Docket: **1984CV03971-BLS2**
Date: **May 12, 2020**
Parties: **THOMAS J. CROTTY V.CONTINUUM ENERGY TECHNOLOGIES, JOHN T. PRESTON, AND OTHERS[1]**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER ON CERTAIN MOTIONS TO DISMISS

Thomas J. Crotty has been in a protracted disputed with Continuum Energy Technologies ("CET") and its principal John Preston. After they settled one lawsuit against a company in which Crotty was a lead investor, CET sued Crotty for alleged fraud in negotiating that settlement. Judge Sanders dismissed CET's fraud claims and then sanctioned CET $100,000, after finding that CET and Preston knew their claims had no legal or factual basis yet brought them "in an effort to gain some unfair advantage."[2]

Crotty has now sued CET and Preston, alleging that in the prior fraud case they engaged in malicious prosecution, abuse of process, and civil conspiracy. Crotty also alleges that several investors in CET, including Prof. Michael Porter, knowingly participated in and are jointly liable for the purported conspiracy.

CET and Preston assert counterclaims. They contend that certain factual allegations in Crotty's complaint constitute tortious interference with advantageous business relations, and that Crotty's conspiracy claim against CET investors constitutes tortious interference with contractual relations.

Crotty has moved to dismiss these counterclaims. And Porter has moved to dismiss the civil conspiracy claim against him. The parties agreed by email to waive oral argument on the motions to dismiss.[3]

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[1] The other remaining defendants are Michael Porter, Weston Quasha, and John Does 1-5. Plaintiff dismissed his claims against Renet CET, LLC, Vanterra Continuum Ltd., Christopher Henkel, Paul Lohnes, and Meredyth South LLC.

[2] The Court takes judicial notice of the docket and docket entries in Continuum Energy Technologies, LLC v. Crotty, Suffolk Civ. Action 1984CV02182-BLS2. A judge may take judicial notice of the records in a related judicial action when deciding a motion to dismiss. Jarosz v. Palmer, 436 Mass. 526, 530 (2002).

[3] If the waiver of oral argument was intended to apply to only one motion to dismiss, the Court nonetheless exercises it discretion to decide both motions without a hearing. Though Superior Court Rule 9A(c) says requests for hearings on dispositive motions will normally be allowed, it makes clear that "the parties do not have a right to a hearing" and that "a request for a hearing presents a matter of discretion for the motion judge." F. W. Webb Co. v. Averett, 422 Mass. 625, 627 (1996). Rule 9A has been revised since 1996, but not in any way that undermines this holding in F.W. Webb. The Court finds that a hearing is not necessary and would not be helpful because the issues have been well and clearly briefed, that no party will be unfairly prejudiced if the motions are decided without a hearing, and that waiting for a hearing would unnecessarily delay resolution of these motions given the current public health emergency.

The Court will allow Crotty's motion to dismiss. Crotty is entitled to

dismissal of the counterclaims against him under the so-called anti-SLAPP statute, and that he is therefore entitled to recover reasonable legal fees and costs incurred in responding to the counterclaims.[4] Even if dismissal under that statute were not warranted, Crotty would be entitled to dismissal under Mass. R. Civ. P. 12(b)(6) because the facts alleged in the counterclaims do not plausibly suggest that CET and Preston are entitled to any relief against Crotty.

In contrast, the Court will deny Prof. Porter's motion to dismiss because the facts alleged in Mr. Crotty's complaint plausibly suggest that Porter may be liable for engaging in an unlawful civil conspiracy.

1. Counterclaims against Crotty. The Court will dismiss the counterclaims asserted by CET and Preston for two, independent reasons.

1.1. Anti-SLAPP Motion. Mr. Crotty is entitled to have the counterclaims against him dismissed under the so-called "anti-SLAPP" statute. This law applies to and may bar civil claims that are based on a party's "exercise of its right of petition under the constitution of the United States or of the commonwealth." See G.L. c. 231, § 59H. "The acronym 'SLAPP' stands for strategic lawsuit against public participation." Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 134 n.2 (2017).

