17-P-1397 Appeals Court

THE PATRIOT GROUP, LLC. vs. BRUCE W. EDMANDS & another.[1]

No. 17-P-1397.

Middlesex. September 17, 2018. - November 13, 2019.

Present: Blake, Wendlandt, & McDonough, JJ.

Libel and Slander. Conspiracy. Privileged Communication. Witness, Privilege. Evidence, Privileged communication, Before quasi-judicial tribunal. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on April 10, 2017.

A pretrial motion to dismiss was heard by C. William Barrett, J.

Jack I. Siegal for plaintiff.
Michael J. Stone (Steven DiCairano also present) for the defendants.

McDONOUGH, J. In this case, we address a Superior Court judgment dismissing an otherwise well-pleaded complaint for defamation against an attorney and his law firm by applying the

[1] Edmands & Williams, LLP.

so-called absolute "litigation privilege." Concluding that the litigation privilege -- which is essentially a complete defense to defamation claims -- has no application to the plaintiff's complaint, we reverse the judgment and remand the matter for further proceedings consistent with this opinion.

Standard of review. We review the allowance of a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), accepting the allegations in the complaint as true and drawing all reasonable inferences in the nonmoving party's favor. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n.7 (2008); Baker v. Wilmer Cutler Pickering Hale & Dorr, LLP, 91 Mass. App. Ct. 835, 842 (2017). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." Iannacchino, supra at 636, quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, supra at 1965.

Background. 1. Patriot's defamation complaint. We summarize the facts alleged in the complaint, again accepting them as true for the purpose of our review. See Harrington v. Costello, 467 Mass. 720, 724 (2014). In 2011, the plaintiff, The Patriot Group, LLC (Patriot), obtained a judgment in excess

of $20 million against Steven C. Fustolo,[2] following litigation arising out of a development project dispute. After Patriot was unsuccessful in collecting its judgment, Patriot (along with two other creditors) initiated involuntary bankruptcy proceedings against Fustolo. As we explain below, one key to our holding is that Attorney David M. Nickless, and not the defendants Attorney Bruce W. Edmands or his law firm, Edmands & Williams, LLC, (collectively, Edmands),[3] represented Fustolo in the bankruptcy proceeding. Thereafter, Edmands, purportedly acting as Fustolo's attorney, sent a letter dated May 9, 2014, on his firm's letterhead (May 9 letter) to Patriot's counsel, Michael J. Fencer, (and three others) that included a number of false statements of fact about Patriot. Principally, the May 9 letter stated that Patriot had committed tax fraud, and that Fustolo had filed two whistleblower claims for award based on Patriot's tax fraud, one with the Internal Revenue Service (IRS) and a

[2] Fustolo, who was not listed as a party in the complaint, is not a party to this appeal.

[3] In his affidavit submitted prior to the hearing on the rule 12 (b) (6) motion, Edmands unequivocally states, "I did not represent Fustolo in [his bankruptcy] proceedings."

second with the Securities and Exchange Commission (SEC).[4,5] The May 9 letter further stated that Fustolo "anticipate[d] the possibility of filing additional claims" against Patriot under other Federal and State whistleblower statutes, and that Fustolo would "pursue all available remedies in response to any continuing or further acts of retaliation and harassment." In addition, the May 9 letter falsely asserted that Fustolo had "previously informed a Patriot representative of his intention to notify the [IRS] of Patriot's alleged tax fraud," that Patriot had filed the involuntary bankruptcy petition against Fustolo "to harass and intimidate [Fustolo] and destroy his reputation," and that Patriot and its principal, John Howe, had driven Fustolo into bankruptcy proceedings specifically in retaliation for threatening to "blow the whistle to the IRS and SEC" on Patriot's tax fraud.

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[4] The May 9 letter stated that Fustolo had filed whistleblower claims, reporting Patriot's fraudulent tax filings with the IRS in accordance with its "Whistleblower statute, Section 7623 of the Internal Revenue Code," and with the SEC "as a notice . . . identifying himself as a whistleblower . . . pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act."

[5] In December 2013, the bankruptcy court appointed a trustee to investigate Fustolo's financial assets. Notably, in January 2014, Fustolo filed sworn bankruptcy schedules listing his assets and liabilities in which he did not disclose any pending whistleblower or retaliation claims for award.

