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20-P-537 Appeals Court

HAVERHILL STEM LLC & another[1] vs. LLOYD JENNINGS & another.[2]

No. 20-P-537.

Essex. January 15, 2021. - May 26, 2021.

Present: Green, C.J., Kinder, & Englander, JJ.

"Anti-SLAPP" Statute. Constitutional Law, Right to petition government, Privileges and immunities. Privileged Communication. Evidence, Privileged communication. Practice, Civil, Motion to dismiss, Review of interlocutory action, Interlocutory appeal. Consumer Protection Act, Unfair act or practice. Words, "Solely."

Civil action commenced in the Superior Court Department on June 5, 2019.

A special motion to dismiss was heard by David A. Deakin, J., and motions to reconsider and to stay proceedings were considered by him.

Alvin S. Nathanson (Scott Adam Schlager also present) for the defendants.

Thomas K. MacMillan for the plaintiffs.

[1] Caroline Pineau.

[2] Brad Brooks.

ENGLANDER, J. This case presents issues regarding the types of claims that can survive challenge under the so-called "anti-SLAPP statute," G. L. c. 231, § 59H. The plaintiffs, Caroline Pineau and Haverhill Stem LLC (collectively Pineau or plaintiffs), sought to operate a marijuana dispensary at a property that Pineau leased in downtown Haverhill. The defendants, Brad Brooks and Lloyd Jennings, own the property next door to Pineau, and opposed the dispensary, including Pineau's efforts to obtain necessary zoning relief. The plaintiff's complaint alleges that Brooks and Jennings coerced and threatened Pineau, in an effort to extort money from her in return for the defendants' agreement to withdraw their opposition to the proposed dispensary.

The complaint accordingly alleges claims, among other things, for violations of G. L. c. 93A and the Massachusetts Civil Rights Act, see G. L. c. 12, § 11I, as well as for defamation. The defendants moved to dismiss under the anti-SLAPP statute, G. L. c. 231, § 59H, arguing that the plaintiff's claims were based upon the defendants' lawful, constitutionally protected petitioning activity. The motion was denied, and the defendants appeal. We affirm.

Background. We recite the well-pleaded facts from the complaint, supplemented in part by facts identified by the judge

as a result of the process employed to decide a motion to dismiss under the anti-SLAPP statute.[3]

As is one of the paradigms in anti-SLAPP cases, the plaintiff was seeking something from the government here, and the defendants opposed same. As of 2018 Pineau was seeking to establish a marijuana dispensary in Haverhill's downtown, and was advocating for zoning ordinance changes that would allow such establishments in that district. In October of 2018, Pineau's father purchased the building at 124 Washington Street, the eventual site of her marijuana business. Pineau thereafter contacted her neighbors, including defendant Brooks. The defendants Brooks and Jennings own the property at 128-130 Washington Street, where they lease out several residential units as well as space for a restaurant, in which Jennings has a financial interest.

According to the complaint, Brooks and Jennings objected to the proposed use of 124 Washington as a marijuana dispensary, unless Pineau first paid them $30,000. The defendants' position was based in a dispute that predated Pineau's lease of the

[3] Unlike with a motion pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), § 59H expressly provides that in ruling on a special motion to dismiss, the court "shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." In this case the parties not only submitted affidavits, but also agreed to the taking of a limited number of depositions.

building at 124 Washington. The defendants had been at odds with the prior owner, when the defendants had sought to build a deck behind their own building at 128 Washington. The prior owner raised concerns that the defendants' proposed deck extended onto his property; that dispute was resolved by the defendants paying $30,000 to also build a deck behind 124 Washington. As a result, in the defendants' view "the building," now leased by Pineau, owed the defendants $30,000, and absent a payment the defendants "would fight whatever Pineau proposes for use of the building."

