing Parcel 18-1A, and for violation of M.G.L. c.93A, §11, for its repudiation of CPA's rights based on the false claim that those rights had been voided by Judge Sanders, and its subsequent

petition to the BPDA for a dormitory development on Parcel 18-1A. (*AVC, App-I, p. 15*).

VI. SUMMARY OF ARGUMENT

A. The Superior Court erred in denying CPA's motion for summary Judgment on Counts I, II, III, VII and VIII, for breach of contract, breach of implied covenant of good faith and violation of M.G.L. c.93A, and granting summary judgment to Northeastern thereon, where Northeastern was bound by two contracts, a 1999 Agreement for developing Parcel 18 generally, and a 2007 Agreement for developing Phase Parcel 18-1A, and repudiated CPA's contractual rights by claiming, falsely, that they had been voided by the Superior Court, which was *per se* a violation of c.93A, as held in *Anthony's Pier Four, Inc. v. HBC Assocs.,* 411 Mass. 451 (1991). . . . . pp. 19-36.

B. The Superior Court committed clear error in granting Northeastern's special motion to dismiss, in part, under M.G.L. c.231, §59H, based on CPA's pleading that Northeastern had committed fraud and violated c.93A by falsely claiming the Superior Court had voided CPA's development rights on Parcel 18; because making such a false claim to a regulatory agency is not "permitted" petitioning under the statute and is instead "sham" petitioning, *Duracraft Corp. v. Holmes Products Corp., et al*, 42 Mass. App. Ct. 572 (1997); because

Northeastern did not meet its threshold burden to establish that CPA's pleading is intended solely to "chill" its petitioning activity, where CPA's claims are more than "colorable," as based on contract documents put into evidence; because CPA's cause of action, as pleaded, is based on Northeastern's June 2019 repudiation of CPA's rights, which preceded its November 2019 letter of intent to the BPDA, and was itself a *per se* violation of c.93A irrespective of any later "petitioning" based on that repudiation; because CPA clearly seeks only performance by Northeastern as agreed, or money damages, with no "strategic" purpose to prevent Northeastern from developing its property; and because the Amended Verified Complaint does not even mention Northeastern's opposition to CPA's 2017 petitioning the BPDA. . . . . pp. 37-47.

It follow that the Court's award of attorneys' fees and costs to Northeastern under c.231, §59H was in error, where that award turns the salutary statutory purpose on its head, taking the sling and stone from David and giving it to Goliath . . . . . pp. 47-48.

C. The Superior Court erred in granting Northeastern's Rule 12(b)(6) motion to dismiss CPA's common law tort claims, where the complaint, as pleaded, sufficiently states claims on which the Court may grant relief to CPA. . . . . pp. 48-50.

VII. ARGUMENT

The Superior Court's dismissal of CPA's Amended Verified Complaint (AVF) was clearly in error and must be reversed, with an order of remand to the Superior Court, for the following reasons.

A. The Superior Court Erred In Denying CPA's Cross Motion For Partial Summary Judgment On Counts I, II, III, VII and VIII And Entering Summary Judgment For Northeastern On Those Counts.

By reason of the incontrovertible material facts, as filed with the Superior Court under Mass. R. Civ. P. 56 (***App. I, p. 109***), restated in the Statement of Material Facts (*SMF*) in Sect. V of this Brief, CPA was clearly entitled to summary judgment on its contract claims, Counts I and II, on Count III for breach of the implied covenant of good faith, and on Counts VII and VIII, for unfair and deceptive acts in violation of M.G.L. c.93A.

1. Standard Of Review On Denial Of Summary Judgment

The Court's review of the denial of a motion for summary judgment is *de novo*. *Miller v.Cotter*, 448 Mass. 671, 676 (2007). As held in *Fortenbacher v. Commonwealth*, 72 Mass. App. Ct. 82, 84 (2008), the Court reviews a denial of summary judgment to determine "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." *Id*., citing *Miller v. Mooney*, 431 Mass. 57, 60 (2000). A judge shall grant summary judgment "if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact [2] and that the moving party is entitled to a judgment as a matter of law." *Attorney General v. Bailey*, 386 Mass. 367, 370 (1982).

2. Northeastern Is Liable For Breach Of Contract On Counts I And II

Northeastern is clearly in breach of contract, under both the June 1999 Second Amended and Restated Sale and Construction Agreement (the 1999 Agreement) and the January 2007 Amended and Restated Development Plan (the 2007 Agreement), when it repudiated CPA's request to form a partnership for developing Parcel 18-1A in June 2019 (*Martin, R, E-mail, Tab K, App-II, p. 331*) and in November 2019 when it notified the Boston Planning & Development Authority (BPDA) of its intent to develop Parcel 18-1A for its sole institutional use (*Letter of Intent, Tab I, App-II, p. 319*).

(a) Northeastern's Breach Of The June 1999 Agreement, Count I

The June 1999 Second Amended and Restated Sale and Construction Agreement (the 1999 Agreement) is unquestionably a contract, binding on both

[2] In support of its cross-motion for summary judgment, CPA relies, *inter alia*, on portions of its Verified Amended Complaint. For purposes of summary judgment, a verified complaint must be "treated as an affidavit insofar as it contains specific facts that the signer knows to be true." *Enterprise Music and Games, Inc. v. McCarthy, e et al.*, 9 Mass. App. Ct. 906 (1980).

Northeastern and CPA, as well as the BPDA as successor to the BRA. It is titled as an "Agreement" for developing real estate in a designated area, and it is signed, under seal, by authorized representatives of both Northreastern and CPA, as well as the BRA. (*Tab G, pages 72- 73, App-II, pp. 295-297*).

(*i*) The Contract Language Specifically Establishes CPA's Right To Participate Any Development On Parcel 18 Unless Otherwise Agreed.

The 1999 Agreement specifies, in Article I, Sect. 102(r), that all development on that parcel, as well as any other "Phase" parcel in Parcel 18, "shall" be done by agreement between Northeastern and a co-venturer specifically including CPA, which then must be approved by the BRA. (*Tab G, App- II, p. 236*). Because the relevant language is specific, the Court must construe the 1999 Agreement in CPA's favor as a matter of law.[3] *Siebe, Inc. vs. Louis M. Gerson Co., Inc.*, 74 Mass. App. Ct. 544, 549-550 (2009). In making this determination, the document must be viewed in its entirety, giving the contract language be given plain, ordinary and usual meaning. *Id.*

The June 1999 Agreement specifies that CPA "shall" be included as the co-venturer for development of every "Phase Parcel" in Parcel 18. (*Tab G, App-II, pp. 236*). The Superior Court, limiting this language to a "Garage Parcel"

[3] There is no genuine dispute as to any of the underlying material facts as to Northeastern's actions which CPA claims is in breach of the June 1999 Agreement and the 2007 agreement to include CPA in developing Parcel 18-1A.

(*Memorandum & Order, ppl 14-15 Connolly, J., App-I, pp. 155-156*), is plainly in error, and would be even if the contract language were ambiguous.

The 1999 Agreement, at §102(r), refers to development of "every Phase," with CPA's participation in development of "all the Phase Parcels," in the plural. (*1999 Agreement, p.9, Tab G, App-II, p. 236*). The "Phase Parcels are defined at §102(kk) as the "Acquired Parcels collectively," to include the Garage Parcel only *after* its expected acquisition by Northeastern. (*Tab G, App-II, p. 238*). The term "Acquired Parcels" is defined in §102(a), specifically, to include Parcel 18-1A.

> a. "Acquired Parcels" *shall mean Phase Parcels 18-1A*, 18-1B, 18-3A and 18-3B, each of which was acquired by RCJV, or its affiliate, RCDP, under the Original Sale Agreement and each of which is currently owned by Northeastern.

(*Tab G, App-II, p.231, emphasis supplied).* Sect. 102(r) thus clearly applies to Parcel 18-1A, as already acquired by Northeastern.

Also, if Northeastern failed to acquire the Garage Parcel, then: "the Original Amended Sale Agreement shall be deemed revived and in full force and effect with respect to the Acquired Parcels,. . . ." (*Tab G, §101, App-II, p. 231*). That original1991 agreement was between the Boston Redevelopment Authority (BRA) and the Ruggles Center Joint Venture (RCJV) only, and "its successors and assigns." Under that original agreement, Sect.(p), p. 14, the "Developer" was specified as RCJV, a general partnership, specifically including Columbia Plaza

Associates." (*Tab D, §101(p), App-II, p. 67*). It is beyond dispute, that CPA is the sole successor to RCJV as designated minority developer on Parcel 18 generally, and Parcel 18-1A specifically. (*AVF, ¶¶ 7-10. App-I, p.19*).

It is also clear that Northeastern has no right to develop any of the Phase Parcels without petitioning the BPDA (formerly BRA), with a plan that either includes CPA as a co-venturer or CPA's agreement. When Northeastern took title to the Phase Parcels, it did so subject to CPA's exclusive development rights in PDA No. 34, as recorded with Suffolk Registry of Deeds (*Sale and Construction Agreement, Bk.17670-Pg.27, Tab D, App. II, p. 54*).

The Superior Court's finding that the 1999 Agreement is not a contract providing for CPA's right to participate in development of Parcel 18 is clearly in error, as it is contrary to the specific and terms of the contract. It would also be in error, even if the Agreement were ambiguous as to the respective rights of the Parties on Parcel 18, applying basic principles of contract law.

(*ii*) The Agreement Must Be Construed In A Manner Fully Consistent With Its Stated Purpose.

The object of the Court as to disputed terms is to "construe the contract as a whole, in a reasonable and practical way, consistent with its language, background and purpose." *USM Corp. v. Arthur D. Little Systems, Inc., et al.*, 28 Mass. App. Ct. 108,116 (1989), and cases cited.

The background, substance and purpose of the 1999 Agreement are, as stated therein:

> . . . Northeastern and CPA wish to further amend and restate the terms of the Original Sale Agreement and Original Amended Sale Agreement as set forth therein.

(*Tab G, p.3, App. II, pp. 230*). Those terms, as incorporated, specify that:

> "Developer" shall mean RCJV, a general partnership organized under the laws of the Commonwealth of Massachusetts whose partners are Metropolitan Structures ("Structures"), Columbia Plaza Associates ("Columbia"), . . .

(*Sale And Construction Agreement, Article I, Sect. 101(p*), Tab D, App. *II, p. 67).* That purpose was clearly to include CPA's rights as a developer on all Phase Parcels, because Northeastern's deed states it is subject to that prior agreement and, "[b]y its execution hereof, *Grantee agrees to assume the obligations set forth in such Sale and Construction Agreement* arising from and after the date hereof. (*Quitclaim Deed, Exhibit E, App. II, p.200, emphasis Supplied*).[4]

(*iii*) <u>Northeastern Must Be Bound To An Understanding Of The Agreement Consistent With Its Actual Performance In Compliance With Its Terms.</u>

When construing ambiguous contract provisions the Court looks at how the the parties have actually performed, as evidence of their understanding of their

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[4] The BRA's purpose for designating Columbia Plaza and the other members of RCJV as Developer of Parcel 18 was to implement the City's "Linkage" program for promoting minority enterprise in the development of Planned Development Area No. 34 (PDA No. 34), in Boston's Southwest Corridor. (*AVC, ¶¶ 3-10, App. I, pp. 18-19*).

contractual obligations, because "[t]here is no surer way to find out what parties meant when they entered into contract than to see what they have done." *Martino v. First Nat'l Bank of Boston*, 361 Mass. 325, 332 (1972), and cases cited.

