COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2001-P-612

Norfolk County

OFFICE ONE, INC. and PILGRIM TELEPHONE, INC.,
PLAINTIFFS-APPELLANTS

v.

CARLOS M. LOPEZ, JACQUELINE S. SULLIVAN, BRYAN CHEGWIDDEN, NICHOLAS PROCARO, LYNN H. MOORE, JAMES E. GADO, GALE RAPHAEL, JILL HEROLD, INDIVIDUALLY AND AS TRUSTEES OF THE RIVER COURT CONDOMINIUM TRUST, V. DOUGLAS ERRICO, MARCUS, GOODMAN, EMMER & BROOKS, P.C., THOMAS SANSONE, LINDA SANSONE, JAMES STANLEY, JOAN STANLEY, ALONG WITH MEMBERS OF THE COMMITTEE TO PROTECT RIVER COURT AND OTHER PERSONS UNKNOWN WHO HAVE ATTEMPTED TO INTERFERE WITH PLAINTIFFS' ADVANTAGEOUS BUSINESS RELATIONS, THOMAS WOLFE, DENNIS P. WOLFE, PETER S. KATZ, and LYNNE H. MOORE, TRUSTEE OF CAMBRIDGESIDE REALTY NOMINEE TRUST,
DEFENDANTS-APPELLEES

ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT

BRIEF OF THE DEFENDANTS-APPELLEES, THOMAS AND LINDA SANSONE

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2. Whether the Superior Court's decision to award attorneys' fees and costs to Thomas and Linda Sansone pursuant to G.L. c. 231, s. 59H, the Massachusetts anti-SLAPP statute, should be affirmed, where the Superior Court did not abuse its discretion or make an error of law.

3. Whether additional attorneys fees and costs should be awarded to Thomas and Linda Sansone for the additional fees and costs they have incurred in defending this case through two unsuccessful motions for reconsideration by the plaintiffs and this appeal, pursuant to the provisions of G.L. c. 231, s. 59H, the Massachusetts anti-SLAPP statute.

I. STATEMENT OF THE CASE

A. THE NATURE OF THE CASE

The plaintiffs, Office One and Pilgrim Telephone, Inc. ("the plaintiffs") have sued, among others, Thomas and Linda Sansone ("the Sansones"), residents in a condominium building, for exercising their right to petition the Federal Deposit Insurance Corporation ("FDIC") to refrain from selling condominium units in their building to the plaintiffs, who the Sansones reasonably

understood would operate a 24-hour telephone sex business out of the units. The Superior Court granted the Sansones' special motion to dismiss pursuant to G.L. c. 231, s. 59H, the Massachusetts Anti-SLAPP[1] Statute, which protects individuals exercising their right to petition the government from being forced to defend meritless suits brought to deter or punish them for their petitioning activities. The Superior Court also granted the Sansones attorneys' fees and costs pursuant to the anti-SLAPP statute. The plaintiffs subsequently brought two motions to reconsider, which were denied, and now appeal the granting of the special motion to dismiss and of attorney's fees.

B. THE COURSE OF PROCEEDINGS

In Counts II and III of their amended complaint the plaintiffs alleged that while they were negotiating to buy condominium units from the FDIC in the condominium building where Thomas and Linda Sansone lived, the Sansones and other residents expressed negative opinions about the plaintiffs. (See appendix at pp. 215-219.) Count II alleges Slander, Defamation, and Trade Libel. (See appendix at pp. 215-216.) Count III alleges interference with contractual relations. (See appendix at pp. 216-219.) No other counts of the amended complaint apply to the Sansones.[2]

[1] SLAPP stands for Strategic Litigation Against Public Participation. (See G.L. c. 231, s. 59H.)

[2] The plaintiffs further amended the amended complaint a number of times after the Sansones' special motion to dismiss was granted. None of the amendments affect the allegations against the Sansones or their legal arguments.

Specifically, in Count II of the amended complaint the plaintiffs alleged that the Sansones "knowingly and intentionally made certain defamatory statements to various Unit Owners at River Court and others concerning the nature of Pilgrim Telephone's business…to the effect that Pilgrim Telephone was a sleazy operation of 'dubious character' and that its presence at River Court poses a significant threat to property values and to the personal and physical security of its residents"; that these statements were false and made for the sole purpose of injuring Pilgrim Telephone's business and reputation and to bring pressure upon Office One not to purchase the FDIC units; and that these statements "tended to blacken and injure the honesty, morality, reputation and business of Pilgrim Telephone and exposed it to public contempt and ridicule, thereby causing it damage and economic harm." (See appendix at pp. 215-216.)