Accordingly, the defendants actively opposed the effort to allow marijuana establishments to operate in the downtown waterfront district. When Pineau first contacted Brooks regarding her plans in October of 2018, Brooks responded: "[W]ell, you better bet me and my partner are going to get our money back from the deck we built, which is $30,000, and make sure you go through the same hell with the city that we did." The parties met several times thereafter, with Brooks and Jennings reiterating their demand for money. The complaint repeatedly characterizes the way the defendants went about their opposition as "threats" and "coercion." The characterizations by themselves are not sufficient to avoid dismissal, of course; because anti-SLAPP law must account for the defendants' fundamental rights of speech and petitioning, we must go beyond

the labels in the complaint, and examine what the defendants allegedly said and did.

Although Haverhill approved the zoning ordinance allowing marijuana establishments in January of 2019, the parties' dispute continued throughout the first several months of 2019, as did the negotiations. Jennings reportedly told people "around town" that Pineau "doesn't know who she is dealing with" and would "see how Haverhill works."[4] The parties met again in March of 2019, with the defendants demanding $30,000, the use of the deck at Pineau's building, and "that no cannabis commerce take place on the second or third floor" of Pineau's building. The defendants also threatened to bring a "RICO"[5] lawsuit against Pineau. In subsequent negotiations the defendants raised their price to $50,000, and then to $75,000.

Then, on April 10, 2019, the defendants met with Pineau's husband. During that meeting Jennings became angry. He reiterated the threat of a RICO lawsuit and stated that he was "prepared to try and destroy the Pineaus and their business

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[4] According to the complaint, Brooks and Jennings also made their demand known to "many people in the Haverhill business and downtown community," which resulted in "people" "ask[ing] Pineau why she owed [Brooks and Jennings] $30,000." These alleged statements by the defendants were the basis for Pineau's defamation claim.

[5] Presumably, a lawsuit under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (c) (1988).

before it got off the ground." He then went on to say that "the Pineaus don't have the money to fight him and he has already won and was prepared to take everything from the Pineaus, including their house." Further negotiations were unsuccessful. On May 30, 2019, the defendants and another business owner filed a suit in the Land Court against the plaintiff and others, seeking to invalidate the recreational marijuana zoning bylaw on several grounds. On June 5, the day after being served with the complaint in the Land Court action, Pineau filed this lawsuit in Superior Court. Pineau's complaint states six counts, including claims for violation of G. L. c. 93A, violation of the Massachusetts Civil Rights Act, see G. L. c. 12, § 11I, and defamation. The defendants moved to dismiss under the anti-SLAPP statute, contending that the suit was based on their protected right to petition the government. They also moved to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for failure to state a claim. As part of litigating the anti-SLAPP motion, the parties agreed to depositions, and Pineau, Brooks, and Jennings were each deposed.

The Superior Court judge denied the anti-SLAPP motion. Most saliently, he concluded that the defendants had failed to show that Pineau's claims were "based solely on [the defendants'] exercise of the constitutional right to petition" -- the threshold element of anti-SLAPP analysis under the

decisions of the Supreme Judicial Court. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 167-168 (2017), S.C., 483 Mass. 514 (2019) (477 Harrison); Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 147-148 (2017), S.C., 483 Mass. 200 (2019) (Blanchard I). The judge noted that Pineau's claims were based on more than that the defendants had objected to the marijuana dispensary, and more than that the defendants had demanded money to drop their objection; rather, the plaintiff had "allege[d], not implausibly, that the defendants engaged in a pressure campaign to coerce Pineau to pay them," which had included threats "both [to] Pineau's business project and her family's financial wellbeing." The judge also went on to deny most of the defendants' rule 12 (b) (6) motion.[6,7]

[6] Since filing the complaint, Pineau has received all of the necessary permits and approvals, and the dispensary has been open since June of 2020. As a result, in response to the rule 12 (b) (6) motion the plaintiff agreed to dismiss one of the six counts -- for intentional interference with contractual and economic relations. The judge also dismissed the count for civil harassment. The remaining counts were allowed to proceed -- the three counts mentioned above, as well as a count for civil conspiracy.