Edmands and Fustolo were deposed in the latter's bankruptcy proceeding.[6] Fustolo could not recall a single salient detail supporting the May 9 letter, including any bases for the accusation that Patriot had committed tax fraud. When queried further about the May 9 letter, Fustolo generally invoked his Fifth Amendment right against self-incrimination. Edmands testified that he reviewed, edited, and sent the May 9 letter drafted by Fustolo, and that he sent it out to intimidate Patriot and Howe, whom Edmands perceived as "'bullies' toward his long-time client, Fustolo."[7] Edmands further testified that

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[6] See Patriot Group, LLC v. Fustolo, 597 B.R. 1, 6 (Bankr. D. Mass. 2019) where, following trial, judgment entered in favor of Patriot denying discharge of Fustolo: (1) under 11 U.S.C. § 727(a)(2)(A) (2012), as Fustolo had transferred cash from his personal bank account to a foundation for the purchase of gemstones with the intent to hinder, delay, and defraud a creditor; (2) under 11 U.S.C § 727(a)(2)(B) (2012), as the assets of two corporations were, in fact, Fustolo's assets under an alter ego theory and, thus, became property of his bankruptcy estate, and his transfer of those assets to a new entity were done with the intent to defraud creditors; (3) under 11 U.S.C. § 727(a)(3) (2012), as Fustolo, a sophisticated businessman and certified public accountant, failed to establish that he had kept and preserved adequate books and records from which his financial condition and business transactions might be ascertained; and (4) under 11 U.S.C. § 727(a)(5) (2012), as Fustolo could not satisfactorily explain the unaccounted for cash withdrawals from his bank accounts withdrawn before the filing of the bankruptcy petition.

[7] As we have noted, the substance of the May 9 letter originated with Fustolo. Fustolo initially had drafted the letter and sent it to Edmands, who then advised Fustolo that his "representation would be strictly limited to finalizing [Fustolo's] draft notification letter and transmitting it to [an

without "inform[ing] himself" about the details of the applicable IRS code and whistleblower award statutes, he nevertheless was "willing to send the letter because of the time constraints," and because "[i]t might throw [Patriot's counsel in Fustolo's bankruptcy case] off his game."

No one -- including Edmands and Fustolo -- has proffered any evidence to substantiate Edmands's accusation that Patriot committed tax fraud. Although Edmands knew that many allegations in the May 9 letter lacked any factual basis, he knowingly and willfully assisted Fustolo's dissemination of false allegations against Patriot by sending the letter to Patriot's counsel and three others in the hope of influencing the bankruptcy proceedings in Fustolo's favor.

Thereafter, Fustolo republished the false statements regarding Patriot contained in the May 9 letter through widely disseminated Internet postings. To that end, Fustolo hired a specialist in posting online content, Dylan Potter, to post "blog" websites falsely claiming that Patriot committed tax and securities fraud. At Fustolo's request, Potter created a blog website entitled whistleblowersinternationalblog.blogspot.com (WBI blog) using BlogSpot (an Internet service owned by Google, Inc.). Fustolo then sent Potter draft articles for the WBI

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attorney involved in the bankruptcy proceeding] and the bankruptcy trustee."

blog, which "in large part[] mirrored" the false tax fraud allegations in the May 9 letter. One such posted article referenced a "letter" from Fustolo's "attorney" (inferentially, Edmands, whose letter was not otherwise publicly available). Fustolo sent Potter other articles that Potter then posted on the WBI blog, repeating the tax fraud falsehoods about Patriot originating in the May 9 letter. When questioned by Potter as to the veracity of the content being posted, Fustolo stated, "My attorney thinks [that Patriot is] on weak ground about the underlying claim that the articles are false as they are not."

Patriot has not committed any tax or securities fraud and no regulatory agency has investigated or contacted Patriot regarding such allegations. Patriot has never retaliated against, nor has ever been accused of retaliating against, a purported whistleblower.[8]

2. Superior Court proceedings. On April 10, 2017, Patriot filed its complaint for damages against Edmands -- summarized above -- asserting claims that Edmands had defamed Patriot with malice (count I), aided and abetted Fustolo's defamation (count II), and conspired with Fustolo to defame Patriot (count III). Claiming principally that Patriot's defamation complaint was

[8] We accept as true Patriot's allegation that the basis Edmands asserted for Fustolo's whistleblower claims -- that Patriot had committed tax fraud -- is false.

