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24-P-11

Appeals Court

ANDRES HIDALGO vs. WATCH CITY CONSTRUCTION CORP. & another.¹

No. 24-P-11.

Middlesex. October 11, 2024. - December 26, 2024.

Present: Vuono, Englander, & Hodgens, JJ.

"Anti-SLAPP" Statute. Practice, Civil, Motion to dismiss.
Abuse of Process. Malicious Prosecution. Constitutional
Law, Right to petition government.

Civil action commenced in the Waltham Division of the District Court Department on March 17, 2021.

A special motion to dismiss was heard by Ellen M. Caulo, J., and a motion for reconsideration was heard by her.

David E. Belfort for the plaintiff.
Elliott M. Loew for the defendants.

ENGLANDER, J. This case raises a recurring issue under the "anti-SLAPP" statute, G. L. c. 231, § 59H, which we address under the revised framework recently set forth by the Supreme Judicial Court in Bristol Asphalt Co. v. Rochester Bituminous Products, Inc., 493 Mass. 539 (2024) (Bristol Asphalt). The

¹ Mainor Ariel Zepeda.

issue is how the anti-SLAPP statute applies to common-law counterclaims for malicious prosecution and abuse of process -- counterclaims that arguably in every case are "based solely on petitioning activity," in that such counterclaims seek to sanction the plaintiff/defendant-in-counterclaim for filing a lawsuit or invoking judicial process. Assuming that such counterclaims are based solely on petitioning activity, then the only remaining question under the Bristol Asphalt framework is whether the defendants/plaintiffs-in-counterclaim -- the proponents of the claims for malicious prosecution and abuse of process -- can nevertheless avoid dismissal of those claims by "show[ing]" that the plaintiff's claims were "devoid of any reasonable factual support or any arguable basis in law." G. L. c. 231, § 59H.

In this case, the defendants/plaintiffs-in-counterclaim Watch City Construction Corp. and Mainor Ariel Zepeda (collectively, Watch City) argued that they had met their burden and could avoid dismissal under the anti-SLAPP statute by alleging, in their malicious prosecution and abuse of process counterclaims, that the plaintiff Andres Hidalgo had filed his lawsuit "in bad faith, maliciously and for ulterior purposes which have nothing to do with allegations of a legitimate dispute" and "unlawfully to coerce, pressure and intimidate [Watch City] to pay money to Hidalgo to which Hidalgo knew he

was not entitled." A judge of the District Court denied Hidalgo's motion to dismiss under the anti-SLAPP statute and allowed the counterclaims to go forward. For the reasons that follow, we reverse and hold that Hidalgo's anti-SLAPP motion to dismiss should have been allowed, as Watch City's "showing" was far from sufficient to meet its burden here. Under the circumstances, however, the anti-SLAPP dismissal is without prejudice to Watch City possibly refiling these claims, after Hidalgo's claims have been resolved.

Background. The plaintiff Hidalgo filed his complaint on March 17, 2021, alleging that he was hired as an hourly laborer by Watch City, a landscaping and construction business owned by the defendant Zepeda. Hidalgo claims that he worked for Watch City for six weeks, but that Watch City paid him only for the first two weeks of work. Hidalgo asserted claims for violations of the Wage Act, G. L. c. 149, §§ 148-150, and related counts. The total amount of his claim was \$11,216.01, after trebling under G. L. c. 149, § 150 (not including attorney's fees).

Watch City denied the allegations, and also brought counterclaims for, among other things, malicious prosecution and abuse of process. Hidalgo moved to dismiss those two counterclaims under the anti-SLAPP statute, arguing that the claims were based solely on Hidalgo's petitioning activity --

the filing of his lawsuit to recover wages.² Watch City responded that its abuse of process and malicious prosecution counterclaims should survive, among other reasons, because Watch City had alleged in essence that Hidalgo's claims were without basis in fact. Watch City alleged in its counterclaims that Hidalgo in fact had worked only for two weeks, not six weeks, and thus had been paid in full.