In Count III, the plaintiffs alleged that the Sansones made slanderous statements at a condominium unit owners meeting to the effect that Pilgrim Telephone was a sleazy operation of dubious character, whose presence at River Court posed a significant threat to property values and to the personal and physical security of residents; that the Sansones or other defendants contacted the FDIC for the purpose of interfering with the sale of the condominium units to Office One; that as a result the FDIC initially refused to sell the units to Office One at the scheduled closing date and time; and that Office One therefore incurred additional fees, expenses, and costs to persuade the FDIC to sell it the units. (See appendix at pp. 216-219.)

The Sansones filed a Special Motion To Dismiss pursuant to G.L. c. 231, s. 59H, the Massachusetts Anti-SLAPP Statute. (See appendix at pp. 663-681.) In support of the Special Motion to Dismiss, Thomas Sansone offered an affidavit stating that he learned from other unit owners that plaintiff Pilgrim Telephone planned to operate a telephone sex operation 24 hours a day from the subject condominium building; that he verified this information by calling Pilgrim Telephone and learning that it was, indeed, a telephone sex operation; and that through a flyer he disseminated this information to other unit owners and urged them to oppose the sale by the FDIC of the subject condominiums to the plaintiffs because the presence of the plaintiffs' business would pose a threat to property values and to personal and physical security. (See appendix at pp. 667-669.) Linda Sansone offered an affidavit in support of the special motion to dismiss stating that she did not participate in Thomas' creation or dissemination of the flyer; and that she expressed concern about safety issues and other issues related to the plaintiffs at a condominium board meeting. (See appendix at pp. 675-681.) For their legal arguments in support of their special motion to dismiss the Sansones relied on the briefs of the other parties in this case, which were filed at the same time. (See Appendix at 1695-1822; 1857-1918; 1989-2001.)

The Superior Court granted the Sansones' special motion to dismiss and ordered that the plaintiffs pay the Sansones' attorneys' fees and costs. (See Addendum to plaintiffs' appeals

brief at A.) The specific findings of the Superior Court are discussed at length in the argument section of this brief.

The plaintiffs filed a motion for reconsideration. (See appendix at pp. 808-813.) The court denied their motion. (See addendum to plaintiffs' appeals brief at pp. B8-B9.) The plaintiffs again moved for reconsideration, this time because the Supreme Judicial Court had issued its first ruling interpreting the anti-SLAPP statute in Duracraft Corporation v. Holmes Products Corporation, 427 Mass. 156, 161-162 (1998). (See appendix at pp. 1029-1030; 2001-2035; 2059-2066.) In a well-reasoned opinion, the Superior Court denied the plaintiff's motion for reconsideration with respect to Counts II and III, the only counts against the Sansones. (See addendum to plaintiffs' appeals brief at G5-9.)

Following the court's original order that the plaintiffs pay the Sansones' attorneys' fees, the Sansones filed an application for attorney's fees in the amount of $6,248.00 (See appendix at pp. 774-787.) The court disallowed $121.00 of this amount as being improperly documented and awarded to the Sansones $6,127.00 in attorney's fees. (See addendum to plaintiffs' appeals brief at D2-5.) The Sansones subsequently defended this case through the plaintiffs' two unsuccessful motions for reconsideration. The Sansones' motion for entry of separate and final judgment was denied and the Sansones continued to monitor this case until all other issues were resolved, and now defend this appeal.

C. THE DISPOSITION OF THE SUPERIOR COURT

The Superior Court allowed the Sansones' special motion to dismiss and granted to the Sansones attorneys' fees and costs.

The Superior Court denied the plaintiffs' motions for reconsideration.

D. STATEMENT OF THE FACTS

In 1996 Thomas and Linda Sansone were residents of the River Court Condominiums in Cambridge, Massachusetts. (Appendix at 667, 675.) As successor in interest to River Court's failed developer and its failed construction lender, the FDIC, as receiver for the Connecticut Bank and Trust and New Bank of New England, N.A. was marketing for sale certain condominium units in River Court. (See appendix at p. 213, para. 20.) On July 18, 1996, Thomas Sansone saw a flyer posted by the condominium trustees indicating that plaintiff Pilgrim Telephone, Inc. was attempting to purchase from the FDIC units in the condominium building; and that Pilgrim Telephone would operate a business 24 hours a day in three shifts, which would cause the parking lot to be used around the clock by Pilgrim Telephone's employees. (See appendix at 667, 671.) Mr. Sansone learned from other condominium unit owners that Pilgrim Telephone was a telephone sex company. (See appendix at p. 667.) Mr. Sansone called Pilgrim Telephone and confirmed that it was a telephone sex business. (See appendix at p. 668.)

Mr. Sansone prepared and posted a flyer on the condominium building bulletin board urging other condominium unit owners to petition the FDIC against the sale of the property to the plaintiffs. (See appendix at p. 668.) In the flyer he posted, Mr. Sansone listed the information he had learned when he called Pilgrim Telephone and stated, "As you can discern, Pilgrim Telephone, Inc. is of dubious character—one that poses a

significant threat to our property values and when one considers their customers possibly even our personal and physical security. We deeply urge all of you to petition this property acquisition, before it closes at the end of the month." (See appendix at p. 673-674.)