The counterclaims implicate the anti-SLAPP statute because they are based solely on Crotty's actions in filing his complaint and suing the Defendants. "Commencement of litigation is quintessential petitioning activity" that is

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[4] If a court grants a special motion to dismiss under the anti-SLAPP statute, it "has no discretion whether to grant costs and reasonable attorney's fees; under the statute [GI. c. 231, § 59H] the grant of both is mandatory." MacDonald v. Paton, 57 Mass. App. Ct. 290, 296 (2003); accord McLarnon v. Jokisch, 431 Mass. 343, 349-350 (2000).

protected by the anti-SLAPP statute. See 447 Harrison Ave. LLC v. JACE Bos., LLC, 483 Mass. 514, 520 (2019) ("Harrison II").

CET and Preston do not contest Crotty's argument that the anti-SLAPP statute applies here. That makes sense. Preston and CET contend that Crotty committed tortious interference by including in his complaint allegations attacking Preston's professional reputation and business ethics and by asserting the civil conspiracy claim against CET investors. Crotty's petitioning activity in filing this suit is therefore the sole basis for the counterclaims.

Since Crotty has shown that the anti-SLAPP statute is implicated, the burden shifts to Preston and CET to prove that their counterclaims are not barred. They may do so in either of two ways. But their efforts to meet that burden are unavailing.

One option is to show by a preponderance of the evidence that Crotty's complaint lacks "any reasonable factual support or any arguable basis in law," and that the filing of the complaint caused Preston and CET "actual harm." See Harrison II, 483 Mass. at 518. To meet the first part of this test, Preston would have to show that Crotty's claims are "devoid of merit." Id. at 522 & 529.

Preston and CET have not shown that Crotty's petitioning activity lacks factual support or any arguable legal basis.

They argue that many of the factual allegations made by Crotty in support of his claims were unnecessary and serve only to impugn Preston's character. But that is not the standard. Claims are not devoid of merit merely because they could have been stated differently. If a civil complaint has reasonable factual and legal support, that does not disappear by adding additional, unnecessary allegations.

Preston and CET also disagree with the inferences Crotty that draws in his complaint from Preston's prior deposition testimony, and insist they can disprove Crotty's allegations. But, again, that is beside the point. Crotty has identified specific evidence that arguable supports his allegations; the possibility that Preston may be able to refute or that Crotty may not be able to prove those allegations at trial does not demonstrate that Crotty's claims lack reasonable factual support. See Wenger v. Aceto, 451 Mass. 1, 6 (2008); Keegan v. Pellerin, 76 Mass. App. Ct. 186, 190-191 (2010).

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The civil conspiracy claim against some of CET's investors is sufficient to withstand a Rule 12(b)(6) motion to dismiss, as discussed below. It necessarily follows that CET and Preston cannot show that claim is devoid of merit either.

Alternatively, in theory Preston and CET could also defeat this motion by showing that their tortious interference claims were "not brought primarily to chill" legitimate petitioning activities. See Blanchard v. Steward Carney Hospital, Inc., 477 Mass. 141, 160 (2017) ("Blanchard I"). The Court must consider "the totality of the circumstances" relevant to Preston's "asserted primary purpose" in bringing the counterclaims, and decide whether it "may conclude with fair assurance" that Preston's goal was to seek damages for harm rather than interfere with or burden Crotty's exercise of his right to petition the government. Id.

Preston and CET cannot meet this standard for several reasons.

First, they cannot meet this burden because Preston and CET are asserting counterclaims in the very action that they say tortious interference. The Supreme Judicial Court has held that "a counterclaimant asserting damages caused by the conduct of the same proceeding ... cannot establish that its counterclaim is not a SLAPP suit." Harrison II, 483 Mass. at 530. In other words, this path to defeating an anti-SLAPP motion is not available where, as here, a defendant's counterclaim is based solely on petitioning activity in the same action. Id. at 529.