Citing to pre-Bristol Asphalt case law, Watch City also argued that its counterclaims should be allowed to proceed because it had alleged that Hidalgo had an ulterior motive in filing suit -- "unlawfully to coerce, pressure and intimidate [Watch City] to pay money to Hidalgo to which Hidalgo knew he was not entitled." Finally, Watch City argued that the anti-SLAPP statute was not intended to eliminate the common-law torts of malicious prosecution and abuse of process, and that Hidalgo's proposed application of the anti-SLAPP statute would do just that.

² Hidalgo also filed a motion to dismiss all of the defendant's counterclaims under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Noteworthy for present purposes, he argued that Watch City's counterclaim of malicious prosecution must be dismissed because an element of a malicious prosecution claim is that the malicious prosecution plaintiff was successful in the action complained of, and Hidalgo's action against Watch City was ongoing. See Chervin v. The Travelers Ins. Co., 448 Mass. 95, 103 (2006) ("To prevail on a claim for malicious prosecution, a plaintiff must establish . . . that the original action terminated in [the plaintiff's] favor").

After initially dismissing the two counterclaims, the judge granted Watch City's motion for reconsideration and denied Hidalgo's anti-SLAPP motion, thereby allowing the counterclaims to go forward. Hidalgo then filed this interlocutory appeal, as allowed under the case law. See Fabre v. Walton, 436 Mass. 517, 521-522 (2002), S.C., 441 Mass. 9 (2004).

Discussion. As recast by Bristol Asphalt, the anti-SLAPP statute analysis asks two core questions when evaluating a motion to dismiss: first, is the complaint based solely on the opposing party's petitioning activity? Bristol Asphalt, 493 Mass. at 555. If it is not -- if the plaintiff is complaining (at least in part) about activity that is not petitioning -- then the anti-SLAPP motion to dismiss will be denied. Id. at 556. If the complaint is based solely on petitioning activity, then the analysis moves to the second question -- was the challenged petitioning activity "devoid of any reasonable factual support or any arguable basis in law"? Id. at 557.

Applying this framework to claims for malicious prosecution and abuse of process, it is evident that as to those claims question (1) will be answered "yes" in the vast majority of cases -- that is, claims for malicious prosecution and abuse of process are based solely on the opposing party's petitioning activity, and thus are *prima facie* subject to dismissal under

the anti-SLAPP statute.³ In this regard, we reject Watch City's suggestion that its counterclaims are not based "solely" upon petitioning activity because the claims allege that Hidalgo brought his claims in bad faith, or for an ulterior purpose not related to prosecuting the lawsuit itself. Such allegations -- that an abuse of process defendant had an improper subjective motive for filing a lawsuit -- do not alter the fact that a plaintiff's abuse of process claim is based solely upon the abuse of process defendant's prior lawsuit. The operative act complained of is the filing of a lawsuit. The damages sought flow from the filing of that lawsuit. And the filing of a lawsuit is unquestionably protected petitioning activity. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 520 (2019) (Harrison II) ("Commencement of litigation is quintessential petitioning activity"). In attempting to preserve its abuse of process claim, Watch City's focus on Hidalgo's motive for filing suit thus does not aid Watch City's argument that its counterclaim is not based solely on Hidalgo's petitioning activity, because the subjective motivation for filing a lawsuit is not separable, or separately actionable, from the act of filing suit. Claims of malicious prosecution and abuse of process may be unique in this regard, but such

³ This is true in particular where, as here, the action complained of is the filing of a lawsuit.

claims will satisfy the first question in the anti-SLAPP analysis in most every case.⁴

This does not mean that every claim for abuse of process or malicious prosecution must be dismissed, of course. We must still address the second question -- has the abuse of process plaintiff nevertheless shown that the petitioning activity it challenges lacked a reasonable basis in fact or law? As the court said in McLarnon v. Jokisch, 431 Mass. 343, 347 (2000):

"Nor do we believe that claims for malicious prosecution will be precluded by the [anti-SLAPP] statute. As we discussed in Duracraft[Corp. v. Holmes Prods. Corp.], 427 Mass. [156,] 168 [(1998)], after the movant has made a threshold showing . . . [t]he nonmoving party then has the opportunity to overcome the movant's showing and preserve the claim."