barred by the absolute litigation privilege, and that the complaint failed to allege sufficient facts to support Patriot's claim that Edmands had aided and abetted or conspired with Fustolo to defame Patriot, Edmands moved under Mass. R. Civ. P. 12 (b) (6) to dismiss Patriot's complaint.[9]

Following a hearing, a judge dismissed Patriot's complaint, essentially relying on our decision in Fisher v. Lint, 69 Mass. App. Ct. 360 (2007). The judge reasoned that because Fustolo's purported IRS and SEC whistleblower claims had to be submitted under the penalties of perjury, and because Fustolo could be represented by counsel before the agencies, those proceedings were "sufficiently judicial or quasi judicial in nature" so as to trigger the litigation privilege. Id. at 366. The judge stated:

> "The safeguards applicable to filing whistleblower claims with both the IRS and the [SEC] support the conclusion that the litigation privilege applies to the May 9th Letter. First, filing notices with both the IRS and the [SEC] require a declaration under the penalty of perjury that the submitted information is true. 17 C.F.R. § 240.21F-9 ([SEC]); 26 C.F.R § 301.7623-1(c)(3) (IRS). Courts have deemed this threat of prosecution for perjury to be significant when considering whether a proceeding's safeguards 'serve to reduce the need for tort actions to control injurious statements or testimony.' Fisher, [supra] at 369; see id. (holding that 'the threat of

[9] Edmands also filed a separate special motion to dismiss Patriot's complaint pursuant to G. L. c. 231, § 59H, the "anti-SLAPP" statute. Because the judge allowed Edmands's rule 12 (b) (6) motion to dismiss, he took no action on the special motion to dismiss.

> perjury . . . serve[s] to enhance the reliability of the evidence to be assessed by impartial decision-makers'). Second, whistleblowers to both entities may be represented by counsel, another relevant factor in the analysis. 15 U.S.C. § 78u-6(1)-(2) ([SEC]); 26 U.S.C. § 7623(b)(6)(B) (IRS); see Fisher, [supra] ('including the right to counsel' among factors that 'serve to reduce the need for tort actions to control injurious statements or testimony')."

Applying the litigation privilege, the judge then dismissed the defamation count, and as to the remaining counts of aiding and abetting, and conspiracy, dismissed those counts "to the extent that they arise out of the May 9th Letter."[10] So limiting his review of the remaining two counts, the judge ruled that although Patriot's complaint sufficiently alleged that Edmands had knowledge of Fustolo's defamatory posts, Patriot did not sufficiently allege that Edmands provided Fustolo with "substantial assistance" necessary to sustain its counts for aiding and abetting or conspiracy. On this point, the judge determined that Patriot did not allege facts "plausibly suggest[ing] that [Edmands] did any more than provide Fustolo with 'legal advice' with respect to the Internet postings."

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[10] The judge reasoned: "As the litigation privilege bars Patriot from bringing any claims against [Edmands] that arise out of the May 9th Letter, [the aiding and abetting, and conspiracy] Counts . . . are limited to Fustolo's statements that do not reference the filing of whistleblower notices with the IRS and the [SEC]. Therefore, these claims are limited to allegations that the IRS and the [SEC] were investigating Patriot for tax fraud and other violations."

Discussion. 1. Litigation privilege. The litigation privilege, which concerns nonevidentiary areas, basically is a defense to suit. See Mass. G. Evid. Art. V(h)(1) (2019). Where it applies, "[w]ritten or oral communications made by a party, witness, or attorney prior to, in the institution of, or during and as a part of a judicial proceeding involving said party, witness, or attorney are absolutely privileged even if uttered maliciously or in bad faith." Id. at 93. Such "[s]tatements made in the course of a judicial proceeding that pertain to that proceeding are . . . absolutely privileged and cannot support [civil liability]." Correllas v. Viveiros, 410 Mass. 314, 319 (1991). "An absolute privilege is favored because any final judgment may depend largely on the testimony of the party or witness, and full disclosure, in the interests of justice, should not be hampered by fear of an action for defamation." Id. at 320, citing Restatement (Second) of Torts § 588 comment (a) (1977). "[T]he absolute privilege which attaches to those statements protects the maker from any civil liability based thereon. . . . To rule otherwise would make the privilege valueless if an individual would then be subject to liability under a different theory." Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140-141 (1996). "[I]t is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their

testimony have a remedy." Correllas, supra at 320, quoting Aborn v. Lipson, 357 Mass. 71, 72 (1970). A party claiming the privilege must have "serious[ly] consider[ed]" litigation "in good faith." Mack v. Wells Fargo Bank, N.A., 88 Mass. App. Ct. 664, 667 (2015), quoting Sriberg v.Raymond, 370 Mass. 105, 109 (1976). Consequently, the party asserting the privilege "must do more than speculate about the possibility of a judicial proceeding in the future." Harmon Law Offices, P.C. v. Attorney Gen., 83 Mass. App. Ct. 830, 838 (2013).