Second, Preston and CET have not shown there is any "reasonable possibility" they will prevail on their counterclaims, which is a "necessary but not sufficient factor" in showing that they did not bring their claims to chill Crotty's exercise of his right to petition for relief in court. See Blanchard I, 477 Mass. at 160-161; accord Harrison II, 483 Mass. at 522-523 (non-moving party has burden to show it asserted colorable claims). As discussed below, the counterclaims would have to be dismissed under Rule 12(b)(6) in any case. Preston and CET cannot show that their primary purpose in asserting counterclaims was to seek compensation for unlawful injury when they have failed to assert claims upon which relief may be granted.

Third, Judge Sanders recently found that in a prior action Preston deliberately had CET assert baseless claims against Crotty in an effort to gain an unfair advantage. "The course and manner of proceedings" may be considered "in evaluating whether the claim is a `SLAPP' suit." Blanchard I, 477 Mass. at 160.

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Here, the course of prior proceedings makes less credible Preston's assertion that the only reason he and CET have asserted counterclaims here is because they have suffered grievous injury, and not because they want to punish Crotty for seeking redress in light of Judge Sanders findings and rulings.

1.2. Rule 12(b)(6) Motion. Even if the counterclaims by CET and Preston were not subject to dismissal under the anti-SLAPP statute, the Court would nonetheless have to dismiss those counterclaims under Rule 12(b)(6) because they do not state any claim upon which relief may be granted.

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege

facts that, if true, would "plausibly suggest[] ... an entitlement to relief" in court. Lopez v. Commonwealth, 463 Mass. 696, 701 (2012), quoting Ian nacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

The counterclaim for tortious interference with advantageous business relations is barred by the litigation privilege. "[S]tatements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." Sriberg v. Raymond, 370 Mass. 105, 108 (1976). In other words, the privilege protects all statements that are "pertinent to the proceedings." Aborn v. Lipson, 357 Mass. 71, 73 (197). And this privilege applies "even if the offensive statements are uttered maliciously or in bad faith." Doe v. Nutter, McClennan & Fish, 41 Mass. App. Ct. 137, 140 (1996).

For the reasons stated at pages 14-17 of Crotty's memorandum, the factual allegations that Preston seeks to challenge by way of counterclaim are pertinent to Crotty's claims. Those allegations are therefore absolutely privileged, meaning that the first counterclaim fails as a matter of law.

The second counterclaim, for tortious interference with contractual relations, fails because Preston and CET allege no facts plausibly suggesting that Crotty actually interfered with any contract. Though Preston expresses concern that Crotty's suit may scare off investors in CET, he does not allege that anyone has breached a contract with CET or Preston.

Without such an allegation, Preston and CET have not stated a viable claim. See generally Weiler v. PortfolioScope, Inc., 469 Mass. 75, 84 (2014) (knowingly inducing third party to break contract is element of claim for tortious interference with contractual relations); JNM Hospitality, Inc. v. McDaid, 90 Mass. App. Ct. 352,354-55 & 357(2016) (where landlord did not breach lease

by failing to make nonexclusive parking spaces available to customers of restaurant lessee, third party cannot be liable for intentionally interfering with lease to detriment of tenant); Cavicchi v. Koski, 67 Mass. App. Ct. 654, 661 (2006) (where clients did not breach contingent fee agreements when they discharged attorney, new lawyer who convinced them to do so could not be liable for intentional interference with contract).

2. Claim against Porter. The Court will deny Prof. Porter's motion to dismiss the claim against him. Count III states a viable claim of civil conspiracy against Porter because the facts alleged plausibly suggest that he participated in "a common plan to commit a tortious act" of malicious prosecution and abuse of process by knowingly providing "substantial assistance" to the prior action in the form of financial support. Cf. Kurker v. Hill, 44 Mass. App. Ct. 184, 188189 (1998); accord Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1563-1564 (1st Cir. 1994) (applying Massachusetts law).

The allegations that Porter answered repeated capital calls by providing additional funds to CET, and that he did so with the understanding that at least part of this additional funding would be used to pursue baseless litigation, are sufficient to state a civil conspiracy claim against Porter.