That specific indicator, as to Northeastern's actual performance under the 1999 Agreement, negotiating the 1999 non-binding agreement on Parcel 18-3A, and then transferring CPA's rights on that parcel to a binding agreement on Parcel 18-1A, evidences Northeastern's correct understanding that it must include CPA, by agreement, for any development on Parcel 18.

(b) Northeastern's Breach of the 01/11/2007 Agreement, Count II

The January 11, 2007, Amended and Restated Development Plan, the 2007 Agreement, is not, like the 1999 Agreement, a contract document executed by the Parties. Still, it must be enforced against Northeastern as it complies with the Statute of Frauds, and Northeastern is bound by promissory estoppel from denying that there is a binding agreement with CPA on Parcel 18-1A. The Superior Court clearly erred in finding otherwise.

(*i*) Statute of Frauds

The 2007 Agreement is a written instrument embodying Northeastern's claim, as made to the BRA, that an agreement existed with CPA, allowing Northeastern to move Parcels 18-3A and 18-3B out of the development phase

parcels in return for Northeastern's commitment to develop a commercial building on Parcel 18-1A with CPA. (*Tab H App- II, p.300*). This satisfies the Statute of Frauds with "(1) terms sufficiently complete and definite, and (2) a present intent of the parties . . . to be bound by those terms." *Targus Group Intern., Inc. v. Sherman*, 76 Mass. App. Ct. 421, 428 (2010). M.G.L. c. 259, § 1, Fourth Par., provides that for a contract for conveying any lands or any interest therein, there need only be "some memorandum or note thereof, . . . in writing and signed by the party to be charged therewith. . . ."

The 2007 Agreement, drawn up by Northeastern, more than meets this requirement. The scope of the material terms need not be extensive, where the fact that further documents may be finalized "neither vitiates the completeness of an agreement, nor the parties' present intent to be bound." See *McCarthy v. Tobin*, 429 Mass. 84, 87 (1999).

The Superior Court erred in finding there was no consideration for the 2007 agreement on Parcel 18-1A. The consideration given by CPA for a hotel development on Parcel 18-1A, represented to the BRA by Northeastern, and to Judge Sanders, was a waiver of its development rights on two parcels, 18-3A and 18-3B, which had previously been specified for developing a hotel. It has long been established that "[a]ny act done by the promissee at the request of the promisor . . . is a sufficient consideraton for a promise. *Wit v. Commercial*

Hotel Co., 253 Mass. 564, 573 (1925). CPA's assent to releasing Parcel 18-1A was a thing of value to Northeastern, without which it could not build its new dormitory, and was therefore " sufficient consideration."[6] *Id.* There can be no doubt that the release of Parcels 18-3A and 18-3B was of *immense* value to Northeastern, while CPA had agreed to the transfer of its valuable rights from those parcels onto Parcel 18-1A, and has not received any benefit.

(*ii*) Equitable Estoppel

The 20007 Agreement must also be binding on Northeastern, based on its representations to the BRA, and to Judge Sanders, that a deal was made with CPA to develop Parcel 18-1A. As Judge Sanders found, Northeastern's January 11, 2007, Amended and Restated Development Plan, as approved by the BRA:

> *made it clear* that Northeastern would construct that a (sic) building on that parcel "in partnership" with CPA, expressly identified in that document as the "Developer" together with Northeastern.

(*AVC, ¶¶ 24, App-I, pp. 21, Tab B, page 5, App. II, pp. 31*).

Having thus represented to both the BRA and Judge Sanders that an agreement was made with CPA for a hotel development on Parcel 18-A, in return

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[6] The value of CPA's development rights is evidenced by the non-binding agreement on Parcel 18-3A, as contemplated by the Parties, was a portion of the fair rental value of Northeastern's institutional building. (*Findings of Fact, Rulings of Law and Order of Judgment, Sanders, J., p.5, Tab B, Appendix II, p. 29*).

for CPA waiving its rights on Parcel 18-3A, Northeastern cannot now come before this Court and claim otherwise, under the principle of judicial estoppel. *Otis v. Arbella Mut. Ins. Co., et al.*, 443 Mass. 634, 639-640 (2005). Northeastern must also be bound to CPA under the 2007 Agreement by promissory estoppel. *Barrie-Chivan, et al. v. Lepler*, 87 Mass. App. Ct. 683, 684-686 (2015).

(c) Judge Sanders Did Not Find That CPA Lost Its Rights On Parcel 18 Generally, Or On Parcel 18-1A Specifically, As Northeastern Claims.

Northeastern argues, dishonestly, that CPA has lost its development rights on Parcel 18 by Judge Sanders' findings in the prior action, thereby invoking the principle of *res judicata*. What Judge Sanders found, based on Northeastern's own representations, is that CPA in fact has retained its rights on Parcel 18, including Parcel 18-1A.

(*i*) Judge Sanders' Findings

What Judge Sanders found, based on Northeastern's own representations, is that CPA no longer had any rights as to Parcel 18-3A, which was the sole focus of CPA's complaint in the prior action. Judge Sanders found, expressly, that CPA has retained its rights on Parcel 18-1A, where:

> Northeastern stated that both CPA and Northeastern would be the "Developer" for any hotel located on Parcel 1-A. This was a true statement. *Northeastern agrees, even today, that CPA has certain rights in connection with development of that parcel and does not seek any order that would extinguish them.*

(*Tab B, p. 12, App. II, p. 36, emphasis added*). Northeastern thus falsely alleges that Judge Sanders found that CPA had waived its development rights on Parcel 18-1A because it had declined Northeastern's alleged proposal to develop a hotel on that parcel.[7]

What Judge Sanders actually held, as material to the case then before her, is that CPA had waived its rights on Parcel 18-3A, not Parcel 18-1A, finding no loss of rights on Parcel 18-1A as Northeastern told the BPDA, and the Superior Court below. What Judge Sanders found as to waiver is that:

> [o]ver the next six years, . . . Northeastern did explore the possibility of developing a hotel on *Parcel 18-3A*, even hiring an outside development firm, Newcastle, to look into its economic feasibility.

(*Tab B, page 6, App-II, p.30, emphasis supplied*). Judge Sanders thus held that CPA had lost its rights only as to "whatever rights they had" on Parcel 18-3A (*Id., pp. 11-12, App-II, p. 35-36*), and Parcel 18-3A only.

Judge Sanders made no finding as to what CPA's rights are under either agreement, because that was not essential to her ruling that it had waived its

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[7] The Judge noted in passing that a Northeastern administrator had written to a member of CPA "to discuss" a hotel project on Parcel 18-1A in 2007 – 2008, where the hotel project, at that time, had been moved to Parcel 18-1A. She made no findings of fact as to any proposed hotel development on Parcel 18-1A other than that correspondence. (*Tab B, page 11, App. II, p. 35*),

rights on Parcel 18-3A, and anything else she may have said or implied is therefore mere *dictum.* Northeastern claims that Judge Sanders found CPA's rights to be "limited," based on deposition testimony from its witness Paul McCann as follows.

> They (CPA) had at that point in time and they still have to this day a tentative designation on all the parcels in the parcel 18 as they had in the Ruggles project downtown. . . ; They I (sic) had a tentative designation by the authority, *which all projects proceed through a tentative designation to which it's better than a fishing license, but it is subject to proceeding with a project and getting that approved by the agency . . . .*

(Deposition *Excerpt pp. 5-40 -- 5-41, Tab N, App-II, pp. 347-348 emphasis added*)**.** That was fully consistent with the 1999 Agreement as equally binding on Northeastern, as owner of the fee, who holds only the same "fishing license."

What Attorney McCann omitted to say, and Northeastern and the Superior Court ignored, is that Northeastern's right to develop any phase parcel is equally "tentative" under the 1999 Agreement, [8] as it is also "subject to proceeding with a project and getting that approved by the agency," as required by

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[8] That agreement gave RCJV and CPA both ownership and the development rights on Parcel 18, while Northeastern did not and could not acquire clear title on any part of Parcel 18 because its title is subject to an encumbrance that includes CPA's right to participate in or agree to any development, as required for BRA approval of any development. The 1999 Agreement is an amendment and restatement of the encumbrances on Parcel 18, not a revocation of them. (*Tab G, App-II, p. 230*).

§302(a). (*Tab G, App-II, 254-255*). That follows, while CPA remains as the designated minority developer in PDA No. 34, retaining its rights as "developer" under the 1991 Agreement, as simply "restated" in the 1999 Agreement.

Northeastern can cite no language in Judge Sanders' findings to support its claim that CPA has lost all its rights on Parcel 18, or on Parcel 18-1A, for the simple reason that the Judge made no such finding. Therefore, by purporting to develop that parcel for its own institutional use in partnership with an entity other than CPA, and without CPA's agreement, Northeastern has repudiated the 2007 Agreement, saying it "will not" perform as agreed, which is a breach of contract, *Petrangelo v. Pollard, et al.,* 356 Mass. 696, 701-702 (1970), and it is actionable as such. *Anthony's Pier Four, Inc. v. HBC Assocs.,* 411 Mass. 451, (1991).

(*ii*) Northeastern Cannot Claim Res Judicata

A party asserting *res judicata* and/or issue preclusion on any matter has the burden to prove four specific elements: "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication *is identical* to the issue in the current adjudication; and (4) the issue decided in the prior adjudication *was essential* to the earlier judgment.

Green v. Town of Brookline, 53 Mass. App. Ct. 120, 123 (2001), citing *Martin v. Ring*, 401 Mass. 59 , 60-61 (1987), emphases added.

Under these criteria, Northeastern could not meet its burden to support a claim of issue preclusion as to CPA's development rights on Parcel 18 generally,[9] or Parcel 18-1A specifically, even if Judge Sanders' findings could somehow be read as voiding those rights, for two reasons.

First, the only issue actually adjudicated in the prior action was that CPA had lost its rights on Parcel 18-3A, which was the actual case in controversy, based on the Verified Complaint filed in that action. CPA's claims on Parcel 18-1A in the present case are based on a different agreement, a different parcel and different conduct by Northeastern, while neither party in the prior action claimed, or had to claim, that CPA had lost its rights on Parcel 18-1A, or Parcel 18 generally.

Second, any imaginable finding by Judge Sanders as to CPA's losing rights on Parcel 18 generally, or Parcel 18-1A, would be mere *dictum*, with no *essential* relation to CPA's waiving its rights on Parcel 18-3A.

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[9] No issue was present in the prior action as to CPA's rights under the 1999 Agreement, because the only claim asserted involved a separate June 1999 agreement for developing Parcel 18-3A specifically. (Verified Complaint, Tab A, App-II, p.9) The 1999 Agreement was not even submitted for Judge Sanders' review, and would have made no difference if it had been, since Northeastern's conduct was fully consistent with that contract, having purportedly secured CPA's agreement for removing Parcel 18-3A from the development phase parcels.

(d) Northeastern's Breach Of The Implied Covenant Of Good Faith And Fair Dealing Count III.

