COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-686

COMMONWEALTH

vs.

THE LANDING GROUP, INC., & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendants appeal from the judgment on the pleadings entered in the Superior Court in favor of the plaintiff, the Commonwealth of Massachusetts (Commonwealth).[2] We reverse the judgment and remand for further proceedings.

Background. We summarize certain undisputed facts from the record, mindful that where the facts are in dispute, we must accept the defendants' version of them. See Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 723 (2013). The individual defendant, Michael Rauseo, is the sole officer of The Landing Group, Inc. (TLG), which owns 175 Granite Street, Rockport, Massachusetts; the property in question. This property is

[1] Michael J. Rauseo.

[2] The Commonwealth of Massachusetts brought this enforcement action "by and through" the Department of Environmental Protection and the Attorney General.

bounded to the east by Pigeon Cove, a small bay off the Atlantic Ocean. The boundary between the property and the waters of Pigeon Cove is formed by a seawall, which is in a state of disrepair.

The construction of the seawall and the fill behind it was authorized by legislative grants in 1826 and 1830, as well as tidelands licenses granted in 1895, 1918, and 1941. The most recent recorded license for the property -- issued on July 2, 1941 -- authorizes a thirteen-foot high "masonry" wall. As it exists now, the seawall is made of "rows of granite blocks that extend from below the mudline to above the high-water mark," atop of which are "[c]oncrete caps of varying heights . . . secured to the granite blocks[] with steel dowels and clips drilled into the granite."

In December of 2016, the defendants sought approval from the Rockport Conservation Commission (RCC) to "raise the seawall height" to fifteen feet and to fill "specific areas, as necessary." The RCC approved the work and issued an order of conditions (OOC). The Department of Environmental Protection (DEP) appealed the OOC and issued a superseding OOC denying approval for the project. The defendants appealed this denial and no permit issued.[3]

[3] The defendants state that the DEP denied them a permit. The Commonwealth represents that the defendants failed to complete

On June 1, 2018, Rauseo e-mailed the Rockport building inspector to inform him that Rauseo intended to perform "repair work" on the seawall. In his e-mail, Rauseo cited Bourne v. Austin, 19 Mass. App. Ct. 738 (1985), as support for proceeding without a valid OOC.[4]

The defendants thereupon commenced the work at issue in this case. It is uncontested that this work consisted of "removing the concrete debris," "replacing the steel[] dowels and clips with marine grade re[]bar," and pouring concrete "specifically designed for seawall cap applications." Rauseo directed contractors to "repair and replace the existing concrete cap, without elevating it, and without filling in any land areas." The new concrete caps were to be "in the same size and dimensions as previously existed." It also is uncontested that the defendants poured sixteen inches of concrete in one area without a permit.[5]

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the application and to comply with requests for additional information. For our purposes, the reason a permit did not issue is irrelevant.

[4] The defendants might have avoided this litigation by -- prior to beginning this work -- simply seeking a determination of the applicability of the Wetlands Protection Act (G. L. c. 131, § 40), see 310 Code Mass. Regs. § 10.05(3) (2014), and of the Waterways Act (G. L. c. 91), see 310 Code Mass. Regs. § 9.06 (2014), or by filing permit and license applications with the associated fees, see 310 Code Mass. Regs. §§ 4.04 and 9.11 (2014).

[5] The defendants claim that this concrete pour "brought the wall to an elevation of [nine] feet, which is far below what it was

In June of 2018, the RCC issued a cease and desist order against the defendants on the grounds that they were "[w]orking on the seawall (coastal bank) without a permit" by drilling into the seawall, installing rebar, and mortaring the rebar "into the top stone of the seawall." On August 16 and 24, 2018, the DEP issued unilateral administrative orders (UAO), ordering the defendants to cease and desist work on the seawall because such work violated the Wetlands Protection Act, G. L. c. 131, § 40 (WPA), and the Waterways Act, G. L. c. 91 (chapter 91). The RCC also fined the defendants for failing to comply with "earlier" enforcement orders, the WPA, and a "local wetlands bylaw."

On September 4, 2018, the Commonwealth filed a complaint in the Superior Court alleging that the defendants continued to perform work "without authorization" and "in direct violation of multiple orders from [the RCC] and [the DEP] to cease this illegal activity." The Commonwealth sought a preliminary injunction, a "permanent injunction requiring future compliance with the WPA and [c]hapter 91," and civil penalties. On the same date, the Superior Court ordered the defendants to stop work on the seawall "until further order" and ordered a continuance of the case so that the defendants could file an application for emergency authorization to perform the work.

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before. The prior concrete cap in this area was 3.7 [feet] above the seawall."

On September 18, 2018, the trial court entered a preliminary injunction restraining further work on the seawall. On October 11, 2019, the judge allowed the Commonwealth's motion for judgment on the pleadings and entered judgment against the defendants.[6] The judge fined each defendant $2,500 under the WPA and $2,500 under chapter 91, and ordered the defendants to cease work on the seawall and to seek a permit to undo the work they had already performed. The judge subsequently stayed so much of the order and judgment pertaining to the latter provision in order to allow the defendants to apply for a permit to perform work at the site.[7]

After oral argument, we requested supplemental briefing from the parties. The defendants had appealed the UAOs. However, when the motion judge issued the preliminary injunction in this case, the DEP withdrew the UAOs and the administrative

[6] The judge took judicial notice of "the admissions contained in Rauseo's affidavit regarding the nature of the work on the seawall." Neither party challenges the appropriateness of this judicial notice and the parties waive any objection to the judge having done so. We will consider the same materials that were before the motion judge. See Navarro v. Burgess, 99 Mass. App. Ct. 466, 467 n. 4 (2021). Nonetheless, the better procedure would have been for the judge to have converted the motion for judgment on the pleadings to a motion for summary judgment, see Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), and for the parties to have followed the procedures outlined in Rule 9A of the Rules of the Superior Court (2018).

