COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-438

BARRY FINKEL

vs.

LOVENBERG & ASSOCIATES, P.C., & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Barry Finkel, appeals from the allowance of certain of the defendants' special motions to dismiss pursuant to G. L. c. 231, § 59H, commonly referred to as the anti-SLAPP statute. With regard to so much of the judgment as entered in favor of defendants Nancy Marks and Margaret Lys Hunt, we affirm in part and reverse in part. We affirm so much of the judgment as entered in favor of defendants Melissa Polland and Lovenberg & Associates, P.C. (collectively Lovenberg), in its entirety.

Background. We summarize the facts as alleged in Finkel's complaint, supplemented by the affidavits and exhibits submitted

[1] Melissa Polland, Esq.; Nancy Marks; Margaret Lys Hunt; Trustees of the Goldsmith Arboretum Condominium Trust; Harmon Law Offices, P.C.; Green Tree Servicing, LLC; and Bank of America, N.A.

by the parties in connection with their special motions to dismiss. See Dever v. Ward, 92 Mass. App. Ct. 175, 176 (2017).

Marks, Hunt, and Finkel each own one unit in a three-unit condominium located in Jamaica Plain. The condominium is managed by the Goldsmith Arboretum Condominium Trust (trust). In 2009, there was a flood in the basement of the building. Finkel, who was a practicing attorney, claims that Marks and Hunt agreed that he "would interact" on behalf of the three of them with the company, Restorepro, Inc. (Restorepro), that was hired to clean and restore the premises. A dispute arose, and Restorepro sued Finkel individually. Finkel alleges that he, Marks and Hunt further agreed that he would not implead Marks and Hunt as defendants and that Marks and Hunt would compensate him for his legal work. Finkel asserts that Marks and Hunt failed to pay him and then failed to contribute to the costs of the litigation and the judgment that Restorepro eventually obtained against him, despite having received the benefit of not having to participate in the lawsuit. As a result of Marks and Hunt's alleged conduct, Finkel refused to pay his monthly condominium fees and assessments relating to the maintenance of the condominium's common areas. In 2012, Marks and Hunt executed and recorded trustee certificates in the Suffolk County Registry of Deeds naming themselves as the trustees of the

trust.[2] Acting as trustees, Marks and Hunt retained Lovenberg to represent the trust and eventually filed three lawsuits.

The first lawsuit, filed in August 2013, sought injunctive relief and damages against Finkel for his interference with the operation and maintenance of the condominium. After a hearing, a judge of the Superior Court granted a preliminary injunction, concluding that Marks and Hunt had "established a reasonable likelihood of proving that [they] are duly elected trustees in accordance with the requirements of the Condominium documents" and that the trust "is likely to suffer irreparable harm if [Finkel] continues to interfere with the effort to repair the property."[3]

The second and third lawsuits were brought against Finkel and Finkel's mortgage lender, Green Tree Servicing, LLC (Green Tree). In the second action, filed on April 1, 2014, they alleged that Finkel had failed to pay $8,725.50 in assessed common expenses and charges. In the third action, filed on January 5, 2015, Marks and Hunt sought an additional $1,969.50 in unpaid common area assessments. Both cases were resolved when Green Tree agreed to pay the assessments.

[2] The certificates were refiled in 2014 and 2015.
[3] Finkel filed a motion for reconsideration, which was denied. He did not appeal from the order denying the motion.

Soon thereafter, Finkel commenced this action against Marks, Hunt, and Lovenberg.[4] As to Marks and Hunt, the complaint alleges slander of title (Count One), breach of contract (Count Three), tortious interference with contractual relationships (Count Ten), willful malfeasance (Count Eleven), and unjust enrichment (Count Twelve), and seeks a declaratory judgment that Marks and Hunt are not duly elected trustees and that Finkel does not owe any statutory assessments (Count Two).[5] As to Lovenberg, Finkel asserts claims of slander of title (Count One), making false statements in connection with debt collection under 940 Code Mass. Regs. § 7.00 (2012) (Count Four), violations of G. L. c. 93A, §§ 2 and 9 (Count Six), and tortious interference with contractual relationships (Count Ten).

The defendants filed motions to dismiss the complaint for failure to state a claim under Mass. R. Civ. P. 12 (b) (6), as appearing at 365 Mass. 754 (1974), and pursuant to G. L. c. 231, § 59H. Following a hearing, a judge of the Superior Court allowed the special motions to dismiss without ruling on the

[4] Finkel also sued Green Tree, Green Tree's attorneys, Harmon Law Offices, P.C., and Bank of America, N.A. (Bank of America), where the trust had its bank account. On cross motions for summary judgment, a different judge of the Superior Court entered judgment in favor of Green Tree. Finkel's appeal from that judgment is not before us. The cases against the remaining defendants were dismissed by stipulation.