Linda Sansone's only involvement with the issue of the sale of the units to the plaintiffs was at a meeting of the condominium Board of Trustees, when she expressed her concern about safety issues related to the possibility of Pilgrim Telephone employees parking in the building and having access to the premises 24 hours a day. (See appendix at pp. 675-676.)

The plaintiffs subsequently wrongfully brought this suit, alleging against the Sansones slander, defamation, trade libel, and interference with contractual relations. (See appendix at pp. 215-219.) The Sansones won a special motion to dismiss under the Massachusetts anti-SLAPP statute and were awarded attorneys' fees and costs. (See Addendum to plaintiffs' appeals brief at A.) The Sansones prevailed on two motions to reconsider by the plaintiffs. (See appendix at pp. 808-813; addendum to plaintiffs' appeals brief at pp. B8-B9; appendix at pp. 1029-1030; 2001-2035; 2059-2066; addendum to plaintiffs' appeals brief at G5-9.) Still unsatisfied after three bites at the apple, the plaintiffs now appeal the granting of the special motion to dismiss and of attorneys' fees and costs.

II. ARGUMENT

A. SUMMARY OF THE ARGUMENT

The Superior Court's decision allowing the Sansones' special motion to dismiss and awarding the Sansones attorneys' fees and costs should be affirmed because the Superior Court neither abused its discretion nor committed an error of law in granting the Sansones' motion.

The anti-SLAPP statute was enacted to protect individuals petitioning the government from generally meritless lawsuits brought to deter them from exercising their political or legal rights or to punish them for doing so. (See infra at pp. 10-12.) Under the statute, the Sansones were required to make a threshold showing through pleadings and affidavits that the claims against them were based on their petitioning activities alone, and have no substantial bases other than or in addition to their petitioning activities. The burden then shifted to the plaintiffs to show by a preponderance of the evidence that the Sansones' petitioning activity was devoid of any reasonable factual support or any arguable basis in the law. (See infra at pp. 12-16.)

The Sansones met their threshold showing through their affidavits with respect to Count II. (See infra at pp. 18-20.) The plaintiffs failed to show by a preponderance of the evidence, or by any evidence, that the Sansones' petitioning activity was devoid of any reasonable factual support or arguable basis in law. (See infra at pp. 21-23.) Similarly, with respect to Count III, the Sansones made their required threshold showing and the plaintiffs failed to meet their burden of production. (See infra

at pp. 24-25.) In addition, the plaintiffs' argument that the anti-SLAPP statute does not apply to petitioning the FDIC is plainly wrong. (See infra at pp. 25-27.) The plaintiffs' other arguments with respect to Count III are also without merit. (See infra at pp. 27-28.)

The plaintiffs make no argument that attorneys fees and costs were incorrectly granted to the Sansones. (See infra at p. 28.) Additional attorneys fees and costs should be granted by this court to the Sansones for the fees and costs incurred in continuing to defend this suit after the original award. (See infra at p. 29.)

B. THE STANDARD OF REVIEW

The standard of review of the granting of a special motion to dismiss pursuant to the anti-SLAPP statute is "whether there was an abuse of discretion or an error of law." McLarnon v. Jokisch, 431 Mass. 343, 348 (2000).

C. ARGUMENT

The Superior Court neither abused its discretion nor made an error of law when it granted the Sansones' special motion to dismiss and ordered the plaintiffs to pay the Sansones' attorneys fees. Rather, the Superior Court properly applied the law as set forth in the anti-SLAPP statute and interpreted by the Supreme Judicial Court of Massachusetts. The Superior Court ruling should therefore be affirmed.

1. The anti-SLAPP statute

a. The anti-SLAPP statute was passed to protect precisely the type of activity in which the Sansones engaged when they petitioned the FDIC.

G.L. c. 231, s. 59H, the Massachusetts anti-SLAPP statute, states in relevant part:

> In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. … The court shall grant such special motion, unless the party against whom such special motion is made shows 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. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. …
>
> If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters…
>
> As used in this section, the words 'a party's exercise of its right of petition' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of any issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling

> within constitutional protection of the right to petition government.

As described by the Supreme Judicial Court of Massachusetts, the anti-SLAPP statute was enacted by the legislature because:

> full participation by persons and organizations and robust discussion of issues before legislative, judicial and administrative bodies and in other public fora are essential to the democratic process, and … there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. In order that such 'disfavored' litigation could be resolved quickly with minimum cost to citizens who have participated in matters of public concern [the anti-SLAPP statute provides]…a procedural remedy for early dismissal of the disfavored SLAPP suits.
>
> …
>
> The typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects. SLAPP suits have been characterized as generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them from doing so…The objective of SLAPP suits is not to win them, but to use litigation to intimidate opponents' exercise of rights of petitioning and speech. … SLAPP suits target people for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.