The litigation privilege protects an attorney's statements made while "engaged in his function as an attorney," both during and prior to litigation. Mack, 88 Mass. App. Ct. at 669, quoting Sriberg, 370 Mass. at 109. The litigation privilege does not apply when the individual claiming the privilege "was neither 'a party, counsel [n]or witness in the institution of, or during the course of, [that] judicial proceeding' when [the individual] engaged in the conduct complained of." Mack, supra at 668, quoting Sriberg, supra at 108. Moreover, the privilege does not "encompass attorneys' conduct in counselling and assisting their clients in business matters generally." Mack, supra at 667, quoting Kurker v. Hill, 44 Mass. App. Ct. 184, 192 (1998).

The party asserting the litigation privilege bears the burden of showing that a particular communication is privileged.

Mack, 88 Mass. App. Ct. at 668. A judge determines whether the litigation privilege applies "on a case-by-case basis, after a fact-specific analysis, with a proper consideration of the balance between a plaintiff's right to seek legal redress for injuries suffered and the public policy supporting the application of such a strong protection from the burdens of litigation." Fisher, 69 Mass. App. Ct. at 365-366. In order for the litigation privilege to apply, the key inquiry is "whether a proceeding is sufficiently judicial or quasi judicial in nature." Id. at 366. We have held that a proceeding which included "the right to counsel, the right to present evidence, the right to cross-examine adverse witnesses, and the threat of perjury," constituted a "quasi judicial" proceeding. Id. at 369. In Fisher, we determined that "the State police trial board possesses the authority and provides the procedural protections that differentiate a quasi judicial board from one that merely performs an administrative function." Id. See Visnick v. Caulfield, 73 Mass. App. Ct. 809, 813 (2009) (holding that statements made in letter regarding intention to file complaint with Equal Employment Opportunity Commission covered by litigation privilege because such proceedings are "sufficiently judicial in nature").

As to both Fustolo's purported whistleblower claims for awards and his bankruptcy proceeding, we conclude that Edmands

"did not meet [his] burden in the Superior Court" to show that the litigation privilege bars Patriot's claims against Edmands. Harmon Law Offices, P.C., 83 Mass. App. Ct. at 838. Accordingly, it was error to apply the litigation privilege in this case.

a. Fustolo's purported whistleblower claims. Here, we agree with Patriot that the judge erred in concluding that, based on the May 9 letter describing purported whistleblower claims Edmands's client had presumably submitted to the IRS and SEC, the litigation privilege barred Patriot's defamation count, as well as its aiding and abetting, and conspiracy counts to the extent that they arise out of the May 9 letter. On the current record, there is nothing to suggest that any whistleblower proceeding was filed with either the IRS or the SEC, and there is nothing in the record to indicate that Edmands was counsel for Fustolo in any such hypothetical proceeding.[11] In the

[11] The record of the motion hearing reveals that Edmands failed to provide the judge with any corroboration that Fustolo, in fact, submitted the subject whistleblower claims to either agency. Nevertheless, the judge appears to have assumed that Fustolo did so, notwithstanding Patriot's allegations contained in its complaint calling into serious question whether the Fustolo whistleblower claims ever existed. On appeal, Patriot continues to state that "whether Fustolo made IRS and SEC filings has never been established" and bluntly asserts that "Fustolo's supposed filings with the SEC and IRS never occurred (it was a fiction invented by Fustolo and [Edmands])." We add that neither party to this appeal has been able to locate or produce copies of either purported whistleblower claim.

absence of any litigation (or even a suggestion that one seriously was considered in good faith by Edmands), perforce the litigation privilege is unavailable. See Mack, 88 Mass. App. Ct. at 667.

