

BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

GUEST COMMENTARY

Mixed Bag For Developers In SJC Decision

SJC Addresses Strategic Litigation Against Development Opposition

BY MICHAEL T. SULLIVAN
SPECIAL TO BANKER & TRADESMAN

Lawyers are nothing if not enamored by ostensibly humorous acronyms (and long sentences). The Massachusetts “anti-SLAPP” statute, M.G.L. c. 231, § 59H, proscribes “strategic litigation against public participation,” or in other words, litigation commenced by the plaintiff in response to nothing more than the defendant’s meritorious efforts to petition the government for the redress of grievances.



MICHAEL SULLIVAN

The statute often is applied in the real estate setting – say when a neighbor is the subject of an “abuse of process” or “malicious prosecution” claim after opposing a developer’s local zoning application. Sometimes the developer’s claim is legitimate, but other times, the developer may be looking to intimidate the neighbor into withdrawing his zoning opposition.

In any case, in order to protect everyone’s legal-petitioning rights, the anti-SLAPP statute allows defendants in such cases to file an immediate “special motion to dismiss” that accelerates the typically much longer process of obtaining a court decision on the merits of the plaintiff’s claim. Then, if the special motion to dismiss is denied, the defendant can file an immediate appeal, which again is unusual.

This procedure was used in the real estate development case of *477 Harrison Ave., LLC v. JACE Boston, LLC*, which recently generated a decision by the Massachusetts Supreme Judicial Court (SJC).

The case involved the defendant property owner’s efforts to impede the plaintiff property owner’s efforts to redevelop its Boston property.

Alleging that the defendant had no legitimate basis to prevent the plaintiff from redeveloping its property, and was simply looking to wear out the plaintiff (or drive it into bankruptcy), the plaintiff sued the defendant in Superior Court, claiming abuse of process and unfair and deceptive trade practices. The defendant filed a special motion to dismiss both claims. This motion

Hospital, Inc. – essentially created new law.

In these two cases, the SJC declared that going forward, with respect to special motions to dismiss under the anti-SLAPP statute, the trial court must first consider whether the plaintiff’s claim is focused exclusively upon the defendant’s legal-petitioning activities. If so, then the plaintiff must show that its claim against the defendant nevertheless has an objectively reasonable basis in law and fact. As in the *477 Harrison Ave.* case, where

The bottom line for anyone opposing real estate development projects is that their legal-petitioning activities remain highly protected.

was denied, so the defendant appealed, and the SJC took up the case, finding that it presented a novel issue of law.

In its decision, the SJC said the defendant’s special motion to dismiss the unfair and deceptive trade practices claim rightly was denied, for the defendant had not shown that this claim was based *solely* on the defendant’s legal-petitioning activities. But the SJC considered the abuse of process claim to present somewhat greater complexity, so rather than simply upholding the denial of the special motion to dismiss with respect to this claim, the SJC instead remanded the case to the Superior Court for further consideration of the facts in comparison to the SJC’s decision, which – together with another case decided by the SJC on the same day *Blanchard v. Steward Carney*

the defendant had filed a questionable police report against the plaintiff, this often can be shown when the defendant’s legal-petitioning activity was of dubious merit. Notably, the defendant’s motivations are of no consequence – all that matters is the validity of their opposition.

But the “new law” is that if the plaintiff can make this showing with respect to some, but not all, of the defendant’s legal-petitioning activities, then the defendant’s special motion to dismiss will be granted as to the former activities alone. Also, even if the plaintiff cannot make this showing at all, it still can salvage its claim, if it nevertheless can show that its claim against the defendant is not intended primarily to chill or punish the defendant’s legal-petitioning activities, but instead, is genuinely intended to obtain legal redress and the

money damages resulting from those activities. Otherwise, its claim will be considered strategic litigation against public participation – i.e., SLAPP – and be dismissed. This could be considered a minor victory for real estate developers.

After *477 Harrison Ave.*, the bottom line for anyone opposing real estate development projects is that their legal-petitioning activities remain highly protected. Even if they wish to do nothing more than annoy or frustrate the developer, their

legal-petitioning efforts will be immune from suit, as long as they have reasonable merit.

But real estate developers can take solace, too. If their opponents' legal-petitioning efforts are frivolous, they still very much have the ability to challenge these efforts, and even obtain the money damages resulting therefrom, in a court of law. But in order to guard against the improper intimidation of those who wish to oppose real estate development projects, the anti-

SLAPP statute will continue to provide an early mechanism for disposing of claims that fall into this category. ■

Michael T. Sullivan is a litigation partner in the Boston law firm of Conn Kavanaugh Rosenthal Peisch & Ford LLP who handles a variety of real estate and construction disputes. He can be reached at MSullivan@ConnKavanaugh.com. Julie Martin, J.D. candidate 2018, Suffolk University, also contributed to this article.