Duracraft Corporation v. Holmes Products Corporation, 427 Mass. 156, 161-162 (1998).

It is clear from the text of the statute itself and from the discussion in Duracraft that the anti-SLAPP statute was passed to protect precisely the type of activity the Sansones engaged in when they exercised their right to urge other condominium residents to petition the FDIC against the sale of the condominium units to the plaintiffs.

b. The caselaw interpreting burdens of proof for special motions to dismiss pursuant to the anti-SLAPP statute demonstrate that the Sansones' special motion to dismiss was properly granted.

The Supreme Judicial Court of Massachusetts has interpreted burdens of proof for special motions to dismiss under the anti-SLAPP statute on three separate occasions, in Duracraft, supra, McLarnon v. Jokisch, 431 Mass. 343 (2000), and Baker v. Parsons, 434 Mass. 543 (2001). Although only the Duracraft decision had been rendered when the Superior Court issued its ruling on the plaintiffs' second motion for reconsideration, the holdings of McLarnon and Baker support the Superior Court's decision. These three cases, as discussed below, culminated in the following burdens of proof on the parties with respect to special motions to dismiss pursuant to the anti-SLAPP statute:

The initial burden is with the moving party to make a threshold showing through the pleadings and affidavits that the claims against the moving party are based on petitioning activities alone and have no substantial bases other than or in addition to the petitioning activities. The burden then shifts to the party opposing the special motion to dismiss to show by a preponderance of the evidence that the moving party's petitioning

activity is devoid of any reasonable factual support or any arguable basis in law, and that the moving party's acts caused actual injury to the non-moving party. With respect to petitioning activities lacking any arguable basis in law, it is not enough for the non-moving party to show that the alleged petitioning activity was based on an error of law by the moving party; the non-moving party must show that no reasonable person could conclude that there was a basis in law for requesting that review.

The Supreme Judicial Court first interpreted the burdens of proof in a special motion to dismiss in Duracraft, supra. In Duracraft, the court held:

> The special movant who 'asserts' protection for its petitioning activities would have to 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 bases other than or in addition to the petitioning activities. Once the special movant so demonstrates, the burden shifts to the nonmoving party as provided in the anti-SLAPP statute.

Id. at 167-168. Under the statute, the plaintiffs' claim must be dismissed "unless the plaintiff can show that the special movant's petitioning activity is devoid of any reasonable factual support or any arguable basis in law." Id. at 165. In Duracraft, the Supreme Judicial Court applied these burdens of proof and found that the defendant's special motion to dismiss must be denied, on the grounds that breach by the defendant of a non-disclosure agreement with the plaintiff constituted a substantial basis other

than the defendant's petitioning activities of the plaintiff's claims for breach of contract.

The Supreme Judicial Court next discussed the burdens of proof for a special motion to dismiss in McLarnon v. Jokisch, 431 Mass. 343 (2000). In McLarnon the Supreme Judicial Court upheld the Superior Court's granting of the defendants' special motion to dismiss. The plaintiff had filed suit against his son and ex-wife alleging violation of civil rights, malicious prosecution, alienation of affection, and intentional infliction of emotional distress. The plaintiff alleged that the defendants had committed perjury, fraud, and misrepresentation in falsely claiming abuse when they sought restraining orders against him. Id. at 344-345. The Superior Court granted the defendants' special motion to dismiss pursuant to the anti-SLAPP statute. Id. at 345. Following the burden of proof requirements laid out in Duracraft, the Supreme Judicial Court found on appeal that the defendants had made an initial showing that the claims against them were based on their petitioning activities alone. Id at 348. The burden then shifted to the plaintiff to show that (1) the defendants' exercise of their right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the defendants' acts caused actual injury to the plaintiff. Id. at 349, citing G.L. c. 231, s. 59H. The Supreme Judicial Court noted that several judges had granted or extended the protective orders sought by the defendants against the plaintiffs after numerous hearings. Id. at 349. On this basis, the Supreme Judicial Court held, a judge could find that the plaintiff failed to meet his burden of proving

no reasonable factual support or basis in law for the defendants' petitioning activities. Id. at 349.

The Supreme Judicial Court further clarified the burdens of proof in July, 2001, in Baker v. Parsons, 434 Mass. 543 (2001), a case not cited by the plaintiffs in their appeals brief. In Baker, the Supreme Judicial Court again upheld the granting of a special motion to dismiss by the Superior Court. The plaintiff brought a claim for tortious interference with a pier permit application, intentional infliction of emotional distress, slander, libel, and violation of civil rights. Id. at 953. These claims arose out of a letter that the defendant wrote to the United States Army Corps of Engineers opposing the plaintiff's application for a permit to build a pier, in which the defendant discussed bird habitat loss since the plaintiff had become owner of the subject property. The plaintiff characterized the letter as containing defamatory allegations, and stated that the letter caused other citizens to petition the Executive Office of Environmental Affairs to require an environmental impact statement. Id. at 546. The defendant brought a special motion to dismiss pursuant to the anti-SLAPP statute, which was granted by the Superior Court and upheld by the Supreme Judicial Court of Massachusetts.