There is in every contract, an implied covenant of good faith and fair dealing. *Anthony's Pier Four, supra,* 411 Mass. at 473. "The implied covenant of good faith and fair dealing provides 'that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract . . . .' " *Id.* at 471. That is what Northeastern did, by rejecting CPA's June 2019 request that it develop Parcel 18-1A through a commercial partnership, co-venture with CPA, thus repudiating its obligations under both the 1999 Agreement and the 2007 Agreement, and by telling the BPDA, falsely, that Judge Sanders had voided CPA's rights on Parcel 18-1A.

There are no material issues of fact as to those actions by Northeastern, which are squarely on point with *Anthony's Pier Four, supra,* where the Court found a breach of the implied covenant of good faith based on the defendant's repudiation of its agreement for a planned hotel development. 411 Mass. at 474. They also substantiate CPA's c.93A Counts VII and VIII against Northeastern.

(e) Northeastern Is Liable For Unfair & Deceptive Acts, In Violation Of M.G.L. c.93A, §11

It is clear that Northeastern and CPA were engaged in commercial transactions, under the aegis of the BRA, for developing real estate in PDA

No. 34 (*Tab F, App- II, p. 208; and Tab G, App-II, p. 223*). It is also clear, based on reading what Judge Sanders actually held, *supra*, that Northeastern had an agreement with CPA for developing Parcel 18-1A, and repudiated it by falsely claiming that the Superior Court found that CPA had no development rights on Parcel 18-1A. (*E-mail, R. Martin to H. Owens, 06/19/2019, Tab K, App-II, p. 331*). That conduct by Northeastern was plainly calculated to defraud CPA, and thereby deprive CPA of the benefit of the bargain it made on Parcel 18-1A. Northeastern had earlier made the same false claim to the BPDA in May 2017. (*Letter, R. Martin to B. Golden, Tab I, App-11, p. 335*).

(*i*) Northeastern and CPA Were Engaged In The Business Of Commercial Real Estate Development

Such conduct by Northeastern is unfair and deceptive under M.G.L. c.93A, §11. It exists in a business context, commercial real estate development,[10] and involves conduct which, even if it were not otherwise actionable in tort or contract, is actionable under the statute. Again, this case is squarely on point with *Anthony's Pier Four*, *supra*, which held that the defendant violated c.93A by

[10] Northeastern's defense of "charitable immunity" is thus frivolous, where the limitation under M.G.L. 231, § 85K, does not apply when "the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue for charitable purposes." *Mason v. S. N.E. Conf. Assn. of Seventh Day Adventists,* 696 F.2d 135, 139-140 (CA 1, 1982).

reason of its repudiation of the contract, making false claims as to its contractual obligations. This was held, *per se*, to be in violation of M.G.L. c.93A, §11.

> Conduct "in disregard of known contractual arrangements" and intended to secure benefits for the breaching party constitutes an unfair act or practice for c.93A purposes.

Id., 411 Mass. at 474. Moreover, the knowing use of a pretext to obtain such benefits "establishes willfulness as a matter of law. *Id.*, 411 Mass. at 475.

(*ii*) Northeastern Cannot Claim The Exemption For Petitioning Activity Found In c.93A, §3.

Among the several scattershot defenses advanced by Northeastern is the exemption for petitioning activity stated in M.G.L. c. 93A, §3. That exemption cannot apply here, because Northeastern petitioned the BPDA based on a false claim that the court negated CPA's development rights.

It is Northeastern's burden to establish that CPA's c.93A claim is based *solely* on Northeastern's petitioning activity, where c.93A, §3, provides that upon the person claiming the exemptions." Northeastern cannot meet that burden on the facts of this case, where CPA's c.93A claims are based on unfair and deceptive conduct apart from the petitioning activity alone, as when Northeastern repudiated CPA's rights on Parcel 18-1A in June 2019 (*Martin E-mail, Tab K, App-II, p. 331*).

That repudiation was clearly unfair and deceptive, wholly separate from any "petitioning" activity, while Northeastern's false representations to the BPDA, cannot be found to be legitimate petitioning activity under any reasonable application of a statute designed to promote fairness and honesty in the transaction of business generally. Sect. 3 provides for an exemption only where a party's actions are "permitted" under laws administered by a regulatory board, but presenting a "petition" to any regulatory board, based on intentionally deceptive claims. cannot be permitted under any rational application of the law.

Such unfair and deceptive conduct cannot be "permitted" under any rational application of M.G.L. c.93A, §3, as it clearly violates an overriding public policy[11] that requires honesty in dealing with public agencies.

(f) The Court Erred By Granting Summary Judgment To Northeastern Dismissing CPA's Contract Claims And M.G.L. c.93A Claims

As seen above, the Superior Court committed clear error in denying CPA's motion for summary judgment on Counts I, II, III, VII and VIII. It therefore follows that it erred in granting summary judgment of dismissal to Northeastern on those Counts. The Court's orders must therefore be reversed, and the case remanded to proceed on CPA's claims.

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[11] See, e.g., M.G.L. c.12, §5B(a)(1), which makes it a crime for any person to present a false or fraudulent claim to a state or municipal agency while seeking any "approval."

B. The Court Committed Clear Error In Granting Northeastern's Special Motion To Dismiss, Under M.G.L. c.231, §59H

The appellate court reviews the granting of a M.G.L. c.231, §59H, special motion to dismiss under the "clear error" standard which clearly appears here with the Superior Court's granting Northeastern's special motion to dismiss.

The Superior Court granted Northeastern's special motion to dismiss on Counts VI, pleading fraud, and partially on Counts VII and VIII for violations of c.93A, finding that Northeastern's false statements to the BPDA in May 2017, opposing CPA's petition, were protected as permitted petitioning activity. (*Memorandum of Decision, pp. 8 and 12, App. I, pp. 149 and 153*). That was clearly erroneous and cannot be sustained on appeal for the following reasons.

1. Northeastern Did Not Engage In Legitimate Petitioning Activity, Under M.G.L. c.231, §59H, Because It Was "Sham" Petitioning At Best

It is clear that the Superior Court could not find that Northeastern's "petitioning" to the BPDA in May 2017, in response to CPA's petition to the BPDA to enforce the 2007 Agreement, was permitted and protected under M.G.L. c.231, §59H, because it was based on the false claim that CPA lost its rights on Parcel 18. (*Letter, R. Martin, Tab L, App. II, p. 335*). That was "sham" petitioning, and contrary to public policy evidenced by M.G.L. c.12, §5B(a)(1), to reject false or deceptive "petitions" seeking relief from public agencies.

CPA had the constitutional right to petition the BPDA for enforcing its development rights on Parcel 18-1A under the 2007 Agreement, where the BPDA was itself a party to the Agreement and had to approve all development on Parcel 18. Northeastern had no right to claim that it owned "all of the development rights" on Parcel 18, based on the flagrantly false claim that the Superior Court ruled that "CPA does not have – and never had – any actual 'development rights' in relation to Parcel 18-3A or 18-1A." (*Letter, 05/25/2017, Tab L, App-II, pp. 335-338*). [12]

Judge Sanders made no such ruling. Northeastern's claim was therefore "sham petitioning," while the statute protects only "non-sham petitioning." *Duracraft Corp. v. Holmes Products Corp., et al*, 42 Mass. App. Ct. 572, 581 (1997), hereinafter *Duracraft I*. Moreover, where CPA's petition to the BPDA clearly sought only to enforce its contractual rights, as granted by the BRA and confirmed by Judge Sanders' ruling in the prior action, it cannot be dismissed under the statute as sham petitioning.

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[12] What Judge Sanders found was that CPA had lost "whatever rights it had" on Parcel 18-3A, based on Northeastern's claim that CPA had agreed to transfer those rights onto Parcel 18-1A (*Memorandum of Decision,, p. 6, Tab B, App-II, p.30*). Judge Sanders did not attempt to define or delimit what CPA's rights were in general, which was not essential to the actual ruling that CPA had ceded its rights on Parcel 18-3A in return for developing Parcel 18-1A instead.

The right to petition does not include a right to file "deliberately false" claims. See *Duracraft I*, *supra*, 42 Mass. App. Ct. at 582, Making that false claim in response to CPA's May 2017 petition to the BPDA, [13] in addition to being fraudulent as pleaded in Count VI, was an also a repudiation of CPA's contractual rights and was thus in violation of c.93A, *per se*, as pleaded in Counts VI and VII. *Anthony's Pier Four*, *supra*.

It was thus Northeastern who violated M.G.L. c.231, §59H, with sham petitioning within the meaning of the statute, when it submitted its opposition to CPA's petition, by falsely claiming that the Superior Court had voided CPA's development rights on Parcel 18. The Superior Court got it backwards, and dismissal of CPA' s common law fraud claim, and partial dismissal of its c.93 Northeastern cannot be found to have engaged in legitimate petitioning activity by opposing CPA's 2017 petition to the BPDA, as it instead perpetrated a fraud on both CPA and the BPDA.

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[13] The Superior Court granted Northeastern's special motion as to the c.93A Claims, Count VII and VIII only in part, and common law fraud, Count VI, in connection with its "petitioning" the BPDA in opposition to CPA's May 2017 petitition to compel Northeastern to comply with the 2007 Agreement on Parcel 18-1A. (*Memorandum of Decision, pp. 8 and 12, App-I, pp. 149 and 153*). The Court dismissed the rest of CPA's c.93A claims relating to the events of 2019, and CPA's contract claims, by entering summary judgment thereon under Rule 56, as discussed above.

2. Northeastern Did Not And Cannot Meet Its Burden To Establish That CPA's Claim Under c.93A Is Based Solely On Northeastern's "Petitioning"

The Superior Court's finding that CPA's claims under M.G.L. c.93A are intended solely to deter Northeastern's petitioning activity in May 2017 is clearly in error because the claim, on its face, is based on events occurring later, when Northeastern rejected CPA's June 2019 demand to form a co-venture for developing a hotel on Parcel 18-1A and then sent a letter of intent to the BPDA for developing a dormitory, in partnership with another entity.

(a) CPA's Cause Of Action Under c.93A Arose Prior To Northeastern's Petitioning The BPDA In November 2029 For A Dormitory Project

Northeastern petitioned the BPDA in November 2019 for a dormitory development on Parcel 18-1A, *after* it expressly repudiated CPA's rights as the designated minority developer on Parcel 18, saying that "the Cruz/Cohee leadership of CPA waived any opportunity to participate in the development of 18-1A, as Judge Sanders found, . . ." (*E-mail, R. Martin, 06/19/2019, Tab K, App. II, p. 331*). That, and the subsequent Letter of Intent to the BPDA (*Tab I, App-II, p. 319*) is what precipitated this lawsuit, not the May 25, 2015, letter to the BPDA more than two years earlier.

Northeastern had also repudiated CPA's contracted rights on Parcel 18-1A when it wrote to the BPDA in May 2017 saying CPA "has no legitimate claim,

interest or right to any portion of Parcel 18," and opposed CPA's petition to mandate a hotel project on Parcel 18-3A. (*Letter, Tab L, App-II, p.335*). That repudiation, based on the false claim that CPA had no rights on any portion of Parcel 18, would itself be actionable *per se* under M.G.L. c.93A as a contract violation, apart from any purported "petitioning" by Northeastern. *Anthony's Pier Four, supra,* 411 Mass. at 474.