Although Porter denies these allegations, in deciding this motion to dismiss the Court must assume that the facts alleged by Crotty in his complaint are true and must draw "every reasonable inference" in favor of Crotty from those allegations. Rafferty v. Merck & Co., Inc., 479 Mass. 141, 147 (2018). An inference "need only be reasonable and possible;" it does not have to be "necessary or inescapable." Parker v. EnerNOC, Inc., 484 Mass. 128, 132 (2020), quoting Commonwealth v. Kelly, 470 Mass. 682, 693 (2015).

Porter's assertion that the claim against him must be dismissed because some allegations are made on "information and belief" is unavailing. "For purposes of surviving a motion to dismiss, ... a party may allege facts

based on 'information and belief'" and the court must "assume the truth of such allegations." Polay v. McMahon, 468 Mass. 379, 383 n.5 (2014) (partially reversing Rule 12(b)(6) dismissal).

Porter's further contention that Crotty must proffer "particularized allegations" of Porter's actual knowledge of and active participation in the alleged conspiracy is also incorrect. See Patriot Grp., LLC v. Edmands, 96 Mass. App. Ct. 478, 489 (2019); accord Mass. R. Civ. P. 9 (b) ("knowledge ... may be averred

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generally). "[D]etailed factual allegations are not required" to survive Rule 12(b)(6) motion to dismiss. Lopez v. Commonwealth, 463 Mass. 696, 701 (2012). Since civil conspiracy claims do not have to be alleged with particularity, all that is needed is a "short and plain statement of the claim showing that the pleader is entitled to relief." See Mass. R. Civ. P. 8(a), 9(b).

Finally, the Court is not convinced that Mr. Preston's prior deposition testimony establishes that there is no factual basis for the conspiracy claim against Prof. Porter.

Although it is unusual for a Rule 12(b)(6) motion to dismiss to rely on evidence outside the complaint, in this case Porter is within his rights to contend that this prior testimony shows Crotty's claim has no factual basis. Where a complaint sets out "detailed factual allegations which the plaintiff contends entitle him to relief," a claim must be dismissed if those allegations "clearly demonstrate that plaintiff does not have a claim." Fabrizio v. City of Quincy, 9 Mass. App. Ct. 733, 734 (1980); accord Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). Crotty's complaint repeatedly refers to and purports to summarize Preston's prior testimony. The Court may therefore consider that testimony as a part of Crotty's factual allegations without converting Porter's motion into one seeking summary judgment. See generally Maram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004) (in deciding motion to dismiss, court may consider document relied upon by plaintiff in framing complaint); Berkowitz v. President & Fellows of Harvard College, 58 Mass. App. Ct. 262,270 n.7 (2003) (document referenced in complaint considered to be part of it).

But Porter has not shown that Preston's deposition testimony refutes, or even that it does not support, Crotty's civil conspiracy claim. Although nothing in Preston's testimony explicitly ties Porter to the alleged tortious plan, one could reasonably draw that inference from the things Preston did say. And, as noted above, at this stage of the case the Court must draw all reasonable inferences in favor of Crotty, under the assumption he will be able to muster evidence at trial to support the facts he has alleged.

Preston testified that CET owed more than $12 million in debt and was relying on litigation—expressly including its now-failed lawsuit against Crotty—to generate the money needed to repay that debt. He also testified that CET's investors were doing monthly capital calls to fund CET's lawsuit against

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Crotty, and suggested that the investors were insisting that CET proceed with that litigation.

One permissible inference from this evidence is, as Crotty alleges, that Porter knew he was funding CET's lawsuit against Crotty and did so only because he hoped it would generate the money needed to pay CET's debt. Therefore the deposition testimony does not demonstrate that there is no factual basis for the conspiracy claim against Prof. Porter.

ORDERS

Plaintiff Thomas Crotty's motion to dismissed the counterclaims asserted against him is ALLOWED under the anti-SLAPP statute and under Mass. R. Civ. P. 12(b)(6). Crotty is therefore entitled to recover reasonable legal fees and costs that he "incurred for the special motion and any related discovery matters." See G.L. c. 231, § 59H.

Defendant Michael Porter's motion to dismiss the civil conspiracy claim asserted against him is DENIED.

/s/Kenneth W. Salinger Justice of the Superior Court