[7] Following the issuance of a special permit to Haverhill Stem LLC, the defendants filed a second Land Court suit, in September of 2019, challenging the issuance of the special permit. The first suit, challenging the zoning ordinance, resulted in a judgment adverse to the defendants, and is now on appeal to this court. The second suit, challenging the issuance of the special permit, was voluntarily dismissed in June of 2020.

The defendants appealed from the order denying their anti-SLAPP motion to dismiss, invoking the doctrine of present execution. The defendants also moved for reconsideration, this time pressing an argument that the plaintiff's claims were barred by the litigation privilege. The judge rejected the litigation privilege argument as well, and denied the motion for reconsideration. On the appeal before us, the defendants raise arguments based on the anti-SLAPP statute, the litigation privilege, and their rule 12 (b) (6) motion.[8]

Discussion. 1. The anti-SLAPP motion to dismiss. The anti-SLAPP statute provides a mechanism for early dismissal of civil claims, where those claims are "based solely on [a defendant's] exercise of the right of petition" to the government. 477 Harrison, 477 Mass. at 168. The Supreme Judicial Court has construed the statute several times, and has provided a framework, which has evolved over time, for analyzing whether an anti-SLAPP motion to dismiss should be allowed. See, e.g., Blanchard v. Steward Carney Hosp., Inc., 483 Mass. 200

[8] The denial of the defendants' anti-SLAPP motion to dismiss is immediately appealable under the doctrine of present execution. See Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 136-137 (2017). The same is true of a "denial of a motion to dismiss predicated on litigation privilege." Id. at 140. On the other hand, the denial of a rule 12 (b) (6) motion generally is not appealable on an interlocutory basis, and we do not address those issues. See Chiulli v. Liberty Mut. Ins., Inc., 87 Mass. App. Ct. 229, 232-233 (2015). See also Elles v. Zoning Bd. of Appeals of Quincy, 450 Mass. 671, 674-675 (2008).

(2019) (Blanchard II); 477 Harrison, 477 Mass. 162; Blanchard I, 477 Mass. 141; Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156 (1998). The court has admonished that an anti-SLAPP motion must be evaluated in light of the statute's fundamental purpose, which is to identify and cut off those claims that are "without merit primarily brought to chill legitimate petitioning activities." Blanchard I, supra at 155. To that end, a defendant seeking dismissal must show, at the threshold, that the claims against it "are based solely on [its] exercise of its [constitutional] right to petition" (emphasis added). Id. at 147. The defendants' motion founders on this threshold requirement.

The standard of review of a denial of an anti-SLAPP motion to dismiss for failure to meet the threshold element is de novo. See Reichenbach v. Haydock, 92 Mass. App. Ct. 567, 572 (2017). In resolving whether the plaintiff's claims here are based solely on the defendants' petitioning activity, we find the Supreme Judicial Court's decision in Blanchard I particularly instructive. In this case, as in Blanchard I, some of the plaintiff's allegations are based on protected petitioning activity, but other significant allegations are not.

In Blanchard I, 477 Mass. at 146, the court addressed a motion to dismiss a single defamation count that alleged defamation by two separate types of statements. The plaintiffs

were nurses at a local hospital; the defendants were the hospital and hospital officials. Id. at 142. The hospital defendants had made one set of allegedly defamatory statements publicly, through the Boston Globe Newspaper Co. (Globe); the court ruled that these statements were intended to reach and to influence a public agency that was then investigating the defendants, so the statements qualified as petitioning activity. Id. at 150-151. The court noted that the statements had not been made directly to a government body, but ruled that the statements nevertheless qualified as petitioning activity because they met the statutory definition of § 59H -- in particular, they were "statement[s] made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding" (emphasis added).[9] G. L. c. 231, § 59H. See Blanchard I, supra

[9] The anti-SLAPP statute defines petitioning activity as follows:

> "[1] any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] 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; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government."

at 148-151. Accordingly, because the part of the defamation claim based on the Globe statements was based on the defendants' petitioning activity, it was potentially dismissible under the anti-SLAPP statute and case law.[10] See id. at 161.