The Supreme Judicial Court then clarified that, where there are conflicting factual allegations by the parties supporting and opposing a special motion to dismiss, "the party opposing a special motion to dismiss is required to show by a preponderance of the evidence that the moving party lacked any reasonable

factual support or any arguable basis in law for its petitioning activity." Id. at 552, 554. Further, with respect to petitioning activities lacking any arguable basis in law, "It is not enough for [the plaintiff] to show that [the defendant's] alleged petitioning activity, requesting broad environmental review was based on an error of law; he must show that no reasonable person could conclude that there was a basis in law for requesting that review." Id. at 555, fn. 20.

In the present case, although the Supreme Judicial Court had not issued its rulings in McLarnon and Baker further explaining the burdens of proof set out in Duracraft when the Superior Court allowed the Sansones' special motion to dismiss, the Superior Court's ruling was squarely within the paradigm for burdens of proof recently finalized in Baker. As the Superior Court committed no abuse of discretion and made no error of law in granting the Sansones' special motion to dismiss, the Superior Court's ruling should be upheld.

2. The Superior Court should be upheld in its dismissal of Count II of the complaint against the Sansones, as the Superior Court correctly found that the Sansones made a threshold showing that the plaintiffs' claims were based on the Sansones' petitioning activities alone, and had no substantial bases other than or in addition to the petitioning activities; and that the plaintiffs failed to meet their burden of demonstrating that the Sansones' right to petition was devoid an any reasonable factual support or any arguable basis in law.

Under the burdens of proof set out in Duracraft, McLarnon, and Baker with respect to special motions to dismiss, the Sansones were required to make a threshold showing through

pleadings and affidavits that the plaintiffs' claims against them were based on the Sansones' petitioning activities alone, and had no substantial bases other than or in addition to the petitioning activities. Duracraft, supra at 167-168. The burden then shifted to the plaintiffs to show by a preponderance of the evidence that the Sansones' exercise of their right to petition "was devoid of any reasonable factual support or any arguable basis in law." Baker, supra at 554. As the Superior Court correctly found, the Sansones met their burden and the plaintiffs failed to meet their burden. As the Superior Court committed no abuse of discretion and made no error of law in this finding, its decision should be affirmed.

a. The Sansones made a threshold showing that the claims against them were based on their petitioning activities alone and had no substantial bases other than or in addition to the petitioning activities.

In Count II of the amended complaint the plaintiffs alleged that the Sansones "knowingly and intentionally made certain defamatory statements to various Unit Owners at River Court and others concerning the nature of Pilgrim Telephone's business…to the effect that Pilgrim Telephone was a sleazy operation of 'dubious character' and that its presence at River Court poses a significant threat to property values and to the personal and physical security of its residents"; that these statements were false and made for the sole purpose of injuring Pilgrim Telephone's business and reputation and to bring pressure upon Office One not to purchase the FDIC units; and that these statements "tended to blacken and injure the honesty, morality,

reputation and business of Pilgrim Telephone and exposed it to public contempt and ridicule, thereby causing it damage and economic harm." (See appendix at pp. 215-216.)

In his affidavit in support of his special motion to dismiss, Thomas Sansone stated that he saw a flyer posted by the condominium trustees indicating that plaintiff Pilgrim Telephone was attempting to purchase from the FDIC space in the condominium building and that Pilgrim Telephone would operate a business 24 hours a day in three shifts, causing the parking lot to be used around the clock by Pilgrim Telephone's employees. (See appendix at pp. 667, 671.) Mr. Sansone learned from other condominium unit owners that Pilgrim Telephone was a telephone sex company. (See appendix at p. 667.) Mr. Sansone called Pilgrim Telephone and confirmed that it was a telephone sex business. (See appendix at p. 668.) Mr. Sansone then prepared and posted a flyer on the condominium building bulletin board urging other condominium unit owners to petition the FDIC against the sale of the property to the plaintiffs. (Appendix at p. 668.) In the flyer he posted, Mr. Sansone repeated the information he had learned when he called Pilgrim Telephone and stated, "As you can discern, Pilgrim Telephone, Inc. is of dubious character—one that poses a significant threat to our property values and when one considers their customers possibly even our personal and physical security. We deeply urge all of you to petition this property acquisition, before it closes at the end of the month." (See appendix at p. 673-674.)

Linda Sansone submitted an affidavit in support of her special motion to dismiss stating that her only involvement with the issue of the sale of the units to the plaintiffs was at a meeting of the condominium Board of Trustees, where she expressed her concern about safety issues related to the possibility of Pilgrim Telephone employees parking in the building and having access to the premises 24 hours a day. (Appendix at pp. 675-676.)