It is abundantly clear, from this sequence of events, that CPA, had no intent or "strategic" purpose to prevent Northeastern from developing Parcel 18-1A, and no such intent can reasonably be inferred, as was the case in *Nyberg, et al. v. Whetle, et al*., Appeals Court No.21-P-781, Slip Opinion 03/17/2022,[14] from the fact that CPA claims fraud and violation of c.93A based events occurring in 2019, long after Northeastern's May 25, 2017 letter to the BPDA.

In *Nyberg*, despite purporting to have other, more valid concerns, it was clear that the plaintiffs sought to prevent the defendants from of *any* development of their land, and a reasonable inference could be found that it was a strategic effort to protect their own land values, as opposed to seeking relief due under

[14] Reference is made to this unpublished slip opinion as an example only, as to the proper application of the statute in contrast with the present case. It is not cited as binding precedent on any issue.

contract as in the present case. CPA did not petition the Superior Court based on Northeasterns' May 2017 letter, and did not do so until after Northeastern again repudiated its obligation to partner with CPA for a hotel on Parcel 18-1A, pursuant to its own 2007 development plan that was approved by the BRA. It is clear that the basis for CPA's c.93A and fraud claims, Counts VI, VII and VIII, is not simply the fact that Northeastern petitioned the BPDA, but Northeastern's repudiating CPA's development rights, by falsely claiming that the Superior Court ruled that CPA has no development rights on Parcel 18-1A in June 2019.[15]

It was Northeastern's June 2019 repudiation of the agreement that triggered CPA's c.93A claim for unfair and deceptive acts, with the November 12, 2019, petition to the BPDA merely compounding that repudiation of CPA's contracted rights. Those are the two events, occurring in sequence, on which CPA pleads its claims under c.93A, as appears on CPA's Amended Verified Complaint, paragraphs 26 and 27 (*AVC, App. I, p.22*), and it is beyond dispute that CPA's cause of action under c.93A, as pleaded, accrued on June 19, 2019, before Northeastern filed its petition to build a dormitory on Parcel 18-1A.

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15 Unlike the *Nyberg* plaintiffs, CPA *wants* Northeastern to petition the BPDA, with either a plan to develop Parcel 18-1A in partnership with CPA, or with an agreement with CPA with fair compensation for releasing this last phase parcel from the development parcels.

The claim that Northeastern made the false claim to the BPDA is stated at ¶30 of the complaint (*App-I, p.23*), in context of its 2019 letter of intent only. Nowhere does the complaint refer to Northeastern's May 2017 letter to the BPDA, and CPA's reference to its own petition at that time does not even mention Northeastern's opposition, much less the letter which Judge Connolly described as protected "petitioning" by Northeastern. (*See AVC, ¶¶ 25-26, App-I, p.22*).

(b) Northeastern Failed To Meet Its Threshold Burden To Prove CPA's Lawsuit Lacks Any Colorable Merit And Is Intended Solely To Chill Northeastern's Petitioning To The BPDA

It is clear from the foregoing that Northeastern failed to meet its initial burden to prove that, in addition to its "petitioning" activity, CPA has no valid reason for filing claims under c.93A, or for common law fraud, other than the petitioning itself. As held in *Duracraft Corp. v. Holmes Prod. Corp., et al.*, 427 Mass. 156, 167-168 (1998), hereinafter *Duracraft II*:

> The special movant who "asserts" protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits that the claims against it are "based on" the *petitioning activities alone* and have no substantial basis other than or in addition to the petitioning activities.

(Emphasis is added). See also *Wenger v. Aceto*, 451 Mass. 1, 5 (2008); and *Ayasli, et al. v. Armstrong, et al.*, 56 Mass. App. Ct. 740, 748 (2002).

Northeastern's special motion to dismiss utterly failed to meet that threshold showing as to CPA's c.93A claims, and its related claim for common law fraud (Count VI) arising from the same wrongful conduct by Northeastern. In order to prevail under the statute, Northeastern must prove, at the outset, that CPA's c. 93A claims and common law fraud claim, have no "substantial basis other than or in addition to the petitioning activities implicated" and are based on "the petitioning activities *alone*." *Duracraft II*, 427 Mass. at 167-168, emphasis supplied.

Where CPA's statutory and tort claims all derive from its contract claims, Northeastern must therefore establish that the contract claims, Count I and Count II, have no colorable basis in fact or law, because it is attacking CPA's right to petition the Court based on application of contract provisions, while undeniably seeking to enforce its contract rights by petitioning the BPDA in 2017, and by filing suit in the present action. This is a case where the "petitioner" is CPA, seeking redress of alleged breaches of Northeastern's "preexisting legal obligations," and Northeastern's counter "petitioning" cannot be immunized under the statute. See *Duracraft II*, 427 Mass. at 166. The 1999 Agreement and the 2007 Agreement, have been put into evidence, and CPA bases its claims on those documents, which itself "constitutes a substantial basis other than (Northeastern's) petitioning activities" to support its claims. *Duracraft II*, 427 Mass. at 168.

The construction and application of those documents is a matter of law, on which Judge Connolly's findings are owed no deference under the statute, and it is clear from CPA's reliance on those documents that its claims are more than "colorable," and its purpose is not "primarily" to "chill" Northeastern's "petitioning" the BPDA in May 2017 or November 2019. Cf. *Blanchard, et al. v. Carney Hospital, Inc., et al,* 483 Mass. 200, 203 (2019). Where Northeastern has not met its threshold burden to demonstrate that CPA's claims both lack any colorable merit and were brought primarily to chill its "petitioning" the BPDA in May 2017, the order granting Northeastern's special motion to dismiss under the statute must be reversed.

(d) CPA Has Clearly Demonstrated That Its Pleading Cannot Be Dismissed As A SLAPP Action Under The Statute

Even if Northeastern's special motion could somehow meet its burden to persuade the Superior Court CPA's pleading in this action were both without any colorable basis in fact or law, and filed solely to "chill" its petitioning activity when it opposed CPA's May 2017 petition to the BPDA, CPA has plainly cleared the "high bar" of showing that Northeastern's claim was in essence a sham, which has caused actual injury to CPA. *Blanchard v. Carney Hospital*, *supra*, 483 Mass. at 204.

That "petitioning" by Northeastern was plainly a sham because it was based on the patently false claim that the Superior Court ruled that CPA had no

development rights on Parcel 18-1A, as discussed above, in addition to repudiation of CPA's development rights as confirmed by the BRA in 2007. CPA has been harmed by Northeastern's refusal to recognize CPA's rights on Parcel 18-1A for a lucrative hotel development, and the need to incur legal fees and costs to enforce its rights.

(e) The Superior Court Cannot Have Had Any Doubt That CPA's Statutory And Common Law Claims Are Not SLAPP Claims

As appears from the totality of circumstances discussed above, it was clear error for the Superior Court to grant Northeastern's special motion to dismiss CPA's c.93A claim, where the Court could not have any doubt that CPA's claims are not SLAPP claims. *Blanchard*, 483 Mass. at 205. As held in *Wenger v. Aceto*, 451 Mass. 1 (2008), the purpose of a SLAPP suit:

> is not to prevail in the matter, but rather to use litigation to chill, intimidate, or punish citizens who have excercised their constitutional right to petition the government to redress a grievance. [emphasis added].

451 Mass. at 7, n.6, quoting *Fisher v. Lint*, 69 Mass. App. Ct. 360, 363 (2007). On the facts of the present case, no reasonable court could find that CPA's purpose in suing Northeastern for fraud and violations of c.93A was anything other than to enforce its contractual rights for developing parcel 18-1A.

CPA's Amended Verified Complaint is not a "classic" SLAPP action, brought by "large private interests" and "directed at individual citizens of modest means for speaking publicly against development projects." *Duracraft II*, 427 Mass. at 161. It is, clearly, just an "ordinary lawsuit." that is "not a SLAPP suit," *Blanchard*, 483 Mass. at 213, while Northeastern's special motion to dismiss is, on its face, classic SLAPP litigation.

On such facts, under the clear error standard, the Superior Court's ruling for Northeastern on the special motion under c.231, §59H, cannot be sustained, and the Superior Court's award of costs and attorney's fees based on that ruling must therefore be reversed as well.

(f) The Superior Court's Award Of Costs Attorneys Fees Under M.G.L. c.231, §59H, Was In Error And Must Be Reversed On Appeal

M.G.L. c.231, §59H, the anti-SLAPP statute was designed to give private individuals or small organizations with limited means protection from aggressively pre-emptory lawsuits brought by larger organizations with vastly larger economic resources, and to provide an expeditious remedy to that end. The Legislature enacted the statute to create a device for the quick and inexpensive dismissal of meritless lawsuits, i.e. "SLAPP" suits filed by *large* private interests "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *In re Hamm*, 487 Mass. 394, 397 (2021), citing

Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 147 (2017), emphasis added.

By granting Northeastern's special motion, allowing a large private interest to "chill" the rightful petitioning of a much smaller CPA on more than merely "colorable" contract-based claims, clearly perverting the purpose of M.G.L.c.231, §59H, the Superior Court has thus turned the statute on its head, taking the statutory sling and stone from David's hand and giving them to Goliath.[16] This would be so, even if Northeastern's "petitioning" the BRA in 2017 were not so blatantly a sham, where CPA's claims, as pleaded on its Amended Verified Complaint, are more than colorable and explicitly seek to enforce its contractual rights under two agreements, in addition to whatever imagined "chilling" effect it might have on Northeastern's "petitioning" the BPDA more than two years before CPA filed this action.

C. The Superior Court Erred In Dismissing CPA's Statutory And Common Law Law Claims Under Mass. R. Civ. P. 12(b)(6)

The standard of review on appeal under Rule 12(b)(6) is *de novo*, applying the same criterion as must the lower court, where a complaint is sufficient "unless it appears that the plaintiff can prove no set of facts in support of his claim which

[16] Northeastern has assets valued at $400,000,000 on Parcel 18 alone, while CPA has received only $500,000 from its designation as minority developer on Parcel 18. (*AVC, Introduction at p. 2, App-I, p. 16*).

would entitle him to relief." *Nader v. Citron*, 372 Mass. 96, 98 (1977). Every count dismissed by the Superior Court under Rule 12(b)(6) meets this criterion on its Amended Verified Complaint (*App- I, p. 15*).

When evaluating the sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6), the Court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them, in the plaintiff's favor. *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). "[D]ismissals on the basis of the pleadings, before facts have been found, are discouraged." *Gennari v. City of Revere*, 23 Mass. App. Ct. 979, 980 (1987).

1. Count IV: Interference With Advantageous Economic Relations

The test under Rule 12(b)(6) is whether the pleading, standing alone, suffices to *state* a claim, not whether it *proves* the claim as the Superior Court's analysis would require as to Count IV. (*Memorandum of Decision, pp. 19-20, App-I, pp. 160-161*). CPA's pleadings states that it had been designated by the BRA, predecessor to the BPDA, to be "the designated developer for all of Parcel 18," which is unquestionably an advantageous economic relationship with the City of Boston, through the BPDA, and that CPA is still the "designated minority developer on Parcel 18." (*AVC, ¶¶ 8 - 10, App-I, p.19*).