[5] The counts are not numbered consistently throughout the complaint. We refer to the sequence set forth in paragraphs 68 through 122 of the complaint.

motions to dismiss for failure to state a claim.[6] The claims against Lovenberg were also dismissed on the ground that they were barred by the absolute privilege which attaches to communications or statements made by an attorney on behalf of a client during the conduct of litigation.

Discussion. The special motion procedure under G. L. c. 231, § 59H employs a two-step framework. See Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167-168 (1998). See also Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 159-161 (2017) (augmenting Duracraft framework). First, the moving party must "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." Duracraft Corp., supra at 167-168. See also Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002). The statute defines petitioning activities broadly. "'A party's exercise of its right of petition' is defined . . . as: 'any written or oral statement made before or submitted to a legislative, executive, or judicial body . . . ; [or] any written or oral statement made in connection with an issue under consideration or review by a

[6] The defendants' motions for attorney's fees and costs incurred in connection with the filing of their special motions to dismiss were allowed.

legislative, executive, or judicial body[.]'" Plante v. Wylie, 63 Mass. App. Ct. 151, 159 (2005), quoting G. L. c. 231, § 59H.

If the moving party sustains its threshold burden, the opposing party must show "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.'" Dever, 92 Mass. App. Ct. at 178, quoting G. L. c. 231, § 59H. We "review the judge's decision to grant a special motion to dismiss to determine whether there was an abuse of discretion or error of law." Id. at 178-179.

1. Claims against Marks and Hunt. The factual support for Finkel's claim of slander of title against Marks and Hunt is the recording of trustee certificates with the Suffolk County Registry of Deeds identifying Marks and Hunt as trustees. This conduct constitutes the making of written statements submitted to an executive body, and, consequently, constitutes petitioning activity. See Plante, 63 Mass. App. Ct. at 159, quoting G. L. c. 231, § 59H. Thus, Marks and Hunt met their threshold burden with respect to Count One.

Finkel's request for a declaration that there were no duly elected trustees and no valid statutory assessments against him, and that the management of the condominium requires three to five trustees, is based in part on Marks and Hunt's recording of

the trustee certificates and in part on the lawsuits Marks and Hunt filed to recover unpaid fees and assessments owed to the trust and to prevent Finkel from interfering with the management of the condominium. In both instances, the conduct complained of constitutes petitioning activity. As noted above, the recording of the trustee certificates constitutes petitioning activity. See Plante, 63 Mass. App. Ct. at 159. In addition, Marks and Hunt's "appeals . . . to the courts were quintessential petitioning activity" that is protected by the statute. Dever, 92 Mass. App. Ct. at 179. Accordingly, Marks and Hunt met their threshold burden as to this claim as well.

Finkel's claim of tortious interference is based on Marks and Hunt's alleged interference with his relationships with Bank of America, Green Tree, and the trust. Finkel claims that Marks and Hunt "induced" Bank of America to remove Finkel from an account set up for the condominium owners to receive deposits for the operation of the condominium by claiming authority over the property as trustees and that they "report[ed]" to Green Tree that Finkel had unpaid assessments, which Green Tree paid as part of settling two of the lawsuits against Finkel. All of these allegations arise from Marks and Hunt's filing suit against Finkel and, therefore, Marks and Hunt have demonstrated that Finkel's claim of tortious interference is based on petitioning activity.

We reach a different conclusion with regard to Finkel's claims of breach of contract and unjust enrichment. The claim of breach of contract is based on Finkel's assertion that there was a longstanding agreement among the parties regarding the management of the condominium and that Marks and Hunt breached this agreement in a number of ways. To the extent that Finkel alleges that Marks and Hunt breached the alleged agreement by claiming to be trustees and proceeding to manage the condominium, including by filing lawsuits against him, this claim is based upon both categories of petitioning activity previously discussed, Marks and Hunt's filing trustee certificates with the Registry of Deeds and their petitioning the courts. See Dever, 92 Mass. App. Ct. at 179; Plante, 63 Mass. App. Ct. at 159. However, Finkel also alleges that Marks and Hunt failed to compensate him for the costs of the Restorepro litigation according to the terms of the alleged agreement. This failure amounts to private conduct which does not involve "any statement or communicative conduct by [the petitioners, here Marks and Hunt] designed to influence, inform, or even reach a government body." Citizens Ins. Co. of Am. v. 290 Auto Body, Inc., 95 Mass. App. Ct. 515, 518 (2019).

Marks and Hunt argue that Finkel's delay in bringing his breach of contract claim until years after it arose demonstrates that his lawsuit was designed to punish them for exercising

their right to petition, i.e., to sue Finkel in the first place. We rejected a similar argument in Citizens and held that "the nonmovant's [here, Finkel's] alleged motivation for filing the []claim" is not relevant.[7] Id. In sum, because Count Three is based in part on conduct that is not protected petitioning activity, Marks and Hunt have failed to fully meet their initial burden under the Duracraft framework as to Finkel's breach of contract claim. Accordingly, Count Three should not have been dismissed under § 59H.