The Superior Court correctly found that the Sansones met their threshold requirement that the allegations of Count II were based solely on their petitioning activity and lacked any other basis in fact. (Addendum to plaintiff's appeals brief at p. G6.) "They have demonstrated that each statement forming the basis of Count II was made in an attempt to enlist public participation in the defendants' efforts to affect the FDIC's decision concerning the sale of its condo units. None of the statements alleged in the amended complaint were made in any other context." (Addendum to plaintiff's appeals brief at p. G6.) The Supreme Judicial Court in Baker, supra, supported this analysis, holding that statements made to encourage other citizens to petition the government are protected by the anti-SLAPP statute. Baker, supra at 551, fn. 13.

The Superior Court further found that the "defendants have satisfied this Court that Count II of the amended complaint has no substantial basis other than an attempt to chill the … Sansones' exercise of their right to enlist the participation of fellow unit owners in opposing Silver's purchase of the FDIC units. … Indeed, Count II is an example of what the SJC in [Duracraft] called 'the

archetypical SLAPP suit…" (Addendum to plaintiff's appeals brief at p. G7-G8.)

The Superior Court correctly found that Count II of the complaint was based solely on the Sansones' protected petitioning activities and had no other substantial bases other than or in addition to the petitioning activities. The Superior Court committed no abuse of discretion or error of law in finding that the Sansones met their threshold burden under the anti-SLAPP statute.

b. The plaintiffs failed to show by a preponderance of the evidence that the Sansones' petitioning activity was devoid of any reasonable factual support or any arguable basis in law.

With respect to the notice posted by Thomas Sansone, the Superior Court found that the plaintiffs failed to show that the Sansones' activities were devoid of reasonable factual support or arguable basis in law. As the Superior Court correctly stated, "The evidence submitted to this Court in connection with the original special motion to dismiss suggests a factual basis for the assertion concerning adult telephone services. Moreover, the statements concerning Pilgrim's dubious character and threat to property values are mere statements of opinion based on disclosed and nondefamatory facts which are not actionable. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 262 (1993)." (Addendum to plaintiff's appeals brief at p. G7.) The Superior Court correctly applied the standard with respect to allegations of defamation, that, in the face of the Sansones' affidavits, the plaintiffs failed to meet their burden of showing that the statements made by

the Sansones were devoid of any reasonable factual support or arguable basis in the law.[3]

The plaintiffs in their appeals brief claim that under the Superior Court's analysis, "there could never be a defamation claim for defamatory statements made within the context of petitioning activities." (See plaintiff's brief at p. 25-26.) This statement is neither relevant to the present appeal, nor an accurate reading of the Superior Court's decision, nor an accurate statement of the Massachusetts caselaw with respect to the anti-SLAPP statute.

The Superior Court made an explicit finding that "the statements concerning Pilgrim's dubious character and threat to property values are mere statements of opinion based on disclosed and nondefamatory facts which are not actionable. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 262 (1993)." (Addendum to plaintiff's appeals brief at p. G7.)[4] Further, in both McLarnon, supra and Baker, supra, the Supreme Judicial Court discussed the application of the anti-SLAPP statute to a plaintiff's allegations

[3] In fact, it is worth noting that nowhere do the plaintiffs put forth **any** facts contradicting or denying the statements of the Sansones, either with respect to Thomas Sansone's comments that Pilgrim Telephone is a telephone sex company or with respect to the Sansones' comments relating to safety in the building.

[4] The plaintiffs claim that that the Superior Court judge based her decision on the determination that the defendants' statements were "largely opinion." (See plaintiff's brief at p. 26, fn. 3.) The plaintiffs are apparently implying that the decision was incorrectly decided on these grounds. On the contrary, Massachusetts caselaw with respect to slander and defamation claims is explicit that, as here, statements of opinion based on disclosed and nondefamatory facts are not actionable. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 262 (1993).

of false statements by the defendants. Specifically, the Supreme Judicial Court in Baker held:

> [The] initial showing by the defendants that the claims against them were based on their petitioning activities alone is not defeated by the plaintiff's conclusory assertions that 'certain statements made by the defendants in petitions to government officials constitute defamation.'

Id. at 551.

In this case, the only statement by the plaintiffs in support of their position is that they "have alleged in Count II the necessary elements of a claim for slander, defamation, and trade libel." (Plaintiff's brief at p. 26.) As stated explicitly in both the anti-SLAPP statute and the caselaw interpreting it, this 12(b)(6) standard is not the proper standard to be applied. The Superior Court applied the standard set out in the statute, interpreted in Duracraft, and later specifically applied to allegations of false statements in McLarnon and Baker. The Superior Court correctly found that the special motion to dismiss must be allowed.