[7] The stay authorizes the defendants to seek approval to continue the work at issue here. Neither party contends that the case is now moot.

appeal was dismissed as moot. Both parties represented that the defendants have filed a permit application to perform work on the property and that the hearing for that permit application was scheduled for July 28, 2021.[8]

Standard of review. "We review the allowance of a motion for judgment on the pleadings de novo." Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013). In considering such a motion, "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false" (quotation and citation omitted). Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984). See Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 596 (2010). Judgment on the pleadings is appropriate "only when the text of the pleadings produces no dispute over material facts." Tanner v. Board of Appeals of Belmont, 27 Mass. App. Ct. 1181, 1182 (1989). In considering a motion for judgment on the pleadings, a court can "properly take into consideration facts of which judicial notice may be taken," Jarosz v. Palmer, 49 Mass. App. Ct. 834, 835 (2000), S.C., 436 Mass. 526, 530 (2002), including "matters of public record, . . . items appearing in the record of the case, and exhibits

[8] Any information about the outcome of that hearing is not before us.

attached to the complaint." Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). A court may only rule on a motion for judgment on the pleadings when "there are no material issues of fact remaining to be determined." Merriam, 464 Mass. at 726.

Discussion. The WPA provides:

> "No person shall remove, fill, dredge or alter any bank, riverfront area, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean . . . or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, sewer, water, telephone, telegraph and other telecommunication services, without filing written notice . . . and without receiving and complying with an order of conditions and provided all appeal periods have elapsed." G. L. c. 131, § 40.

The defendants contend that the work at issue is a repair and is therefore exempt from the permitting requirements of the WPA. The Commonwealth argues that the work constitutes an alteration or filling and therefore requires such a permit.

Similarly, the regulations to chapter 91 allow a landowner to perform, without a license or permit, "maintenance, repair, and minor modifications . . . of fill or structures for which a grant or license is presently valid." 310 Code Mass. Regs. § 9.05(3)(a) (2014). See 310 Code Mass. Regs. § 9.22 (2014) (providing nonexhaustive list of authorized maintenance and repairs). While the defendants argue that they are performing

repairs and maintenance pursuant to their regulatory obligations and therefore that they did not need to obtain permitting or a license, the Commonwealth argues that the work the defendants are performing does not meet the definition of exempt maintenance and repairs.

We conclude that the record before us is insufficient to resolve the necessary factual inquiries. See Canter v. Planning Bd. of Westborough, 7 Mass. App. Ct. 805, 808 (1979) ("neither a motion under rule 12 [c] nor one converted to a motion for summary judgment under rule 56 can be granted properly where there is a genuine issue of material fact"). As the DEP moved for judgment on the pleadings, we must view the evidence in the light most favorable to the defendants. For purposes of deciding this appeal, the allegations contained in the affidavits submitted by the Commonwealth, particularly those allegations relating to the environmental impact of the work on the seawall and to the unverified third-party reports that the defendants were performing certain work are not dispositive. When we, as we must for purposes of this motion, view the case in the light most favorable to the defendants, there is a factual dispute about whether the defendants were repairing or altering the seawall. While the defendants did admit to performing some work on the wall up through July 26, 2018, their

admissions do not establish as a matter of law that they violated the WPA, chapter 91, or the UAOs issued in August 2018.

In granting judgment on the pleadings, the motion judge reasoned that the work at issue "falls well within the modern definition of 'alter'" under the WPA. However, the factual basis for that conclusion is not clear on this record. For example, the judge does not state whether, when concluding that this work constituted an alteration, the judge used as a starting point the condition of the wall and wetlands immediately prior to the addition of the caps, the original condition of the caps, or the caps in their damaged state. Further, while the judge found that the defendants admitted they were using "different, newer materials" for the work on the seawall, in violation of the regulations to chapter 91, see 310 Code Mass. Regs. § 9.22(1), the record contains no information about how the replacement concrete is different from the old concrete, particularly whether the existing caps are in fact constructed from "[c]oncrete specially designed for seawall cap applications." Nor does any party address that the only license presented on the record does not authorize concrete caps. Furthermore, the DEP has provided no information about whether it has a statute of limitations for prosecuting preexisting, undiscovered violations if the concrete caps were not authorized.

Remand is thus appropriate to resolve the factual disputes apparent on the record. We also note that, given the complexity of this case and the multitude of procedural avenues remaining open, as well as the lack of briefing concerning legislative intent, the interests of judicial efficiency militate in favor of declining the parties' invitation to determine the scope or applicability of the WPA and chapter 91 to the work at issue at this juncture. Finally, we note that while the defendants argue that a reversal of the trial court decision would "allow [Rauseo] to do . . . the [] work that was enjoined below in this case," the defendants have only appealed from the judgment on the pleadings and have not appealed from the preliminary injunction. See G. L. c. 231, § 118; Mass. R. A. P. 3 (a), (c), as appearing in 481 Mass. 1603 (2019). Accordingly, the preliminary injunction remains in place pending further proceedings and the defendants remain subject to penalties for violating that injunction.

We express no opinion whether the work the defendants performed in 2018 violates the WPA or chapter 91; our decision reverses the motion judge's decision only insofar as we conclude that in the light most favorable to the nonmoving party, there are material disputes of fact such that the record is

inappropriate for judgment on the pleadings.

The judgment is reversed and the matter is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Sullivan, Henry & Grant, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: September 2, 2021.

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