Even assuming arguendo that Fustolo did submit whistleblower claims to these agencies, we conclude that Edmands failed to submit sufficient facts or other information from which the judge could reasonably conclude that the proceedings as to Fustolo's purported whistleblower claims were "judicial or quasi judicial in nature," thus triggering the absolute litigation privilege. Fisher, 69 Mass. App. Ct. at 366. We accept -- as did the judge -- that the purported whistleblower claims had to be filed under the penalty of perjury with the agencies, which permitted the claimant to be represented by counsel.[12] However, our decision in Fisher requires more than that in order to deem an administrative proceeding as judicial or quasi judicial, namely, the presentation of evidence, cross-examination of adverse witnesses, and a decision by an impartial decision maker. See id. at 369. The instant case, thus, is

[12] The judge cited to SEC regulation 17 C.F.R. § 240.21F-9(b), (c) (2018) and IRS regulation 26 C.F.R. § 301.7623-1(c)(3) (2018), each discussing whistleblower claim filings, and noting the penalty of perjury requirement and that the claimant is permitted to be represented by counsel, but including no provisions for evidentiary hearing, presentation of witnesses, cross-examination of adverse witnesses, findings, or review.

easily distinguishable from Fisher, where we held that the judge erred in determining that a State police trial board hearing, conducted under State police rules and regulations, was not a proceeding sufficiently judicial or quasi judicial in nature to apply the litigation privilege. Id. at 367-369. There, we held that a State police trial board hearing is "'a formal administrative proceeding,' . . . which, as the Supreme Judicial Court has noted, 'appears analogous to a military court martial board.'" Id. at 367, quoting Burns v. Commonwealth, 430 Mass. 444, 448 n.6, (1999). We stated in Fisher:

> "[T]he State police trial board possesses the authority and provides the procedural protections that differentiates a quasi judicial board from one that merely performs an administrative function. The safeguards built into the hearing process serve to reduce the need for tort actions to control injurious statements or testimony. . . . The procedural due process protections featured at trial board hearings, including the right to counsel, the right to present evidence, the right to cross-examine adverse witnesses, and the threat of perjury, also serve to enhance the reliability of the evidence to be assessed by impartial decision-makers."

Fisher, supra at 369.[13]

Unlike the State police trial board hearings that we deemed quasi judicial in Fisher, Edmands failed to present to the judge any basis to support a conclusion that the whistleblower claims

[13] In Fisher, we set forth in considerable detail the particulars of these procedural guarantees afforded by the State police rules and regulations. See Fisher, 69 Mass. App. Ct. at 367-369.

are resolved through a judicial or quasi judicial proceeding. Nor on appeal has Edmands called to our attention any authority -- statutory, regulatory, case law, or otherwise -- even suggesting that that the proceedings for either the IRS or the SEC whistleblower claims provide for the presentation of evidence, cross-examination of witnesses, a decision by an impartial decision maker, or review of that decision. Rather, from the record on the motion to dismiss, claims to the IRS and the SEC for whistleblower awards appear to be resolved as part of each agency's administrative, as opposed to adjudicative, functions. See Fisher, 69 Mass. App. Ct. at 369 (outlining "procedural protections that differentiate a quasi judicial board from one that merely performs an administrative function"). Edmands therefore failed to meet his burden to show that the proceedings regarding Fustolo's whistleblower claims for awards are judicial or quasi judicial in nature. Given the lack of a judicial or quasi judicial proceeding attendant to Fustolo's purported whistleblower claims, Edmands may not invoke the litigation privilege as a bar to Patriot's claims. See Harmon Law Offices, P.C., 83 Mass. App. Ct. at 838 ("even assuming that the requested documents constitute statements or communications, they do not relate to . . . contemplated or instituted [judicial or quasi judicial proceedings]").

b. Fustolo's bankruptcy proceedings. We agree with the judge that Fustolo's bankruptcy case, while undoubtedly a judicial proceeding, could not provide a basis for Edmands's litigation privilege defense.[14] As we noted at the outset, Nickless, not Edmands, represented Fustolo in his bankruptcy proceeding. Indeed, Edmands submitted an affidavit, prior to the hearing on his motions to dismiss, denying that he was in any way involved with Fustolo's bankruptcy proceeding. See note 3, supra. Moreover, as the judge correctly concluded, "the entirety of the May 9th letter relates to Fustolo's status as a whistleblower," not to the bankruptcy proceeding itself. Consequently, it is beyond dispute that when Edmands sent the defamatory May 9 letter, he was not "engaged in his function as an attorney" with respect to Fustolo's bankruptcy proceedings, and, thus, that proceeding may not trigger the litigation privilege as to Patriot's defamation claims against him. Mack, 88 Mass. App. Ct. at 669, quoting Sriberg, 370 Mass. at 109 ("it is undisputed that the statements and actions about which the plaintiff complains were 'made by an attorney engaged in his