The Superior Court correctly applied the burdens of proof articulated in Duracraft and later clarified in McLarnon and Baker to find that the Sansones made a threshold showing that the claims against them in Count II of the amended complaint were based on their petitioning activities alone and had no substantial bases other than or in addition to the petitioning activities. The Superior Court also correctly found that the plaintiffs did not meet their burden of showing by a preponderance of the evidence that the Sansones' petitioning activities were devoid of any

reasonable factual support or arguable basis in the law. As the Superior Court ruling involved neither abuse of discretion or error of law, it should be affirmed.

3. The Superior Court should be upheld in its dismissal of Count III of the complaint against the Sansones, as the Superior Court correctly found that the Sansones made a threshold showing that the plaintiffs' claims were made on the Sansones' petitioning activities alone, and had no substantial bases other than or in addition to the petitioning activities; and that the plaintiffs failed to meet their burden of demonstrating that the Sansones' right to petition was devoid of any reasonable factual support or any arguable basis in law.

In Count III, the plaintiffs allege that the Sansones made slanderous statements at a condominium unit owners meetings to the effect that Pilgrim Telephone was a sleazy operation of dubious character, whose presence at River Court posed a significant threat to property values and to the personal and physical security of residents; that the Sansones or other defendants contacted the FDIC for the purpose of interfering with the sale of the condominium units to Office One; that as a result the FDIC initially refused to sell the units to Office One at the scheduled closing date and time; and that Office One therefore incurred additional fees, expenses, and costs to persuade the FDIC to sell it the units. (See appendix at pp. 216-219.) The same arguments apply to Count III of the amended complaint as to Count II and, as with Count II, the Superior Court ruling should be upheld with respect to Count III.

a. Count III of the complaint against the Sansones was properly dismissed by the Superior Court for the same reasons that Count II was properly dismissed.

Applying the same analysis as it applied to the allegations in Count II of the amended complaint, the Superior Court correctly found that the Sansones' statements constituted petitioning activity and were not the basis of cognizable action; and that the Sansones met their burden of showing that Count III is based solely on their petitioning activities and has no other basis other than or in addition to such activity. (See addendum to plaintiffs' appeals brief at pp. G8-G9.) As in Count II, the plaintiffs have failed to show that the Sansones' petitioning activities were devoid of any reasonable factual support or arguable basis in law.

b. The plaintiffs' argument that the anti-SLAPP statute does not apply to Count III of the complaint because the FDIC is not a governmental agency for the purposes of the statute is plainly wrong.

The plaintiffs argue that the Sansones' right to petition the government, protected by the anti-SLAPP statute, was not implicated by Count III, because the FDIC was not acting in its governmental capacity in selling the condominium units. (See plaintiffs' brief at p. 29-30.) Rather, the plaintiffs argue, "when the FDIC acts as receiver, it is to be treated like any other bank acting as a receiver." (See plaintiff's brief at p. 22.) The plaintiffs cite FDIC v. Sumner Financial Corp., 602 F.2d 670, 679 (5th Cir. 1979), a Fifth Circuit Court of Appeals case, in support of this statement. (See plaintiff's brief at p. 22.)

However, as the First Circuit Court of Appeals noted in an appeal of a United States District Court of Massachusetts case, the holding of Sumner was made obsolete by statute passed in 1989. United States v. Sweeney, 226 F.3d 43, 45 (2000). Referring to the comment in Sumner that "the FDIC was to be treated exactly as any other receiver would be," the court in Sweeney stated:

> The fly in the ointment, however, is that the decision in Sumner preceded the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.) (FIRREA). Congress enacted FIRREA to aid the FDIC in its immediate responsibilities of dealing with mounting bank failures in this country…. In so doing, Congress made pellucid that, in acting as a receiver of failed banks, the FDIC fosters important public policies relating to the avoidance of a national banking crises…. This assessment reflects the gist of post-FIRREA authority. See, e.g., FDIC v. Wentz, 55 F.3d 1539, 905, 909 (3rd Cir. 1995) (stating that there is a 'significant public interest in promptly resolving the affairs of insolvent banks'); RTC v. Thornton, 41 F.3d 1539, 1542 (D.C. Cir. 1994) (explaining that in resolving the affairs of failed banks, the RTC and its successor, the FDIC, are required not only to protect the assets of the failed institution for its depositors and creditors but also to 'make efficient use of public funds')…; [FDIC v. Wright, 942 F.2d 1989, 1096 (7th Cir. 1991)] (holding that an action involving the FDIC as receiver is not 'simply a private case between individuals but one that involves a federal agency appointed as a receiver of a failed bank in the midst of a national banking crisis'). We agree with these courts. And insofar as the FDIC serves important public purposes when it functions as a receiver, it may be said to be acting 'in the name of, or on behalf of, the United States'…

Id. at 45-46.

