

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

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1476

HARVARD 45 ASSOCIATES, LLC, & others¹

vs.

BAHIG F. BISHAY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Background. The lengthy underlying history of the dispute between the parties, well known to all of them, need not be recited here. It suffices to say that after much litigation, this case was brought by the plaintiffs, Harvard 45 Associates, LLC, Brighton Avenue Associates, LLC (BAA), The Hamilton Company, Inc., Harold Brown, and Enrique Darer, alleging abuse of process, and seeking an injunction against the defendant Bahig Bishay. At the time this suit was filed, Bishay was in a personal receivership case in Essex County Superior Court. After this lawsuit was filed, on the motion of one of the creditors in that receivership proceeding, an Essex Superior

¹ Brighton Avenue Associates, LLC, The Hamilton Company, Inc., Enrique Darer, and Sally Michael and Robert Somma, as personal representatives of the Estate of Harold Brown. The personal representatives were substituted during the pendency of this appeal for the now deceased Harold Brown, one of the original plaintiffs.

Court judge issued an injunction ordering that all complaints filed by Bishay in any Massachusetts State court must be accompanied by a copy of the injunction, and that before requiring any defendant to file an answer or other responsive pleading, a preliminary hearing must be held before the Regional Administrative Justice (AJ) for the county in which the court is located, or the AJ's designee, to determine whether the claims are frivolous.

Subsequently, Bishay filed a new lawsuit in Suffolk County Superior Court without attaching a copy of the Essex Superior Court injunction. He also moved to reopen an old case in Suffolk Superior Court, something to which the Essex County injunction was construed not to apply.

In the instant matter, in light of this conduct, a judge in the Norfolk County Superior Court allowed partial summary judgment in favor of the plaintiffs, and issued an injunctive order that prohibits Bishay from filing any complaint or motion to reopen a closed case in Norfolk Superior Court against any of the plaintiffs without attaching a copy of the order and the judge's memorandum and decision. The order requires that the Regional Administrative Justice of Norfolk County conduct a brief hearing to determine whether the claims contained in the complaint are frivolous. If they are, the complaint shall be dismissed or the motion to reopen denied. If not, the complaint

or motion shall proceed in the usual manner. The judge's order stated as follows:

"It is clear from the record that Bishay intends to seek to reopen closed cases in the future, and has already sought to do so on at least one occasion since the Essex County injunction was entered. The majority of Bishay's motions to reopen cases apparently have been themselves denied as groundless. In order to prevent Bishay from wasting scarce judicial resources in the future, the Court finds that Bishay should be barred from filing actions to reopen cases without prior court approval, beyond any injunctive relief already granted in the Essex County action."

Bishay also filed a counterclaim in this action. It was ultimately dismissed under the anti-SLAPP statute, G. L. c. 231, § 59H, and final judgment entered. Bishay now appeals both the issuance of the injunction and the dismissal of his counterclaim.

Discussion. As to the injunction, Bishay argues that the instant action was barred by both claim and issue preclusion due to the litigation in the Essex County proceeding that led to the issuance of the injunction there. We disagree. First, there is no claim preclusion. "Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action. . . . It is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit"

(quotation omitted). O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259 (1998).

Of the plaintiffs, only BAA was a party to that receivership action. It was not a creditor, it did not bring the ancillary motion in that proceeding seeking the injunction that was issued there, and it did not litigate that motion. This does not involve an attempt, therefore, to "relitigate" anything, and claim preclusion does not apply. Nor is this the same claim that was litigated by the creditors in the previous action, even viewing this as a question about whether Bishay is a vexatious litigant, such that it should, or even could, have been brought by anyone in the prior action. The injunction here was found necessary only as a result of Bishay's conduct, attempting to reopen a closed case, that took place subsequent to the entry of the prior injunction, action of a type Bishay indicated in the trial court that he plans to continue. This, therefore, is not the same as any claim that was decided in the prior litigation. See St. Louis v. Baystate Med. Ctr., Inc., 30 Mass. App. Ct. 393, 399 (1991) ("A claim is the same for res judicata purposes if it is derived from the same transaction or series of connected transactions").

Nor is the injunction barred by the doctrine of issue preclusion, which requires that the identical issue sought to be precluded actually was litigated, and determined in a prior

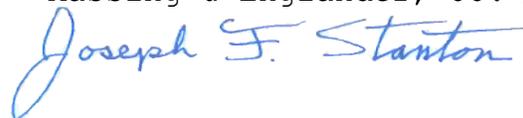
action between the parties or their privies, and that the determination was essential to the judgment in the prior action. Kobrin v. Board of Registration in Med., 444 Mass. 837, 843-844 (2005). As described above, no issue of vexatious litigation or abuse of process has ever previously been actually litigated between these parties. And, obviously, neither has the question whether Bishay should be restrained from seeking to reopen closed cases.

With respect to the dismissal of Bishay's counterclaim, as the motion judge found, dismissal was required under the anti-SLAPP statute, G. L. c. 231, § 59H. The only misconduct Bishay alleged was the filing of this lawsuit, which is petitioning activity. In light of our affirmance of the injunction issued in this case, it is clear that Bishay has not met his burden to demonstrate by a preponderance of the evidence that the plaintiffs' petitioning activity was "devoid of any reasonable factual support or any arguable basis in law." Fabre v. Walton,

436 Mass. 517, 524 (2002).

Judgment affirmed.

By the Court (Rubin,
Massing & Englander, JJ.²),



Clerk

Entered: November 8, 2019.

² The panelists are listed in order of seniority.