The 1999 Agreement unquestionably embodies CPA's advantageous relationship with the City of Boston, as the minority developer on Parcel 18 which

must be included in any development on Parcel 18. Northeastern's attempt to exclude CPA from the development on based on misrepresenting CPA's legal status to the BPDA was thus an attempt to interfere with that relationship, as sufficiently pleaded in Count IV. (*AVC, ¶ 23, App-I, , p. 21*).

2. Counts V, IX and X

The Superior Court's Rule 12(b)(6) dismissal of Counts V, IX and X, for unjust enrichment, declaratory relief and mandatory relief (*AVC, ¶35, ¶39 ¶40, App-I, p. 25-26*) are not supported by any textual or legal analysis, and this Court need only review the pleadings *de novo* to reverse and remand, where those counts, on their face, state claims on which relief may be granted.

VII. CONCLUSION – RELIEF SOUGHT

The Superior Court's Orders and Judgment are clearly in error and must be reversed: as to the denial of the Plaintiff's Rule 56 motion for summary judgment on Counts I, II, III, VII and VIII, and entry of summary judgment for Defendant on those counts; as to granting Defendant's special motion to dismiss under M.G.L. c.231, §59H on Count VI and in part on Counts VII and VIII, with award of attorneys' fees and costs; and as to granting Defendant's Rule 12(b)(6) motion to dismiss Counts IV, V, IX and X. The case must therefore be remanded to Superior Court for further action consistent therewith, to include jury trial on damages.

Dated: October 29, 2022

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ADDENDA

Statutes

Court Rules

Slip Opinion Cited

M.G.L. c.12, §5B(a)(1)

Section 5B. (a) Any person who: (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; . . . shall be liable to the commonwealth or political subdivision for a civil penalty of not less than $5,500 and not more than $11,000 per violation,

M.G.L. c.93A, §3

Section 3: Exempted transactions

Section 3. Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.

For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.

M.G.L. c.93A §11

Section 11: Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; costs

Section 11. Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

* * *

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The respondent may tender with his answer in any such action a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner, then the court shall not award more than single damages.

If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action.

* * *

M.G.L. c.231, §59H

Section 59H: Strategic litigation against public participation; special motion to dismiss

Section 59H. In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

* * * .

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

M.G.L. c.231, §85K

Section 85K: Limitation of tort liability of certain charitable organizations; liability of directors, officers or trustees of educational institutions

Section 85K. It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs; and provided further, that in the context of medical malpractice claims against a nonprofit organization providing health care, such cause of action shall not exceed the sum of $100,000, exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of charitable trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes.

No person who serves as a director, officer or trustee of an educational institution which is, or at the time the cause of action arose was, a charitable organization, qualified as a tax-exempt organization under 26 USC 501(c)(3) and who is not compensated for such services, except for reimbursement of out of pocket expenses, shall be liable solely by reason of such services as a director, officer or trustee for any act or omission resulting in damage or injury to another, if such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by willful or wanton misconduct. The limitations on liability provided by this section shall not apply to any cause or action arising out of said person's operation of a motor vehicle.

M.G.L. c.259, §1

Section 1 Actionable contracts; necessity of writing

Section 1. No action shall be brought:

First, To charge an executor or administrator, or an assignee under an insolvent law of the commonwealth, upon a special promise to answer damages out of his own estate;

Second, To charge a person upon a special promise to answer for the debt, default or misdoings of another;

Third, Upon an agreement made upon consideration of marriage;

Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them; or,

Fifth, Upon an agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.

Mass. R. Civ. P., Rule 12 (b)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted.

(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth;

(10) Improper amount of damages in the Superior Court as set forth in G. L. c. 212, §3 or in the District Court as set forth in G. L. c. 218, §19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

Mass. R. Civ. P., Rule 56

Civil Procedure Rule 56: Summary judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required
Supporting and opposing affidavits shall 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable
Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith
Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Appeals Court of Massachusetts,

Jonathan NYBERG & another 1 v. R. Bruce WHELTLE & another.2

No. 21-P-791

Decided: September 13, 2022

Present: Neyman, Shin, & Hand, JJ. Robert E. McLaughlin, Sr. (John G. Hofmann also present), Boston, for the plaintiffs. Jeffrey J. Pyle, Boston, for the defendants.

This case involves yet another example of the "ever-increasing complexity of the anti-SLAPP case law," and the "difficult and time consuming" resolution of special motions to dismiss pursuant to the "anti-SLAPP" statute, G. L. c. 231, § 59H. Commonwealth v. Exxon Mobil Corp., 489 Mass. 724, 728 n.5 (2022). Here, we are asked to review a Superior Court judge's application of the augmented anti-SLAPP framework crafted in Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141 (2017) (Blanchard I), and amplified in Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200 (2019) (Blanchard II). The plaintiffs, Jonathan Nyberg and Sara Dolan (collectively, Nybergs), contend that the judge erred in concluding that the Nybergs' lawsuit for abuse of process and intentional infliction of emotional distress against the defendants, R. Bruce Wheltle and Susan Wheltle (collectively, Wheltles), was a retaliatory strategic lawsuit against public participation (SLAPP suit), and in allowing the Wheltles' special motion to dismiss. Although we have some concerns with the allowance of the special motion to dismiss under the contested facts detailed herein, we cannot say that the judge erred or abused his discretion, see Blanchard I, supra at 160, in allowing the special motion to dismiss where he sedulously followed the augmented framework, made the step-by-step determinations required by Massachusetts precedent, and considered and weighed the requisite Blanchard II, supra at 206-207, factors before rendering his conclusion. Accordingly, we affirm.

Background. "We summarize the relevant facts from the pleadings and affidavits that were before the motion judge." 477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 164 (2017) (Harrison I). See G. L. c. 231, § 59H (in ruling on special motion to dismiss, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

1. The parties. The Nybergs are brother and sister and were engaged in the real estate development business. In 2015, they acquired an undeveloped lot at 88 Coolidge Road in Arlington (Nyberg lot). The Arlington zoning bylaws require that a buildable lot for a single-family home in the Coolidge Road section of Arlington have lot frontage of at least sixty feet and lot size of at least 6,000 square feet. At the time the Nybergs acquired the Nyberg lot, it had exactly sixty feet of frontage on Coolidge Road and the lot size was 6,035 square feet.

The Wheltles are husband and wife and have resided at 94 Coolidge Road in Arlington from 1971 to the present. The Wheltle property abuts the Nyberg lot. As discussed below, the Wheltles opposed the proposed development of the Nyberg lot.

2. Initial dispute and Land Court action. The Nybergs intended to construct a single-family house on the Nyberg lot. However, they needed permission from the Arlington conservation commission because the Nyberg lot is located near a wetland. Thus, the Nybergs filed a notice of intent and sought an order of conditions establishing terms to protect the environment. The Wheltles and other neighbors opposed the Nybergs' request for the order of conditions, and according to the Nybergs, "the Wheltles pressed each and every objection to the Nybergs' buildable plans imaginable" throughout the approval process. On September 7, 2017, the Arlington conservation commission approved the Nybergs' application to build a single-family home on the Nyberg lot and issued an order of conditions.[3]

On October 27, 2017, the Wheltles filed a complaint in the Land Court, which included a claim for declaratory judgment, an action to quiet title, and a claim for adverse possession of portions of the Nyberg lot. The Land Court complaint alleged, inter alia, that the Wheltles had "acquired title by adverse possession to several disputed slivers of land adjacent to their" property. The Land Court complaint alleged that a brick wall "encroached .52 feet onto the [Nyberg lot]" and that the Wheltles "owned the land under the Brick Wall [by adverse possession,] thereby reducing the Nybergs' frontage to approximately [fifty-nine feet and six inches] and rendering the [Nyberg lot] no longer in compliance with the Arlington zoning building code requirement of a minimum of [sixty] feet of frontage." In addition, the Land Court complaint alleged that a "Boulder Wall encroached [seventy] square feet onto the [Nyberg lot]" and that the Wheltles "owned the land under the Boulder Wall [by adverse possession,] thereby reducing the Nybergs' total square footage to approximately 5,965 square feet and rendering the [Nyberg lot] no longer in compliance with the Arlington zoning building code requirement of a minimum of 6,000 square feet."[4]

Following a three-day bench trial, a Land Court judge concluded that the Wheltles had proved adverse possession as to "an area of encroachment of approximately 9.9 square feet," but had "failed to establish rights by adverse possession with respect to the other [claimed] encroachments." Although the Wheltles prevailed in part at trial, the result did not render the Nyberg lot unbuildable as it still contained sixty feet of frontage and more than 6,000 square feet. Judgment in the Land Court action entered on August 5, 2020. Neither party appealed from the Land Court judgment.

3. The present action. On January 21, 2021, approximately five and one-half months after judgment entered in the Land Court action, the Nybergs commenced the present action in the Superior Court (present action) against the Wheltles alleging abuse of process and intentional infliction of emotional distress, and seeking damages including the costs of defending the Land Court action, the carrying costs of the Nyberg lot, and the diminution in value of their investment. In their complaint, the Nybergs contended,

inter alia, that the Wheltles did not bring the Land Court complaint for the purpose of acquiring seventy square feet of the Nyberg lot. Instead, the Nybergs asserted that the Wheltles used legal process "intentionally and maliciously for the ulterior illegal purpose of preventing the Nybergs from pursuing their legitimate right to build a single-family house on the property they had acquired," because the Nybergs' proposed development would "depriv[e] the Wheltles of the view of the undeveloped lot and natural vegetation existing thereon and the privacy afforded to them by the undeveloped lot along the northern border of their property."

The Nybergs alleged that evidence of the Wheltles' ulterior purpose included the following: on December 6, 2017, at the conclusion of a Department of Environmental Protection site visit to the Nyberg lot, counsel for the Wheltles asked Jonathan Nyberg if he and his sister would be willing to sell their lot to her clients. The Wheltles' offer was much less than what the Nybergs had paid for the Nyberg lot, and thus the parties did not reach agreement. During this conversation, counsel for the Wheltles purportedly stated to Jonathan Nyberg, "My clients are prepared to go straight out on their adverse possession case in order to block the project."

The Nybergs further averred that the Wheltles "aggressively prosecuted" their adverse possession claims in the Land Court, "requiring the Nybergs to mount a rigorous and expensive defense." The Nybergs also alleged that "[t]he Wheltles knew or should have known they had no legal basis to claim title by adverse possession to" certain portions of the Nyberg lot. Finally, the Nybergs alleged that the Wheltles' acts, which were intended to render the Nyberg lot unbuildable, constituted "conduct that was extreme and outrageous" and caused "extreme emotional distress."