Pursuant to the text of the anti-SLAPP statute, the statute applies to the right to petition "a legislative, executive, or judicial body, or any other governmental proceeding." As noted by the Superior Court in its original decision granting the Sansones' special motion to dismiss, "The FDIC's broader legislative mandate…is to promote the stability of the banking system by protecting depositors and creditors of the failed bank and the public generally." (See addendum to plaintiffs' appeals brief at p. A15.) See Federal Deposition Insurance Corporation v. Isham, 782 F.Supp. 524, 531 (D.Colo. 1992.); 12 U.S.C. s. 1821(h)(1) (stating, "The [FDIC as receiver] shall fully consider the adverse economic impact on local communities, including businesses and farms, of actions to be taken by it during the administration and liquidation of loans of a depository institution in default.")

As the caselaw and federal statutes make clear, the activities of the FDIC in its receivership capacity are proceedings by the government in pursuit of the public good, and the Sansones petitioning activities fall squarely within those activities protected by the anti-SLAPP statute.

c. The plaintiffs' other arguments with respect to Count III are without merit.

The plaintiffs next argue that the anti-SLAPP statute does not apply because the protected petitioning activities had ceased several months before the lawsuit was brought. (See plaintiffs' appeals brief at p. 30.) This argument is simply irrelevant to

whether or not the petitioning activities are protected by the anti-SLAPP statute.

The plaintiffs then argue that the anti-SLAPP statute does not apply because the plaintiffs have alleged wrongful interference with contractual relations. (See plaintiffs' appeals brief at pp. 30-31.) In essence, the plaintiffs argue that if a complaint alleges any cause of action, the anti-SLAPP statute does not apply because the allegations are then not based on the right to petition alone. This argument is specious, and if adopted would nullify the statute.

Finally, the plaintiffs argue that the anti-SLAPP statute does not apply because parties may legally contract away their right to certain petitioning activity, as in the non-compete agreement discussed in Duracraft. (See plaintiffs' brief at pp. 31-32.) However, in this case the Sansones did not contract away their right to engage in petitioning activities and, unlike in Duracraft, were not party to the contract at issue between the plaintiffs and the FDIC.

The Superior Court's decision to grant the special motion to dismiss to the Sansones with respect to Count III of the complaint involved neither abuse of discretion nor error of law, and should be upheld.

4. The Superior Court correctly awarded attorneys' fees and costs to the Sansones, and the plaintiffs have offered no argument against this.

In their brief the plaintiffs argue that attorneys fees and costs should not have been granted by the Superior Court for costs incurred that did not relate to the defense of Counts I, II, and

III of the amended complaint. (See plaintiffs' brief at pp. 37-41.) As only Counts II and III relate to the Sansones, the plaintiffs' argument is not relevant to the Sansones, and all costs awarded to them should be affirmed.

5. The court should grant additional attorneys' fees and costs to the Sansones.

Following its initial decision to grant the Sansones' special motion to dismiss, the Superior Court granted to the Sansones attorneys' fees generated through July 29, 1997. (See appendix at 774-782; addendum to plaintiffs' appeal brief at pp. D2-D5.) Since that time, the Sansones have incurred attorneys fees through years of the plaintiffs' unsuccessful motions for reconsideration, the necessary monitoring the lawsuit after a denial of the Sansones' motion for entry of separate and final judgment, and this appeal.

The anti-SLAPP statute states:

> If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters…

G.L. c. 231, s. 59H. "The statutory provisions for reasonable attorneys fees [in the anti-SLAPP statute] would ring hollow if it did not necessarily include a fee for the appeal." McLarnon v. Jokisch, 431 Mass. 343, 350 (2000). The appropriate procedure for a party seeking costs and fees for appellate work is to request them in the appellate brief submitted to the court. Id. at 350. The Sansones therefore respectfully request that this court enter an order that the plaintiffs be ordered to pay all

their attorneys' fees and costs incurred in defense of this lawsuit.

CONCLUSION

The decision of the Superior Court granting the Sansones special motion to dismiss and awarding attorneys fees and costs to the Sansones should be affirmed, and additional attorneys fees and costs should be granted to the Sansones. The Sansones met their threshold requirement of showing through affidavits that the plaintiffs' claims were based on the Sansones petitioning of the FDIC, and had no other substantial bases other than or in addition to the petitioning activities. The plaintiffs utterly failed to show by a preponderance of the evidence, or by any evidence, that the Sansones' activities were devoid of reasonable factual support or any arguable basis in law. As the Superior Court correctly applied the standards laid out in the case law with respect to special motions to dismiss pursuant to the anti-SLAPP statute, it neither abused its discretion nor made an error of law, and its decision should be affirmed. Similarly, the Superior Court correctly granted attorneys' fees and costs to the Sansones, and additional attorneys' fees and costs should now be granted.

THE DEFENDANTS,
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BY THEIR ATTORNEYS,

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