COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-743

KEITH DAYE

vs.

COBB CORNER, LLC, & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Keith Daye, appeals from a Superior Court judgment dismissing Daye's complaint following the allowance of a special motion to dismiss filed by the defendant, Cobb Corner, LLC (Cobb), pursuant to G. L. c. 231, § 59H, the anti-SLAPP statute.[2] Concluding that Daye's claims were both colorable as a matter of law at the time of filing and nonretaliatory, we reverse.

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[1] Law Office of Glen Hannington. Though listed as a defendant on the complaint, the Law Office is not a party to this appeal and was voluntarily dismissed from the underlying action.

[2] Cobb has also moved to dismiss the appeal because Daye noticed the appeal after the motion judge's Memorandum and Order issued but prior to the entry of final judgment. We exercise our discretion to hear the appeal as "a decision on the merits should not be avoided on the technicality that a premature notice of appeal was or may have been filed, where no other party has been prejudiced by that fact." Creatini v. McHugh, 99 Mass. App. Ct. 126, 128 (2021), quoting Swampscott Educ. Ass'n v. Swampscott, 391 Mass. 864, 865-866 (1984).

Background. The relevant facts are not disputed. In April 2017, Cobb brought an action against Daye and Daye's businesses, Untouchable Auto, LLC and K/A Auto Body, Inc., seeking payment due to Cobb pursuant to a commercial lease. In February 2020, the parties filed an agreement for judgment in Cobb's favor and against Daye for $29,000. The court issued an execution on the judgment, which the Sheriff's Office levied on Daye's property by recording a copy of the execution at the Registry of Deeds. The execution stated "I have this day levied upon, seized and taken all right, title and interest that the within named Judgment Debtor had in such real estate (not exempt by law from levy on execution). . . . And immediately afterward, I suspended the further levy on this execution . . . by written request of the attorney for the within named judgment creditor." Cobb instructed the sheriff to levy and suspend the execution notwithstanding the fact that Daye had recorded a declaration of homestead on the property in December 2016. In October 2020, Daye sent Cobb a c. 93A demand letter requesting that the levy be discharged. Daye claimed that the levy on Daye's homestead property violated G. L. c. 188, § 3 (b) and was an unfair and deceptive practice in violation of G. L. c. 93A, § 2.

In November 2020, Daye filed the present action against Cobb. Daye sought a declaratory judgment that the levy on the homestead property was unlawful, violated G. L. c. 93A as an

unfair or deceptive practice, and constituted a slander of title. Cobb then filed a special motion to dismiss pursuant to G. L. c. 231, § 59H, the anti-SLAPP statute, claiming that Daye's lawsuit was based on Cobb's protected petitioning activity, i.e., the levy and suspension of the execution. A Superior Court judge granted Cobb's special motion to dismiss and awarded Cobb attorney's fees. This appeal followed.

Discussion. "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" (quotation omitted). 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 518 (2019). We apply a two-prong burden shifting framework to assess an anti-SLAPP motion to dismiss. See Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 147-148 (2017) (Blanchard I); Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 167-168 (1998).

Under the first prong, the special movant, here Cobb, "must make a threshold showing through 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" (quotations and citations omitted). Blanchard I, 477 Mass. at 147. If the moving party makes the threshold showing under the first prong, the analysis proceeds to the second prong. Id. at 148. The non-moving party, here

Daye, then has the burden to show, by a preponderance of the evidence, either (1) "the moving party's [(Cobb's)] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and . . . the moving party's [(Cobb's)] acts caused actual injury to the responding party [(Daye)]"; or (2) that the non-moving party's (Daye's) suit was colorable and "not brought primarily to chill the special movant's [(Cobb's)] legitimate exercise of its right to petition, i.e., that it was not retaliatory" (quotations and citations omitted). Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200, 204 (2019) (Blanchard II). We review the first prong de novo and the second prong for abuse of discretion. Reichenbach v. Haydock, 92 Mass. App. Ct. 567, 572 & 572 n.14 (2017). The trial judge's ultimate decision is reviewed for an abuse of discretion or error of law. Blanchard II, 483 Mass. at 203.

1. First prong. The parties agree that Cobb's levy constituted petitioning activity, and that Cobb has met its burden under the first prong. We agree. See SMS Fin. V, LLC v. Conti, 68 Mass. App. Ct. 738, 746 (2007) (special movant's "employment of legal mechanisms to obtain trustee process attachments and approval of foreclosure . . . plainly constituted petitioning activity under the anti-SLAPP statute").

2. Second prong. Under the second prong, the burden shifted to Daye to establish by a preponderance of the evidence that Cobb's petitioning activity was a "sham" as it was "devoid of any reasonable factual support or any arguable basis in law," and that it caused actual injury to Daye (first path). Blanchard II, 483 Mass. at 204. Alternatively, if Daye could not make the previous showing, he must have demonstrated, such that the motion judge could have concluded with fair assurance, that Daye's suit was colorable and not brought primarily to chill the special movant's legitimate exercise of its right to petition, i.e., that it was not retaliatory (second path). See id.

The motion judge determined that Daye "has failed to carry his burden of demonstrating that Cobb's petitioning activity lacked any arguable basis in law." We agree. At the time the levy was effectuated, there was no settled appellate authority regarding the validity of a levy, subsequently suspended, on real estate subject to a homestead exemption.[3] "To prevail

[3] In arguing that Cobb's petitioning activity was a "sham," Daye cited M&T Bank vs. Kostopoulos, Mass. Sup. Ct., No. 1477CV01801 (Essex County Mar. 15, 2019), and the single justice order in Hartog, Baer & Hand, A.P.C. vs. Clarke, Mass. App. Ct., No. 18-J-447 (Oct. 18, 2018). See generally In re Ballirano, 233 B.R. 11, 14 (Bankr. D. Mass. 1999). The motion judge correctly determined that these authorities did not definitively establish that Cobb's levy and suspension of the execution had no basis in law.

against a special motion to dismiss, it is not sufficient to show that the petitioning was based on an error of law. The plaintiff must show that no reasonable person could conclude that there was an arguable basis in law that would support the defendant's position." North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 865-866 (2009). No such showing has been made here.

If the non-moving party, here Daye, has not met its burden to show the moving party's petitioning activity was a "sham," it may still prevail in opposing the special motion to dismiss if the non-moving party (Daye) can show that its own suit is both "non-retaliatory" and "colorable." Blanchard II, 483 Mass. at 204. "The judge's task with regard to the second path is to assess the totality of the circumstances pertinent to [Daye's] asserted primary purpose in bringing [his] claim, and to determine whether the nonmoving party's claim constitutes a SLAPP suit" (quotation and citation omitted). Id. at 205.

The motion judge determined that Daye's suit was non-retaliatory as "Daye's primary motivating factor in bringing the suit was to remove what Daye feels is a cloud on his title and remedy an injury to his property that he feels diminishes its value . . . . [And] Daye appears to in good faith believe in the merit of his claims." We discern no abuse of discretion or error of law in that ruling.

The motion judge also concluded, however, that Daye's suit was not colorable and had "no reasonable possibility of success, as the law does not support his complaint." It is here that we part company with the motion judge's ruling.

A claim is colorable if it is "worthy of being presented to and considered by the court, i.e., whether it offers some reasonable possibility of a decision in the party's favor" (quotations and citation omitted). Blanchard I, 477 Mass. at 161.[4] At the time Daye filed his complaint there was a reasonable possibility that the case could be decided in his favor. Our decision in Hartog, Baer & Hand, A.P.C. v. Clarke, 99 Mass. App. Ct. 460 (2021), had not issued. Because we look to the pleadings at the time of filing, the Hartog decision does not bear on our present determination regarding whether the

[4] More recently, in the context of a motion to stay the execution of a criminal sentence, this standard has been given additional definition. "The cases are clear in saying that success on appeal does not need to be certain or even more likely than not. The cases also are clear in saying that frivolous appeals will not qualify. . . . [T]he defendant must show that there is at least one appellate issue of sufficient heft that would give an appellate court pause -- in other words, one or more issues that require a legitimate evaluation, that would engender a dialectical discussion among an appellate panel where both sides find some substantive support, and that would, if successful, lead to a favorable outcome for the defendant." Commonwealth v. Nash, 486 Mass. 394, 404 (2020).

claims were colorable when filed. See Blanchard I, supra at 160.[5]

Daye brought this lawsuit based on his interpretation of a statute that arguably prohibited an attachment on a homestead property. He relied on a Superior Court case that so held. See note 3, supra. Thus, when filed, the claim was subject to debate; it could (and in fact did) "engender a dialectical discussion among an appellate panel," resulting in a published decision of this court on an unanswered question of law. Commonwealth v. Nash, 486 Mass. 394, 404 (2020). Daye's claims were therefore colorable. As Daye's suit was both non-retaliatory and colorable, he has met his burden under the augmented Duracraft framework. See Blanchard II, 483 Mass. at 207-211. Accordingly, Cobb's special motion to dismiss should

[5] We express no opinion regarding Daye's position at oral argument that post-complaint interactions between the parties distinguish this case from Hartog.

have been denied, and the award of attorney's fees entered in connection with the allowance of the motion must be vacated.[6]

Judgment reversed.

By the Court (Sullivan, Massing & Shin, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: May 13, 2022.

[6] Likewise, Cobb's request for attorney's fees in connection with this appeal is denied.

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