Finkel's claim against Marks and Hunt for unjust enrichment alleges that Marks and Hunt failed to compensate him for his management of the repairs to the condominium after the 2009 flooding incident and for the costs and judgment that he later incurred in the dispute with the repair company. This claim is based entirely on private conduct that does not involve statements to any government body and therefore is not petitioning activity. See Citizens Ins. Co. of Am., 95 Mass.

[7] We are similarly unpersuaded by Marks and Hunt's argument that Finkel's breach of contract claim "lacks merit." "Even if a [complaint] lacks merit, an issue we need not decide, a meritless claim alone is insufficient to warrant relief under the anti-SLAPP statute." Citizens Ins. Co. of Am., 95 Mass. App. Ct. at 519. See also O'Gara v. St. Germain, 91 Mass. App. Ct. 490, 496 (2017) ("In ruling on a § 59H motion, the judge's role is not to decide whether the opponent's pleading — i.e., the complaint, cross claim or counterclaim — plausibly suggests an entitlement to relief so as to withstand a motion to dismiss under Mass. R. Civ. P. 12 (b) (6)").

App. Ct. at 518. For this reason, Marks and Hunt have not met their burden under the first step of the Duracraft framework and Count Twelve should not have been dismissed under § 59H.[8]

Because Marks and Hunt made the requisite threshold showing that Finkel's claims of slander of title, tortious interference, and, in part, breach of contract, as well as his claim for declaratory relief, are based on protected petitioning activity, the burden shifted to Finkel to show that Marks and Hunt's petitioning activity was devoid of any reasonable factual support or any arguable basis in law, and that their acts caused him actual injury. See Office One, Inc., 437 Mass at 123. That Finkel disputes Marks and Hunt's authority to act as trustees does not, on its own, satisfy this burden. It matters not, as Finkel asserts, that no judge has declared that Marks and Hunt are duly elected trustees. Finkel has not met his burden of demonstrating that Marks and Hunt's conduct lacked factual or legal support.[9] Accordingly, the judge did not abuse her discretion in allowing Marks and Hunt's special motions to dismiss as to Counts One, Two, Ten, and Eleven.

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[8] Marks and Hunt's argument that Finkel's claim of unjust enrichment is "baseless" is not relevant to our analysis and we do not address it. See note 7, supra.

[9] Given our conclusion we need not reach the issue whether Finkel can demonstrate that he suffered actual harm.

2. Claims against Lovenberg. Attorneys who are sued for voicing the positions of petitioning clients may bring a special motion to dismiss under § 59H. See Plante, 63 Mass. App. Ct. at 157. Finkel's claims against Lovenberg are based on Lovenberg's recording of trustee certificates in the Registry of Deeds indicating that Marks and Hunt were duly elected trustees and on Lovenberg's efforts on behalf of the trust to collect unpaid assessments which Finkel claims he did not owe. Thus, all of Finkel's claims against Lovenberg – slander of title, making false statements in connection with debt collection under 940 Code Mass. Regs. § 7.00 (2012), violations of G. L. c. 93A, §§ 2 and 9, and tortious interference with contractual relationships – are based entirely on Marks and Hunt's petitioning activity. See Dever, 92 Mass. App. Ct. at 179; Plante, 63 Mass. App. Ct. at 159. We further conclude, as we have discussed, that Finkel did not meet his burden of demonstrating that the petitioning activity at issue here was devoid of any reasonable factual support or arguable basis in law. See Office One, Inc., 437 Mass at 123. Consequently, the claims brought against Lovenberg were properly dismissed under the anti-SLAPP statute.

In addition, Finkel's claims against Lovenberg are based on conduct and statements made by Lovenberg "in the institution or conduct of litigation" on behalf of Marks and Hunt. Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140 (1996).

Such statements are protected by an "absolute privilege" which "protects the maker from any civil liability based thereon" and "provides a complete defense" (citations omitted). Id. Accordingly, there likewise was no error in dismissing Finkel's claims against Lovenberg on the ground of privilege.

3. Fees and costs. Marks and Hunt did not request an award of appellate attorney's fees and costs in their brief. However, they are entitled to such an award under the anti-SLAPP statute. See McLarnon v. Jokisch, 431 Mass. 343, 349-350 (2000). We award Marks and Hunt appellate attorney's fees and costs in part. They are entitled only to those fees and costs incurred in connection with Finkel's appeal from so much of the judgment as dismissed his claims of slander of title, tortious interference, and willful malfeasance, as well as his request for a declaratory judgment. Lovenberg's request for an award of appellate attorney's fees and costs is allowed. The defendants may file applications for appellate attorney's fees and costs within fourteen days of the date of this decision, and Finkel shall have fourteen days thereafter in which to respond. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

Conclusion. So much of the judgment that dismissed Finkel's claims of unjust enrichment and breach of contract based on Marks and Hunt's failure to pay him under the alleged

agreement pertaining to the Restorepro litigation is vacated. The remainder of the judgment is affirmed.

So ordered.

By the Court (Green, C.J., Vuono & Henry, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: July 21, 2021.

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