[14] Although the judge rejected Edmands's argument that Fustolo's bankruptcy proceeding was a proper predicate to Edmands's assertion of the litigation privilege, on appeal Edmands urges that we affirm the dismissal of Patriot's complaint, in part, because "the May 9 Letter . . . was pertinent to the ongoing bankruptcy proceeding." We are not persuaded.

function as an attorney . . . in the institution or conduct of litigation or in . . . communications preliminary to litigation'").

2. Patriot's remaining aiding and abetting, and conspiracy counts. For Patriot to state a cognizable claim that Edmands aided and abetted Fustolo in defaming Patriot, Patriot "must [sufficiently allege]: (1) that [Fustolo] committed the relevant tort; (2) that [Edmands] knew [Fustolo] was committing the tort; and (3) that [Edmands] actively participated in or substantially assisted in [Fustolo's] commission of the tort." Go-Best Assets Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012). For Patriot to state a cognizable claim that Edmands engaged in a civil conspiracy with Fustolo to defame Patriot, it must sufficiently allege that Edmands "knew that the conduct of [Fustolo] . . . constituted" defamation and "substantially assisted [Fustolo] in or encouraged that conduct." Baker, 91 Mass. App. Ct. at 847-848. We have held that "[a]n allegation that [clients had] acted under the legal advice of the [their attorneys], without more, is insufficient to give rise to a claim that [the] attorney[s are] responsible to third persons for the. . . acts of [their] clients." Id. at 848, quoting Spinner v. Nutt, 417 Mass. 549, 556 (1994).

Here, we conclude that the judge erred in dismissing both the aiding and abetting, and the conspiracy counts because

Patriot's allegations, accepted as true, "'plausibly suggest[]' . . . an entitlement to relief" (citation omitted). Iannacchino, 451 Mass. at 636. As to its aiding and abetting claim, Patriot's complaint sufficiently alleges that Fustolo defamed Patriot through publications that "accuse[ed] [Patriot] . . . of tax fraud and expose[d] [Patriot] to hatred, contempt, ridicule, and obloquy because they inaccurately portray [Patriot] . . . as [a] tax cheat[] that retaliate[s] against people who report alleged wrongdoing -- all of which is false." The complaint sufficiently alleges that Edmands knew about the defamatory online posts, or knew that Fustolo was defaming Patriot. Further, the complaint sufficiently alleges that Edmands "substantially assisted" Fustolo's conduct by defaming Patriot in the May 9 letter, claiming that Patriot initiated bankruptcy proceedings against Fustolo to "retaliate against him for reporting Patriot's tax violations," and by suggesting that the allegations in the online posts that Patriot retaliated against Fustolo were true. See Go-Best Assets Ltd, 463 Mass. at 64.

Similarly, Patriot pleaded sufficient facts to support its civil conspiracy claim. Patriot alleged that Edmands knew that Fustolo defamed Patriot with regard to the Internet postings, and "substantially assisted" Fustolo by editing, signing, and sending the May 9th letter that Fustolo had drafted, and by

implicitly attesting to the accuracy of Fustolo's online posts to a third party. Baker, 91 Mass. App. Ct. at 848. Patriot's claim that Fustolo was defaming Patriot with Edmands's "knowledge, like other conditions of mind, can be averred generally." Id. at 849, citing Mass. R. Civ. P. 9 (b), 365 Mass. 751 (1974).[15]

We conclude, therefore, that Patriot alleged sufficient facts, which, if proved, would entitle Patriot to relief against Edmands for aiding and abetting Fustolo's defamation of Patriot, as well as for conspiring with Fustolo to defame Patriot. Thus, the judge erred in dismissing those counts of Patriot's complaint. See Iannacchino, 451 Mass. at 636.

Conclusion. For the forgoing reasons, the judgment dismissing Patriot's complaint is reversed, and the matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

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[15] Even applying the heightened pleading requirements of rule 9 (b), it was sufficient for Patriot to plead "generally" that Edmands had acted with malice and knowledge that Fustolo was using Edmands's false statements in the May 9 letter to defame Patriot. Mass. R. Civ. P. 9 (b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally").