COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1220

JAMES DEVER

vs.

DAVID L. WARD & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

James Dever filed suit against his former employer, Moors & Cabot, Inc. (M&C), its counsel, Michaels, Ward & Rabinovitz, LLP (MWR), and several individuals associated with those two entities. A Superior Court judge entered an order that allowed the defendants' special motion to dismiss his amended complaint under the "anti-SLAPP" statute. See G. L. c. 231, § 59H, inserted by St. 1994, c. 283, § 1. On appeal from that order, in Dever v. Ward, 92 Mass. App. Ct. 175, 184 (2017) (Dever I), this court held that the judge did not err or abuse his discretion in allowing the special motion, but we remanded the case for further proceedings under the "augmented" framework for evaluating § 59H motions set out in Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 159-161 (2017) (Blanchard I). On

[1] Daniel Rabinovitz; Michaels, Ward & Rabinovitz, LLP; Daniel Michael Joyce; Moors & Cabot, Inc.; and Aaron Foley.

remand, the judge again allowed the special motion to dismiss and Dever again appeals. We affirm.

In Blanchard I, the Supreme Judicial Court augmented the framework from Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156 (1998), to provide a nonmoving party with an additional basis on which to defeat a special motion to dismiss under Duracraft's second stage. Under the augmented standard, should the nonmovant fail to prove by a preponderance of the evidence that the claim was "devoid of any reasonable factual support or any arguable basis in law," G. L. c. 231, § 59H, "the nonmoving party may . . . meet its second-stage burden and defeat the special motion to dismiss by demonstrating in the alternative that each challenged claim does not give rise to a 'SLAPP' suit." Blanchard I, 477 Mass. at 160. To do so, the nonmoving party must, considering the totality of the evidence, demonstrate "that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities." Id.

Here, Dever's amended complaint alleged twelve counts against some or all of the defendants: civil conspiracy, fraud, defamation, libel, two counts of abuse of process, two counts of malicious prosecution, and four counts of intentional or negligent infliction of emotional distress. All of these claims were based primarily on the defendants' reporting of Dever's

alleged criminal behavior to the Boston and Hanover Police Departments; seeking criminal complaints and harassment prevention orders in the Boston Municipal Court Department (BMC) and the District Court; and "referring to and repeatedly bringing up" Dever's alleged threatening and harassing conduct, and making other disparaging comments about him during the course of a Financial Industry Regulatory Authority (FINRA) arbitration.[2]

To meet his new burden on remand under Blanchard I, Dever was required to show that his primary motivating goal in filing each claim in his lawsuit was not brought to chill the defendants' legitimate petitioning activity. See Blanchard I, 477 Mass. at 159-161. See also 477 Harrison Ave., LLC v. Jace, Boston, LLC, 477 Mass. 162, 175 n.14 (2017). Dever has not undertaken a claim-by-claim analysis to show that each count of the complaint is worthy of judicial inquiry. See Blanchard I, supra at 160-161. Instead, Dever maintains that his claims could not have been brought in order to "chill" the defendants' petitioning activities because the petitioning activities before the court and FINRA had concluded by the time he filed suit.

[2] Dever also alleged that after the magistrate's hearing in the District Court, Foley's attorney, Rabinovitz, "took a boxing pose and stated [to Dever's attorney] 'drop the arbitration and my clients will drop the criminal complaints in the BMC.'"

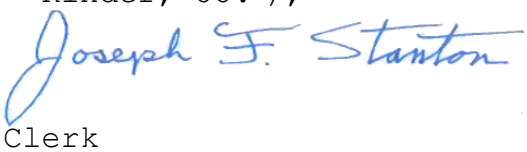
As the motion judge noted, although the arbitration before FINRA was over when Dever filed his lawsuit, the Superior Court had recently confirmed the award and Dever's appeal was pending. Thus, the defendants were still engaged in ongoing petitioning activity when Dever filed his lawsuit. In any event, the anti-SLAPP statute is intended as redress for lawsuits brought not only to chill or deter petitioning activity but also to punish those who have engaged in such activity. See Duracraft Corp., 427 Mass. at 161. Accordingly, the timing of the filing of Dever's lawsuit did not allow the judge to conclude with fair assurance that Dever's primary motivation was not to interfere with or burden the defendants' petitioning rights.

Dever also claims that FINRA is not a governmental agency as contemplated in G. L. c. 231, § 59H. In Dever I, we stated that "Dever has never argued, either in opposing the special motion in the trial court or on appeal, that FINRA arbitration is not a governmental proceeding. Accordingly, the issue is not before us." Dever I, 92 Mass. App. Ct. at 180. Although the motion judge exercised his discretion to reach this issue (and resolved it against Dever), we hold that the issue is waived, or at the very least, we adhere to our narrow remand order from

Dever I[3] and determine that the issue is again not before us. Similarly, Dever further claims that, because Daniel Joyce, David Ward, and Daniel Rabinovitz, individually, and the firms of M&C and MWR were not involved in the "petitioning activity" in the BMC or the District Court, they are not petitioners. However, this claim is also outside the scope of our remand order and we do not address it.[4]

Judgment affirmed.

By the Court (Meade, Hanlon & Kinder, JJ.[5]),



Clerk

Entered: November 6, 2019.

[3] We remanded this case to the Superior Court "solely" for consideration of the special motion to dismiss under the augmented standard announced in Blanchard I, 477 Mass. at 160.

[4] Defendants Daniel Michael Joyce, Moors & Cabot, Inc., and Aaron Foley's request for attorney's fees and costs is denied.

[5] The panelists are listed in order of seniority.