The second type of allegedly defamatory statements in Blanchard I, 477 Mass. at 142, were not made to the Globe, but rather were made internally to hospital staff. As to those statements the court ruled that they did not constitute petitioning activity at all, because those internal statements

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G. L. c. 231, § 59H.

[10] Under the Supreme Judicial Court's precedent, once a defendant invoking the anti-SLAPP statute meets the threshold showing that the claims against it are based on its petitioning activity, the burden then shifts to the plaintiff, who can avoid dismissal by making one of two showings:

> "First path. . . . '(1) the [defendant's] exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the [defendant's] acts caused actual injury to the [plaintiff].'
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> . . .
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> "Second path. [Alternatively,] . . . (a) [the plaintiff's] suit was 'colorable'; and (b) . . . the suit was not '"brought primarily to chill" the [defendant's] . . . legitimate exercise of its right to petition.'"

Blanchard II, 483 Mass. at 204, quoting G. L. c. 231, § 59H, and Blanchard I, 477 Mass. at 159-161. Because the defendants' anti-SLAPP motion here fails at the threshold, we do not need to reach the second stage of the framework and thus do not address it.

"ha[d] no plausible nexus to the hospital's efforts to sway [the government's] licensing decision." Id. at 151-152. Accordingly, the portion of the plaintiffs' defamation claim based upon the hospital defendants' internal statements was not dismissible under the anti-SLAPP statute and would go forward, because the defendants could not meet the threshold burden as to that portion. See id. at 153.

Applying the teachings of Blanchard I here, we conclude that Pineau's claims are not based solely on the defendants' petitioning activity, and thus that the claims survive an anti-SLAPP motion. As discussed, the thrust of Pineau's complaint is that the defendants employed threats in order to coerce Pineau to pay money, in exchange for which the defendants would drop their opposition to the proposed marijuana dispensary. The threats and coercive actions by the defendants were directed at Pineau rather than a government entity, and thus, as in Blanchard I, 477 Mass. at 148, the question is whether the defendants' conduct could nevertheless qualify as "petitioning," because the actions were "in connection with" an issue under consideration by a government body.

Here, some of the defendants' statements to the Pineaus cannot reasonably be viewed as relating to the defendants' petitioning activities. As discussed, the defendants' focus was to obtain money from Pineau that the defendants knew Pineau did

not owe to them. It was in that context -- seeking the $30,000 -- that Jennings made the statements that the Pineaus did not have the money to fight him, that he was preparing to file a RICO claim, and that he "was prepared to take everything from the Pineaus, including their house." Those statements were not reasonably related to the defendants' opposition to Pineau's marijuana dispensary. The defendants' opposition to the dispensary through the Land Court litigation could not have led to the defendants obtaining money from the Pineaus through a lawsuit, let alone to causing the Pineaus financial ruin.[11] Rather, the statements by Jennings, if proven, were part of an extended pattern of threats, made in an effort to coerce payment. We agree with the judge that to the extent the plaintiff's claims were seeking redress for such behavior, they were not based solely on petitioning activity, and not subject to dismissal.

The defendants' arguments to the contrary are not persuasive. It is true that certain allegations in the complaint describe, and are directed at, the defendants' lawful petitioning activity. The defendants have a constitutional

[11] The references to a possible RICO claim have not been fleshed out in the pleadings, and no such suit was ever brought. Those vague references do not suffice as petitioning activity that would insulate the defendants' behavior from suit. See 477 Harrison, 477 Mass. at 171 n.9.