As applied to this case, the anti-SLAPP framework thus provides Watch City the opportunity to demonstrate, in response to an anti-SLAPP motion, that Hidalgo's lawsuit was devoid of reasonable basis in fact or law. And this framework makes

⁴ There can be instances in which a malicious prosecution or abuse of process claim does not challenge protected petitioning activity -- for example, because the conduct complained of is not an exercise of the defendant's own petitioning rights. See Kobrin v. Gastfriend, 443 Mass. 327, 333 (2005) (where defendant was not exercising his own right to petition, but was acting on behalf of government body as investigator and witness, defendant was not engaged in activities protected by anti-SLAPP statute). Cf. Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396, 406-409 (2002), S.C., 442 Mass. 1041 (2004) (ordering new trial on claim for abuse of process against police officers employed by defendant for filing arrest reports that contained false statements).

eminent sense. Hidalgo has a constitutional right to petition the government for redress of grievances, and he exercises that right when he files a lawsuit in court. See Harrison II, 483 Mass. at 520. Hidalgo cannot be subjected to State sanction for bringing that lawsuit, unless -- and this is the important caveat -- unless his lawsuit was without reasonable basis in fact or law. In that instance, his constitutional right falls away, and he can be subject to State sanction through suit for malicious prosecution or abuse of process. The test for whether the petitioning activity -- the lawsuit -- had a reasonable basis is an objective one; it does not turn on the plaintiff's (Hidalgo's) subjective motivation in filing suit, or whether that motivation is considered in some way improper. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 477 Mass. 162, 173 (2017), S.C., 483 Mass. 514 (2019) (Harrison I) ("motivation for engaging in petitioning activity" is irrelevant as to whether such petitioning activity "lacks an objectively reasonable basis"). If Hidalgo's lawsuit had an objectively reasonable basis in both fact and law, he cannot properly be subject to suit. If, on the other hand, Hidalgo in fact worked only two weeks, not six, then it would appear that his lawsuit was without reasonable basis in fact, and his anti-SLAPP motion must be denied.

The next question is, did Watch City carry its burden here of showing that Hidalgo's claim lacked an objectively reasonable factual basis? We conclude that Watch City did not. Watch City argues that the allegations in its answer and counterclaims were "verified," and thus evidentiary, but even assuming that they were, all those allegations set up is a stark factual dispute between the parties as to whether Hidalgo worked two weeks or six weeks. The motion judge would not be able to conclude, on such a record, that Hidalgo's claims were without a reasonable factual basis. For one thing, the Supreme Judicial Court has emphasized that proving that particular petitioning activity is "'devoid' of any reasonable factual support or any arguable basis in law is a difficult task." Bristol Asphalt, 493 Mass. at 557. Courts should be in no rush to label lawsuits as without reasonable basis, lest they end up chilling the very activity the anti-SLAPP statute (and the petition clause) was designed to protect. Here, Watch City's showing -- which contradicts Hidalgo's complaint but provides no factual depth -- is far too thin a reed to support a finding of no reasonable basis for suit.

Indeed, we note that Watch City's supposed "verified" counterclaims do not actually provide evidence that contradicts Hidalgo's key factual allegation that he worked for six weeks. To be sure, Watch City alleges that Hidalgo did not. But the

verification, signed by Zepeda, the owner of Watch City Construction Corp., merely states that the "information" in the counterclaims is "true to the best of my knowledge, information and belief." Nothing in the pleading indicates that Zepeda had personal knowledge that Hidalgo worked only two weeks, not six, or that Zepeda consulted business records that showed same. Watch City's evidence thus was less than a thin reed; it was no evidence at all.⁵ See Shapiro Equip. Corp. v. Morris & Son Constr. Corp., 369 Mass. 968, 968 (1976).