4. The special motion to dismiss. In response to the Nyberg complaint, the Wheltles filed an answer and a special motion to dismiss under the anti-SLAPP statute, G. L. c. 231, § 59H. Through their motion, affidavits, and pleadings, the Wheltles argued that the present action was based solely on the Wheltles' legitimate, and partially successful, petitioning activity. They maintained that they opposed the Nybergs' proposed development and brought the Land Court action because they believed that the development "would harm wetlands and natural resources, and . would place a new boundary wall reaching [ten] feet in height right against [their] property, in place of [their] existing retaining wall." The Wheltles and other residents attended the Arlington conservation commission hearings and spoke out against the Nybergs' proposed project, exercising their legal rights as abutters. R. Bruce Wheltle further averred that he and his wife spent a considerable sum of money to litigate the Land Court claims through trial, and that they "became economically unable to appeal from the adverse portions of the [Land Court judgment] or to maintain [their] appeal from the Arlington Conservation Commission's Bylaw decision." At the time they filed the special motion to dismiss, the Wheltles were seventy-nine and seventy-seven years old and retired. They claimed that during the Land Court proceedings, counsel for the Nybergs told counsel for the Wheltles that if the Nybergs prevailed in the Land Court action, they would bring an abuse of process claim against the Wheltles. The Wheltles argued that the Nybergs

had considerable means, that they operated a substantial real estate development business through which they had completed numerous real estate transactions in Arlington since 2013, and that in the two years prior to the filing of the present action, "[Jonathan] Nyberg was a realtor on transactions in the total amount of $46,194,000." The Wheltles ultimately contended that the present action is retaliatory, and a classic or typical SLAPP suit brought to chill or punish their legitimate petitioning activity, and that having to respond to it has caused them anxiety and distress.

Unsurprisingly, the Nybergs' response to the special motion to dismiss painted a different picture. Through their supporting affidavits and pleadings, including the allegations in their Superior Court complaint, the Nybergs contended that the Wheltles' Land Court action was predicated on illegitimate and ulterior motives, and caused the Nybergs financial damages exceeding $460,000 in the form of attorney's fees, expert fees, other litigation costs and expenses, taxes, and interest. The Nybergs further responded that the Wheltles presented inflated, exaggerated, or inaccurate allegations regarding the Nybergs' real estate business and income. The Nybergs insisted that they were not wealthy and powerful property developers, but brother and sister who lived locally in Arlington and operated a small local company with no office and no other employees. As of May of 2021, the Nybergs owned eight rental properties along with the vacant land at 88 Coolidge Road. The Nybergs averred that Sara Dolan was a homemaker, not a high-end real estate developer. They also averred that the Wheltles were not so-called victims of a typical or classic SLAPP suit, but rather people of substantial means as evidenced by their "free and clear" ownership of the property at 94 Coolidge Road and another residential property at 100 Coolidge Road in Arlington, which had a combined market value of more than $2 million. The Nybergs emphasized that in the Land Court action the Wheltles established adverse possession solely as to a sliver of land located underneath a concrete block wall, and that the result of the Land Court action was that the Nybergs could proceed with their plan to build a single-family house on their lot. Thus, the Nybergs argued, the Wheltles' adverse possession claims were unsuccessful when viewed in context of what the parties sought to achieve. According to the Nybergs, "it was the Wheltles who played the role of bully in these circumstances." The Nybergs argued that far from being a SLAPP suit, the Superior Court action they brought was to recoup the money spent defending the Wheltles' improper and pretextual Land Court claim, and not to retaliate against the Wheltles' petitioning activity.

Following a hearing, a Superior Court judge allowed the Wheltles' special motion to dismiss. In a comprehensive memorandum and order, the judge applied the augmented framework delineated in Blanchard I, 477 Mass. at 159-161, and the nonexclusive factors enumerated in Blanchard II, 483 Mass. at 206-207. "In weighing th[o]se factors and all the facts surrounding the Nybergs' lawsuit in [his] discretion," the judge concluded that he was "not fairly assured that the Nybergs' suit is not a SLAPP suit brought to punish the Wheltles for the Land Court [a]ction," and further concluded that he was "fairly assured that the Nybergs' suit is retaliatory, in response to the Wheltles'

partially successful Land Court [a]ction." Accordingly, the judge allowed the Wheltles' special motion to dismiss. The Nybergs appeal therefrom.

Discussion. 1. Legal standards. a. Overview of the augmented framework. General Laws c. 231, § 59H, provides a procedural remedy -- the special motion to dismiss -- for early dismissal of SLAPP suits, i.e., "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Blanchard I, 477 Mass. at 147, quoting Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161 (1998) (Duracraft). See Duracraft, supra, quoting Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816-817 (1994) ("SLAPP suits have been characterized as 'generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so' "). The Supreme Judicial Court has delineated the following burden-shifting process for evaluating a special motion to dismiss under the anti-SLAPP statute:

"Under G. L. c. 231, § 59H, a party may file a special motion to dismiss if 'the civil claims .' against it are based solely on its exercise of the constitutional right to petition. The burden-shifting framework devised in Duracraft, 427 Mass. 156, and augmented in Blanchard I, 477 Mass. at 159-161, is used to evaluate such motions. At the threshold stage, the moving party (here, the [Wheltles]) must demonstrate, through pleadings and affidavits, that each claim it challenges is based solely on its own protected petitioning activity, and that the claim has no other substantial basis. If the moving party meets its burden, the burden shifts at the second stage to the nonmoving party (here, the [Nybergs]), to demonstrate that the anti-SLAPP statute nonetheless does not require dismissal.

"A nonmoving party may satisfy its burden at the second stage in one of two ways. See Blanchard I, 477 Mass. at 159-160. The first path, which tracks the statutory language, requires the nonmoving party (here, the [Nybergs]) to establish 'by a preponderance of the evidence that the [moving party, here the (Wheltles)] lacked any reasonable factual support or any arguable basis in law for its petitioning activity,' Baker v. Parsons, 434 Mass. 543, 553-554 (2001), and that the moving party's acts caused 'actual injury to the responding party,' G. L. c. 231, § 59H. The second path, laid out in Blanchard I, requires the nonmoving party (here, the [Nybergs]) to establish, such that the motion judge can conclude with fair assurance, that its claim is not a 'meritless' SLAPP suit 'brought primarily to chill the special movant's [here, the (Wheltles')] legitimate petitioning activities.' Blanchard I, supra."

477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 518-519 (2019) (Harrison II).

A judge must apply the augmented framework sequentially. See Harrison II, 483 Mass. at 519. "Beginning at the threshold stage, the motion judge 'consider[s] the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based,' and evaluates whether the party that has the burden of proof has

satisfied it." Id., quoting G. L. c. 231, § 59H. "Sequential application of the framework is especially significant for purposes of the . augmented second stage of the framework."[5] Harrison II, supra. "We review the judge's ruling for an abuse of discretion or error of law." Blanchard II, 483 Mass. at 203.

Before proceeding to our discussion of the judge's application of each stage, we review in more detail the requirements of the second path of the second stage of the augmented framework.

b. Second path of the second stage. Under the second path of the second stage of the augmented framework the nonmoving party (here, the Nybergs) bore the burden to demonstrate, "such that the motion judge may conclude with fair assurance," two elements: (1) that the claims in the present action were "colorable"; and (2) that the present action "was not brought primarily to chill the special movant's [(here, the Wheltles')] legitimate exercise of [their] right to petition, i.e., that it was not retaliatory" (citations and quotation omitted).[6] Blanchard II, 483 Mass. at 204.

The present case hinges on the second element of the second path of the second stage. Under the second element of the second path analysis, a judge must "assess the 'totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim,' and . determine whether the nonmoving party's claim constitutes a SLAPP suit." Blanchard II, 483 Mass. at 205, quoting Blanchard I, 477 Mass. at 160. The judge must be "fair[ly] assur[ed]" in this conclusion, which "requires the judge to be confident, i.e., sure, that the challenged claim is not a 'SLAPP' suit." Blanchard II, supra. "If the judge determines that the nonmoving party's [(the Nybergs')] claim 'was not primarily brought to chill the special movant's [(the Wheltles')] legitimate petitioning activities,' but instead was brought to seek redress for harm caused by the moving party's [(the Wheltles')] conduct, then the anti-SLAPP motion to dismiss the nonmoving party's [(the Nybergs')] claim properly is denied." Id. at 206, quoting Blanchard I, supra. See Blanchard I, supra at 159, citing Duracraft, 427 Mass. at 161, quoting 1994 House Doc. No. 1520 ("A nonmoving party's claim is not subject to dismissal as one 'based on' a special movant's petitioning activity if, when the burden shifts to it, the nonmoving party can establish that its suit was not 'brought primarily to chill' the special movant's legitimate exercise of its right to petition").

Conversely, if the judge concludes that the nonmoving party's claim is a retaliatory SLAPP suit, or if the judge is unsure whether the claim is or is not a SLAPP suit, the nonmoving party has failed to meet its burden and the special motion to dismiss should be allowed. See Blanchard II, 483 Mass. at 205 (fair assurance standard "requires the judge to be confident, i.e., sure, that the challenged claim is not a 'SLAPP' suit").[7]

When analyzing whether a suit is retaliatory, the judge must evaluate the nonmoving party's " 'asserted primary purpose in bringing [its] claim,' Blanchard I, 477 Mass. at 160, in light of the objective facts presented and any reasonable inferences that may be drawn from them." Blanchard II, 483 Mass. at 209-210. "If the judge, considering each

claim as a whole, and holistically in light of the litigation, is fairly assured that each challenged claim does not give rise to a SLAPP suit, then the special motion to dismiss . properly is denied" (quotation and citation omitted). Id. at 210. In making this determination, the judge may consider the following nonexclusive factors (Blanchard II factors): (1) whether the case is a "classic" or "typical" SLAPP case, i.e., "a lawsuit[ ] directed at individual citizens of modest means for speaking publicly against development projects"; (2) whether the suit was commenced shortly after the petitioning activity; (3) whether the special motion to dismiss was "filed promptly"; (4) "the centrality of the challenged claim . [to] the litigation as a whole, and the relative strength of the nonmoving party's claim"; (5) evidence that the moving party's petitioning activity was in fact chilled; and (6) "whether the damages requested by the nonmoving party, such as attorney's fees associated with an abuse of process claim, themselves burden the moving party's exercise of the right to petition" (citation omitted). Blanchard II, supra at 206-207. It is left to the judge "to consider and weigh these and other factors as appropriate, in light of the evidence and the record as a whole." Id. at 207. In doing so, the judge has discretion in determining whether he or she is fairly assured that the challenged claim is not a SLAPP suit. See id. at 203, 205, 207. See also L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion occurs where judge makes clear error of judgment "such that the decision falls outside the range of reasonable alternatives").[8]

2. The judge's application of the augmented framework. Although the present case centers on the second element of the second path of the second stage of the augmented framework, Massachusetts case law mandates the application of the entire framework, sequentially, to each challenged claim. See Harrison II, 483 Mass. at 519; note 5, supra. Accordingly, we review the judge's application and determinations.

The judge followed the augmented framework sequentially. He first considered the "threshold stage" and determined that the Wheltles, as the moving party, met their burden of showing that the Nybergs' claims for abuse of process and intentional infliction of emotional distress were based solely on the Wheltles' petitioning activity in the Land Court action, and had no other substantial basis. See Harrison II, 483 Mass. at 519. The Nybergs do not challenge that determination on appeal.

Next, the judge considered whether the Nybergs had met their burden under the first path of the second stage of the augmented framework to establish that the Wheltles' claims in the Land Court action were "devoid of any reasonable factual support or any arguable basis in law." G. L. c. 231, § 59H. The judge concluded that in view of the Wheltles' partial success in the Land Court action, which the Nybergs did not appeal, the Nybergs had failed to meet the "very high bar" of showing that the Land Court action was devoid of any reasonable factual support or legal basis. See Blanchard I, 477 Mass. at 156 n.20. Again, the Nybergs do not challenge that determination on appeal.