right to address the government, and thus to oppose the plaintiff's efforts to change the zoning bylaws and to obtain a special permit. See Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011) (discussing petition clause of First Amendment to United States Constitution). See also 477 Harrison, 477 Mass. at 166, 169-171. The defendants also have a right to express their opposition passionately; there is nothing actionable in a statement that the defendants would "fight [the plaintiff] every step of the way," provided that in context the fighting is reasonably understood as fighting in the political arena or in court, rather than physical assault. See Van Liew v. Stansfield, 474 Mass. 31, 38-39 (2016), citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Moreover, the defendants did not cross a line merely by stating that they would forego their opposition for a price. See North Am. Expositions Co. Ltd. Partnership v. Corcoran, 452 Mass. 852, 863 (2009) (financial motive behind assertion of petitioning rights irrelevant for anti-SLAPP purposes). It is not inappropriate for parties opposing a neighbor's proposed new land use to state, in essence, that they would be willing to endure the proposed new use, if they were compensated for so enduring. Nor is it inappropriate, thereafter, for the opposers to seek to negotiate that compensation.

The holdings in Blanchard I and Blanchard II demonstrate, however, that defendants do not obtain dismissal through an anti-SLAPP motion just because some of the allegations in the complaint are directed at conduct by the defendants that constitutes petitioning activity. Rather, defendants must show that the complaint, fairly read, is based solely on petitioning, and to that end the allegations need to be carefully parsed even within a single count. See Reichenbach, 92 Mass. App. Ct. at 574-575. Here the defendants did not merely oppose Pineau's proposed business, nor did they merely seek to negotiate their price. Rather, the complaint describes a concerted and extended effort to coerce Pineau to pay, "or else" -- complete with thinly veiled threats such as that Pineau "doesn't know who she is dealing with." The complaint thus adequately describes extortion -- coercion by improper means that is designed to reap an economic reward. Such actions, in the business context, can be actionable under c. 93A, and given the facts alleged here, the suit is not based solely on petitioning activity as required by the anti-SLAPP cases. See G. L. c. 93A, §§ 2, 11; 477 Harrison, 477 Mass. at 172 ("The allegedly false insurance claims asserted as part of the G. L. c. 93A claim are acts distinct from the related but separate assertedly unfair or deceptive acts concerning the defendants' use of process"); Reichenbach, supra at 575 (Massachusetts Civil Rights Act claim

was not based solely on petitioning activity, where many actions giving rise to claim did not constitute petitioning). See also Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 43 (1995).

Finally, the defendants contend that all Pineau has alleged are hardball negotiation tactics, which according to the defendants are accepted business practices that cannot be actionable. Put differently, the defendants argue (1) that they have a right to demand a price for acceding to Pineau's proposed dispensary, and (2) that their liability should not turn on the negotiating tactics they employ.[12] In the first place, we note that these arguments about the appropriateness of negotiating tactics are off point; the question for the anti-SLAPP motion is not whether the negotiating tactics were appropriate, but whether the defendants were engaged in petitioning when they were negotiating.[13] Beyond that, however, we are not persuaded

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[12] We note that during depositions the defendants denied many of the plaintiff's allegations regarding the defendants' conduct during these negotiations. The factual dispute cannot be resolved on this special motion to dismiss.

[13] The defendants' argument sounds more like an argument that their conduct could not violate c. 93A, the Massachusetts Civil Rights Act, or the common-law causes of action. Put differently, it is an argument that the plaintiff's claims could not survive a rule 12 (b) (6) motion. However, as discussed above, see note 8, supra, the rule 12 (b) (6) motion is not before us. We are satisfied that the c. 93A claim, at least, is sufficiently viable to survive an anti-SLAPP motion, and we

that the defendants had free rein to threaten and coerce, as is alleged, simply because they were contemporaneously involved in legitimate petitioning activity. While we acknowledge that there is room for "rough and tumble" in business negotiations, and that such negotiations could occur in relation to legitimate petitioning activity, the repeated threats alleged here, designed to coerce payment -- including threats that portended economic ruin without basis -- fell outside any acceptable boundary. The anti-SLAPP motion was properly denied.[14]

2. Litigation privilege. The defendants also argue that the complaint is barred by the litigation privilege, sometimes called the "absolute litigation privilege," because all that the plaintiff complains about are "settlement negotiations or discussions" that occurred in relation to contemplated litigation. Although this issue was raised for the first time only in the defendants' motion to reconsider, a denial of the privilege may be appealed under the doctrine of present execution, Gillette Co. v. Provost, 91 Mass. App. Ct. 133, 140

express no opinion on the viability of Pineau's remaining claims under rule 12 (b) (6).

[14] The defendants do not make a separate argument that their conduct constituted protected speech -- that is, that their statements did not constitute "true threats"; we accordingly do not consider the issue. See United States v. Coss, 677 F.3d 278, 289 (6th Cir. 2012) (holding that extortionate threats are "true threats").

(2017), and we will exercise our discretion to consider the argument in the interest of efficiency. See Redgate, petitioner, 417 Mass. 799, 801-802 (1994); Mullins v. Pine Manor College, 389 Mass. 47, 63 (1983).

The litigation privilege "generally precludes civil liability based on 'statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding,' as well as statements 'preliminary to litigation' that relate to the contemplated proceeding" (citation omitted). Gillette Co., 91 Mass. App. Ct. at 140. The purpose of the doctrine is to protect parties, counsel, and witnesses so that they may speak freely while asserting their legal rights or participating in judicial proceedings. See Sriberg v. Raymond, 370 Mass. 105, 108-109 (1976); Visnick v. Caulfield, 73 Mass. App. Ct. 809, 812-813 (2009). Although the doctrine is not confined to statements made during the proceedings themselves, where out-of-court statements are at issue the doctrine requires a "fact-specific analysis" as to whether such statements sufficiently "relate to" litigation. Correllas v. Viveiros, 410 Mass. 314, 321, 323 (1991), quoting Sriberg, supra at 108. See Patriot Group, LLC v. Edmands, 96 Mass. App. Ct. 478, 484-485 (2019), citing Fisher v. Lint, 69 Mass. App. Ct. 360, 365-366 (2007).

For the reasons discussed above, much of the defendants' conduct alleged here cannot properly be considered as in connection with litigation, and accordingly is not protected by the litigation privilege. The litigation that the defendants contemplated, and eventually brought, were the two Land Court cases that challenged the Haverhill recreational marijuana zoning bylaw and the award of a special permit to Pineau. On the other hand, the alleged statements at issue are that the defendants would use litigation to obtain monetary relief and thereby cause the plaintiff's financial ruin. Such monetary relief, however, could not be obtained as a result of the contemplated Land Court litigation. The alleged coercive and threatening conduct thus is not sufficiently related to a judicial proceeding to be protected by the privilege.[15] Furthermore, "the privilege does not attach . . . where it is not the statements themselves that are said to be actionable," such as where the statements are being used as evidence of the defendants' misconduct. Gillette Co., 91 Mass. App. Ct. at 141.

[15] Nor could the statements be considered privileged on a theory that they were made in anticipation of a purported RICO suit. From its earliest formulations, the Supreme Judicial Court has noted that the litigation privilege applies only to statements made in anticipation of proceedings where those proceedings are "contemplated in good faith and . . . under serious consideration." Sriberg, 370 Mass. at 109. Here, no such suit was ever brought, nor have we been provided with reason to believe that it was seriously contemplated.

See id. at 142 (absent this distinction, "the privilege would eviscerate . . . longstanding causes of action"). The Gillette Co. case's distinction between "statements" and "conduct" applies here, in that the alleged statements that the defendants claim are privileged fairly can be viewed as part of the conduct of extortion.[16,17]

Order denying special motion to dismiss affirmed.

[16] The plaintiff's request for appellate attorney's fees pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), and G. L. c. 231, § 6F, is denied. The defendants' request for appellate attorney's fees pursuant to McLarnon v. Jokisch, 431 Mass. 343 (2000), is denied.

[17] To the extent that we do not address the defendants' other contentions, "they 'have not been overlooked. We find nothing in them that requires discussion.'" Department of Revenue v. Ryan R., 62 Mass. App. Ct. 380, 389 (2004), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).