The judge then moved to the first element of the second path of the second stage of the augmented framework and considered whether the Nybergs had demonstrated that the

claims in the present action were colorable. Regarding the Nybergs' abuse of process claim,[9] the judge determined that the Nybergs marshaled sufficient evidence to state a colorable claim that the Wheltles' Land Court action was an abuse of process because it was purportedly brought for an ulterior or illegitimate purpose.[10] See Harrison II, 483 Mass. at 527-528. The Wheltles concede on appeal that the colorability determination was within the judge's discretion.

As to the intentional infliction of emotional distress count, the judge found that the Nybergs did not address the issue of colorability, and thus allowed the special motion to dismiss that claim. The Nybergs do not contest the judge's dismissal of the emotional distress claim on appeal.

Finally, the judge considered the pivotal issue in the present appeal: whether the Nybergs had met their burden under the second element of the second path of the second stage of the augmented framework to demonstrate that the present action was not brought primarily to chill the Wheltles' legitimate petitioning activity -- "i.e., that it was not retaliatory." Blanchard II, 483 Mass. at 204. The judge analyzed and applied each of the nonexclusive Blanchard II factors. He found that the first factor "mildly favors a determination" that the present action has characteristics of a typical SLAPP suit because, although the parties dispute each other's net worth, "the Nybergs are experienced and successful real estate professionals while the Wheltles are retired, septuagenarian homeowners who forewent certain lawful means of challenging the development . due to the expense." As to the second factor, the judge noted that the Nybergs brought the present action five and one-half months after judgment entered in the Land Court action, and that such "close temporal proximity weigh[ ]s in favor of a conclusion that the present matter was filed in retaliation for the Land Court [a]ction." As to the third factor, the judge noted that the Wheltles filed their special motion to dismiss approximately one and one-half months after being served with the complaint in the present action, and found that this factor weighs in favor of a conclusion ("albeit less strongly than other factors") "that the present matter is retaliatory." As to the fourth factor -- the strength of the litigation as a whole and the strength of the nonmoving party's claim -- the judge noted that the abuse of process action "is not weak," but the intentional infliction of emotional distress claim "is meritless," and the present action is based solely on the Land Court action and thus on the Wheltles' petitioning activity. Accordingly, the judge concluded that the fourth factor supports a conclusion of retaliation. The judge found that the fifth factor, evidence that the moving party's petitioning activity was in fact chilled, did not apply because the Land Court action had terminated and was not appealed. The judge determined that the sixth factor -- whether the damages requested by the Nybergs burdened the Wheltles' exercise of their legitimate petitioning rights -- did not facially apply because the Land Court action had terminated before the commencement of the present action. Nonetheless, the judge found that the factor "minimally" weighed in favor of a finding of retaliation in view of the Wheltles' averment that they abandoned lawful avenues for challenging the development of the Nyberg lot due to the cost of such measures, "which suggests that potential future lawful petitioning activities . may be hampered."

In addition to analyzing each factor, the judge was cognizant of his obligation to "assess the totality of the circumstances pertinent to the [Nybergs'] asserted primary purpose in bringing [their] claim," Blanchard I, 477 Mass. at 160, and consider "each claim as a whole, and holistically in light of the litigation," Blanchard II, 483 Mass. at 210. After "weighing [the] factors and all the facts and circumstances surrounding the [present action]," the judge, in his discretion, concluded that he was "not fairly assured that the [present action] is not a SLAPP suit brought to punish the Wheltles for the Land Court [a]ction," and was "fairly assured that the [present action] is retaliatory, in response to the Wheltles' partially successful Land Court [a]ction." Having determined that the Nybergs failed to meet their burden under the second element of the second path of the second stage of the augmented framework, the judge allowed the Wheltles' special motion to dismiss the abuse of process claim.

3. Analysis. The record shows that the judge followed the augmented framework sequentially, assiduously, and judiciously. His written decision reflects a comprehensive assessment of the totality of the circumstances and thoughtful consideration of "each claim as a whole, [examined] holistically in light of the litigation" as mandated by the augmented framework. Blanchard II, 483 Mass. at 210. Consequently, it is difficult to conclude that the judge abused his discretion.

The Nybergs disagree. They primarily argue that the present action could not have been retaliatory because it was filed more than five months after the Wheltles' petitioning activity in the Land Court had concluded and neither party had appealed from that judgment. Thus, the Nybergs contend, the present action cannot be deemed a SLAPP suit, brought primarily to chill the Wheltles' legitimate exercise of their right to petition, because there was no ongoing petitioning activity to influence, burden, or chill. This argument is unavailing. As the judge ruled, "ongoing petitioning activity is not required for the nonmoving party's suit to be retaliatory; it is enough if the suit seeks to punish the moving party for prior petitioning activity." Our case law supports the judge's conclusion. See Wenger v. Aceto, 451 Mass. 1, 7 n.6 (2008), quoting Fisher v. Lint, 69 Mass. App. Ct. 360, 363 (2007) ("the purpose of filing a SLAPP suit is not to prevail in the matter, but rather to use litigation to chill, intimidate, or punish citizens who have exercised their constitutional right to petition the government to redress a grievance" [emphasis added]). A lawsuit brought to "punish" petitioning activity may constitute as much of a SLAPP suit as a lawsuit brought to deter or chill ongoing petitioning activity. See Duracraft, 427 Mass. at 161 (SLAPP suits are "generally meritless suits brought . to deter common citizens from exercising their political or legal rights or to punish them for doing so" [citation omitted]). Further, as the judge recognized, punishing past petitioning may serve to burden, if not deter or chill, future petitioning activity.[11]

At oral argument, the Nybergs acknowledged that the above cited language from Wenger, Duracraft, and Lint survives the Blanchard II and Harrison II changes to the anti-SLAPP analysis, and thus that an action brought to "punish" legitimate petitioning activity may still constitute a SLAPP suit. However, they argue that it is neither retaliatory nor punishment to attempt to recover nearly $500,000 for abuse of process

when they were wronged by "the Wheltles' illegitimate adverse possession claims." Specifically, the Nybergs contend as follows: (1) the Land Court action was, as the Land Court judge wrote, "a pitched legal battle over literally every square inch of the disputed property, with the prize being the buildability or non-buildability" of the Nyberg lot; (2) viewed in that context, the Wheltles did not prevail by gaining less than ten square feet of "insignificant" land located under a concrete wall, but, in substance, lost the case as the result did not render the Nyberg lot unbuildable; and (3) in such circumstances, the Nybergs' primary motivation underlying the present action could not have been to punish the Wheltles' legitimate petitioning activity, but instead was to recover damages for the financial loss caused by the Wheltles' illegitimate and pretextual adverse possession claims.

There is a measure of persuasiveness in the Nybergs' argument. The Wheltles brought the Land Court action, at least in part, to prevent the development of the Nyberg lot. Although the Wheltles prevailed on a portion of their Land Court action, they succeeded only in recovering a sliver of land, plus they failed to render the Nyberg lot unbuildable. Furthermore, the judge determined that the Nybergs' abuse of process claim was colorable. See Harrison II, 483 Mass. at 527, quoting Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396, 408 (2002) ("[A]n abuse of process counterclaim may be brought even where the plaintiff has a meritorious claim. It is, indeed, 'immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them' "). In addition, while the Wheltles' motion, pleadings, and affidavits painted them as aging retirees of modest means and the Nybergs as powerful property developers, the Nybergs' pleadings and opposing affidavits disputed those portraits. The Nybergs averred that they were the sole employees of a small family business, while the Wheltles were people of substantial means, as illustrated by their ownership of two considerable properties. The Nybergs presented averments and evidence that the Wheltles coveted the Nyberg lot and acted as the "bully" here.

In view of the factual disputes at this early stage of the proceedings, the Nybergs argue that this case requires a jury resolution. Consistent with this argument, the Supreme Judicial Court has advised courts to analyze special motions to dismiss with caution in view of the obvious and considerable consequences stemming from the allowance of such a motion. See Harrison II, 483 Mass. at 529-530 ("We caution against the weaponization of the anti-SLAPP statute. [I]t is not properly used either as cudgel to bludgeon an opponent's resolve to exercise its petitioning rights, or as a shield to protect claims that, although colorable, were brought primarily to chill another party's legitimate petitioning activity"). See also Exxon Mobil Corp., 489 Mass. at 728 ("Filing a special motion has an immediate and important effect on the litigation, short-circuiting and rerouting the ordinary trial and appellate process"). But see Blanchard I, 477 Mass. at 147, quoting Duracraft, 427 Mass. at 161 ("anti-SLAPP statute provides a 'procedural remedy for early dismissal of the disfavored' lawsuits" -- i.e., those targeting legitimate petitioning activity). The Nybergs further maintain that in seeking damages they did

what every plaintiff-in-tort does when pursuing a tortfeasor, and that such activity was precisely what the Supreme Judicial Court recognized and endorsed as not being a SLAPP suit in Blanchard I, supra at 160.

The Nybergs' arguments demonstrate some of the difficulties associated with the application of the augmented framework. On one hand, the present action presents as a typical SLAPP case in that a supposedly wealthy developer sued abutters of supposedly modest means for petitioning in court to challenge a development project. See Blanchard II, 483 Mass. at 206. On the other hand, the Nybergs averred that far from being wealthy and powerful developers, they were a real estate broker and part-time bookkeeper attempting to develop a single-family residential property, while the Wheltles were not the "individual citizens of modest means" contemplated by the anti-SLAPP law. Id. The parties contested each other's motivations and representations. There is an inherent difficulty and, in some cases, prematurity in requiring a judge to make credibility determinations and discern a party's primary motivation predicated on affidavits, pleadings, and proffers, and not on a more complete evidentiary record [12] scrutinized through cross-examination.[13] Indeed, there is a notable tension between the standard of review, which requires the judge, in his or her discretion,[14] to be "fairly assured" that the challenged claim is not a SLAPP suit before denying a special motion to dismiss, and the Supreme Judicial Court's apparent restraint on that discretion in its admonition to proceed with caution before allowing the special motion to dismiss.[15] See Harrison II, 483 Mass. at 529-530.

Nonetheless, under the standards enumerated in Blanchard II and Harrison II, we cannot say that the judge abused his discretion or made an error of law. As discussed, the judge applied the augmented framework sequentially,[16] considered "each claim as a whole, and holistically . in light of the pleadings, affidavits, and the record as a whole," and "considered the conflicting evidence." Blanchard II, 483 Mass. at 210. The judge concluded that he was "not fairly assured that the Nybergs' suit is not a SLAPP suit." Although a different judge may have reached a different result, there was sufficient objective evidence supporting the judge's conclusion that he lacked "fair assurance" -- i.e., that he was not "confident" or "sure" -- that the action was not a SLAPP suit.[17] Id. at 205. As his determination did not constitute clear error that fell outside the range of reasonable alternatives, we discern no abuse of discretion in the allowance of the special motion to dismiss. See L.L., 470 Mass. at 185 n.27.

The Nybergs also argue that the import of the judge's decision is to render any abuse of process claim obsolete. We disagree. Although application of the special motion to dismiss may, in certain circumstances, create challenges to sustaining an abuse of process claim, application of the augmented framework has not abrogated the common-law tort of abuse of process. To the contrary, the Supreme Judicial Court has addressed and, in effect, rejected this argument. See Harrison I, 477 Mass. at 169, 174-175 & n.14.

Of final note, the Supreme Judicial Court recently expressed the following concern with the anti-SLAPP statute and case law:

"Although originally drafted with a particular purpose in mind -- that is, the prevention of lawsuits used by developers to punish and dissuade those objecting to their projects in the permitting process -- the anti-SLAPP statute's broadly drafted provisions, particularly its wide-ranging definition of petitioning activity, have led to a significant expansion of its application. The ever-increasing complexity of the anti-SLAPP case law has also made resolution of these cases difficult and time consuming. We recognize that this case law may require further reconsideration and simplification to ensure that the statutory purposes of the anti-SLAPP statute are accomplished and the orderly resolution of these cases is not disrupted." (Citations omitted.)

Exxon Mobil Corp., 489 Mass. at 728 n.5. Consistent with this observation, the instant case raises various concerns. Inasmuch as the present action involves a developer-abutter dispute and abuse of process claim -- traditional indicia of SLAPP matters -- and insofar as the judge sequentially and properly applied the augmented framework, the judge did not abuse his discretion in concluding that he was not fairly assured that the present action is not a SLAPP suit. Yet, the judge made this determination on a record in which several nonexclusive Blanchard II factors were at best marginally applicable. See note 16, supra. Furthermore, we have difficulty reconciling the admonition that a judge should be cautious in ending a party's petitioning activity at the early stage of a litigation with a standard that places the burden of proof on the nonmoving party, requires the judge to be fairly assured that the burden is met, and leaves this determination to judicial "discretion" after considering each claim "holistically in light of the litigation." Blanchard II, 483 Mass. at 203-205, 207, 210. In other contexts, dismissing a case at an early stage of the litigation requires a far more exacting burden on the moving party and, typically, requires that we view allegations or evidence in the light most favorable to the nonmoving party. See, e.g., Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021) (in context of motion to dismiss, court must accept facts asserted in complaint as true and draw all reasonable inferences in plaintiff's favor); Casseus v. Eastern Bus Co., 478 Mass. 786, 792 (2018) (summary judgment standard 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 judgment as a matter of law" [citation omitted]). See note 14, supra. Indeed, the fair assurance standard seemingly reverses the usual rule in that doubts about the viability of a claim are typically resolved by allowing it to be developed through the next stage of proceedings, not by dismissing it. We further note the concern regarding a process that authorizes the dismissal of claims on the basis of competing affidavits, disputed facts, and "holistic[ ]" consideration of the claims, particularly in cases, like the present one, that require resolution of the parties' motivations. Blanchard II, supra at 210. In this regard, as we have noted, the Nybergs insist that the present action cries out for a jury trial as the only appropriate way to resolve critical credibility disputes and determine the parties' true motivations. This argument has some force in that there are obvious difficulties in applying the latter stages of the augmented framework and requiring judges to be fairly assured that the

challenged claim is not a SLAPP suit, id. at 205, absent full discovery and testimony tested through cross-examination. Yet, the special motion to dismiss remedy exists, in large part, to avoid costly litigation and trial. See, e.g., Blanchard I, 477 Mass. at 147; Duracraft, 427 Mass. at 161. In any event, it is for the Supreme Judicial Court or the Legislature to address and resolve these concerns should they so choose.

For the aforementioned reasons, we conclude that there was no abuse of discretion or error of law in the allowance of the special motion to dismiss, and affirm the judgment.[18]

So ordered.

FOOTNOTES

3. Bruce Wheltle and two additional neighbors filed suit in the Superior Court challenging the order of conditions under Arlington's wetlands protection bylaw and regulations. Separately, neighbors -- not including the Wheltles -- appealed from the Arlington conservation commission approval to the Department of Environmental Protection. Neither of those matters is before us.

4. In response to the Wheltles' Land Court complaint, the Nybergs filed a special motion to dismiss pursuant to G. L. c. 231, § 59H. A Land Court judge, who was also the trial judge in that matter, denied the motion in a written memorandum and order. The correctness of the judgment in the Land Court action and the resolution of the special motion to dismiss in that matter are not before us on appeal.

5. The Supreme Judicial Court has explained that in applying the augmented framework sequentially, "by the time the motion judge reaches the last step, he or she will be in a more informed position to make an assessment of the 'totality of the circumstances pertinent to the nonmoving party's asserted primary purpose in bringing its claim,' as the augmented framework requires." Harrison II, 483 Mass. at 519, quoting Blanchard I, 477 Mass. at 160.

6. We note the sometimes interchangeable terminology used at this stage, including a showing that the suit was "not a 'SLAPP' suit," was "not brought primarily to chill," or was "not retaliatory." Blanchard II, 483 Mass. at 204-205.

7. In Blanchard II, 483 Mass. at 205-207, the Supreme Judicial Court explained the application of the fair assurance standard to the special motion to dismiss augmented framework. The court also noted that the "fair assurance standard typically has been applied in the context of criminal proceedings to evaluate whether a preserved error is nonprejudicial." Id. at 205. See generally Commonwealth v. Reed, 397 Mass. 440, 443 & n.4 (1986) (fair assurance standard not met where "the error possibly weakened [the defendant's] case in some significant way" and court is left with "grave doubt" [citations omitted]); Commonwealth v. Rodriguez, 92 Mass. App. Ct. 774, 781-782 (2018) (no fair

assurance where "evidence . was not overwhelming"); Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 405 & n.14 (2001) (no fair assurance where court is "left with grave doubt").

8. Massachusetts appellate courts have not explicitly stated whether the "discretion" afforded to a judge in deciding a special motion to dismiss is the same as the discretion defined in L.L., 470 Mass. at 185 n.27. The parties do not dispute that the standard enumerated in L.L. should apply, and thus we do not reach that issue.

9. An abuse of process claim has three elements: "(1) process was used, (2) for an ulterior or illegitimate purpose, (3) resulting in damage" (quotations omitted). Harrison II, 483 Mass. at 526-527, quoting Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636 (2010).

10. The judge found that the Nybergs' affidavits and pleadings alleged "sufficient evidence" of an ulterior or illegitimate purpose underlying the Land Court action, including the following: (1) the Wheltles had previously reached out to the prior owner of the abutting lot (at least a portion of which became the Nyberg lot) three times in an attempt to acquire some or all of that land; (2) the Land Court action sought adverse possession of only a small portion of the Nyberg lot, and had the Wheltles prevailed in full they would have gained title to an insignificant amount of "largely useless" square footage; and (3) the Wheltles' attorney told the Nybergs that her "clients are prepared to go straight out on their adverse possession case in order to block the [Nybergs'] project." As the judge noted, the information alleged by the Nybergs in their pleadings and affidavits was not necessarily sufficient to prove an abuse of process claim, but was sufficient, at this stage of the proceedings, to state a colorable abuse of process claim.

11. The judge concluded that the Wheltles' averments "suggest[ ] that potential future petitioning activities . may be hampered." The Nybergs assert that "[t]he combination of these words -- 'suggests,' 'potential,' 'future' and 'may' -- injects far more speculation and ambiguity than permissible to be able to support a conclusion that the Nybergs 'intended' to prevent some unknown future petitioning by the Wheltles." As discussed below, where the Nybergs bore the burden to prove that the challenged claim is not a SLAPP suit, such that the judge is "fairly assured" and "sure" that it is not, we cannot say that the judge erred or abused his discretion.

12. The parties appended various pleadings and documents to their affidavits in support of or opposition to the special motion to dismiss, many of which stemmed from the Land Court action.

13. General Laws c. 231, § 59H, provides that "discovery proceedings shall be stayed upon the filing of the special motion .; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted." It does not appear that the parties sought additional discovery before the

filing or resolution of the special motion to dismiss. The Supreme Judicial Court has cautioned that "[b]ecause discovery at this stage generally is inconsistent with the expedited procedural protections established by the anti-SLAPP statute, judges should be parsimonious in permitting it" apart from "exceptional cases" such as "to test the veracity of factual allegations" (citation omitted). Blanchard II, 483 Mass. at 212. That notwithstanding, the parties did supplement the special motion to dismiss with myriad exhibits and documents from the Land Court action. See note 12, supra.

14. At oral argument, the Nybergs suggested that rather than leave the determination of a special motion to dismiss to a judge's discretion at this early stage of the proceedings, the summary judgment standard -- i.e., viewing the evidence in the light most favorable to the nonmoving party -- would be a more fair and appropriate standard of review. Although that standard might provide greater consistency to the analysis of G. L. c. 231, § 59H, motions (but result in more denials of such motions), we are bound by the standard set forth by the Supreme Judicial Court.

15. We note the difficulty in defining the nature of the "discretion" that a judge has under a burden-shifting scheme that places the burden of proof on the nonmoving party and requires the judge to be "fairly assured" that the burden has been met. Blanchard II, 483 Mass. at 203, 207.

16. We note that the judge determined that several of the six nonexclusive Blanchard II factors considered at the second element of the second path of the second stage of the augmented framework were either marginally relevant or facially inapplicable in this case. For example, as discussed above, there was a factual dispute as to the applicability of the first factor that the judge chose to resolve at this early stage. Also, the judge found that the fifth factor -- evidence that the moving party's activity was in fact chilled -- did not apply because the Land Court action had already terminated. Likewise, the judge found that the sixth factor -- whether the damages requested by the Nybergs burdened the Wheltles' petitioning rights -- was not facially applicable. Finally, although the judge found that the second factor applied because the present action was commenced in "relatively close temporal proximity" to the Land Court action, any abuse of process claim or counterclaim is likely to be filed within a "relatively close temporal proximity" to the process being challenged. Moreover, there may be myriad and diverse strategic or other reasons that delay the bringing of a legal action or claim.

17. Here, the judge further concluded that he was "fairly assured that the Nybergs' suit is retaliatory." We do not read the augmented framework to mandate such a determination. Rather, anything short of fair assurance that the action was not a SLAPP suit left the Nybergs' burden unmet and required the judge to allow the special motion. See Blanchard II, 483 Mass. at 205.

18. The Wheltles' request for appellate attorney's fees and costs pursuant to G. L. c. 231, § 59H, is allowed. See Benoit v. Frederickson, 454 Mass. 148, 154 (2009). In accordance with the procedure set out in Fabre v. Walton, 441 Mass. 9, 10-11 (2004),

the Wheltles may, within fourteen days of the issuance of this opinion, submit an application for attorney's fees and costs with the appropriate supporting materials. The Nybergs shall have fourteen days thereafter to file a response to that application. The Wheltles' request for double attorney's fees and costs pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), is denied.

NEYMAN, J.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure I, Richard K. Latimer, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20(2)(A) and 4(A), because it is produced in the proportionally spaced Times New Roman font, size 14, with one inch margins all around, and contains no more than 10,721 words the parts hereof subject to Rule 16(a)(5)-(11).

/s/ Richard K. Latimer
Richard K. Latimer
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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(e), I hereby certify that on November 1, 2022, I filed the foregoing document electronically, using the eFileMA system, and a copy hereof will be served electronically by said system upon all registered filers with the Court, including Daryl S. Lapp, Esq., and Elizabeth Kelly, Esq., at Locke Lord LLP, 111 Huntington Avenue, Boston, MA 02199, counsel for Defendant-Appellee Northeastern University.

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