In applying the Bristol Asphalt framework to malicious prosecution and abuse of process claims, it will be quite unlikely that such claims will survive an anti-SLAPP motion to dismiss where they are asserted as counterclaims, because the claim that is alleged to lack reasonable basis has not yet been adjudicated. Put differently, claims for malicious prosecution or abuse of process must ordinarily await the outcome of the lawsuit that they are challenging. Indeed, it seems clear that a malicious prosecution claim cannot be properly brought before

⁵ We note that under the anti-SLAPP statute the court may order that "specified discovery" be conducted for "good cause shown." G. L. c. 231, § 59H. Cf. Benoit v. Frederickson, 454 Mass. 148, 156 (2009) (Cordy, J., concurring) (noting that in anti-SLAPP case in which both parties proffered competing affidavits, and there was not enough in record to determine which affidavits were credible, good cause might have been shown to order specified discovery). Here, Watch City relied entirely on its counterclaim pleading, and did not attempt discovery directed to the bases for Hidalgo's claims.

the prior lawsuit is resolved, as one of the elements of such a claim is that the prior suit was unsuccessful.⁶ See Chervin v. The Travelers Ins. Co., 448 Mass. 95, 103 (2006).

Supreme Judicial Court precedent that predates Bristol Asphalt is consistent with the above. Indeed, the court has addressed claims for malicious prosecution and abuse of process many times previously in the anti-SLAPP context, usually resulting in the dismissal of such claims. Thus, in McLarnon, 431 Mass. at 343-345, the court held that a special motion to dismiss a claim for malicious prosecution was properly granted, even though the plaintiff's complaint alleged that the defendants had obtained G. L. c. 209A abuse prevention orders through perjury, fraud, and misrepresentation. The plaintiff's claims were based on petitioning activity (the requests for G. L. c. 209A orders), and the plaintiff did not meet his burden to show that the defendants had no reasonable factual or legal support when seeking the G. L. c. 209A orders, where the defendants had been successful in obtaining the orders, and

⁶ While an unsuccessful lawsuit is not an element of an abuse of process claim, to survive an anti-SLAPP motion a plaintiff in an abuse of process action based solely on petitioning activity (as here) will have to show a lack of reasonable basis -- in many cases, a difficult showing where the challenged claim has not yet been decided. In this regard we note that in Bristol Asphalt the plaintiff's lawsuit seeking compensation for the defendant's prior claims was not brought until after those prior claims had been adjudicated, and failed. Bristol Asphalt, 493 Mass. at 543-546.

where the plaintiff primarily relied on affidavits attesting to the defendants' falsehoods. McLarnon, supra at 348-349. One year later, in Fabre, 436 Mass. at 522-525, the court once again held that a claim for abuse of process resulting from the defendant applying for a G. L. c. 209A order should have been dismissed under the anti-SLAPP statute, concluding that despite the plaintiff's claim that he was bringing the case based on the defendant's improper motive, the only conduct complained of was the defendant's petitioning activity. Finally, in Benoit v. Frederickson, 454 Mass. 148, 152-154 (2009), the court again reversed the denial of a special motion to dismiss, where the plaintiff's claims, including for malicious prosecution, were based on a defendant's report to the police, and where the plaintiff's affidavits were insufficient to show that the defendants' petitioning activities were devoid of reasonable support in fact or law.⁷

⁷ See also Hanover v. New England Regional Council of Carpenters, 467 Mass. 587, 587-588 (2014) (abuse of process claim dismissed under anti-SLAPP statute where defendant association, which had provided support for litigation, had engaged in petitioning, and plaintiff could not show association's petitioning was without basis in fact or law); Wenger v. Aceto, 451 Mass. 1, 2-3, 6-8 (2008) (abuse of process and malicious prosecution claims dismissed under anti-SLAPP statute where subject of the claims, an unsuccessful application for a criminal complaint, was not without reasonable basis in fact or law).

Van Liew v. Stansfield, 474 Mass. 31 (2016), is also consistent with our holding here. In that case, the court

We add one important caveat to the above. Although the malicious prosecution and abuse of process counterclaims must be dismissed here under the anti-SLAPP statute, that dismissal is not as to the merits of the claims at this juncture, and is accordingly without prejudice. If the facts and law support it, Watch City may refile these claims if it can show that Hidalgo's claims were without reasonable basis in fact or law, and that the other elements of the claims are met.⁸

So ordered.

concluded that while the defendant showed that the plaintiff's complaint was solely based on the defendant's petitioning activities (a request for a harassment prevention order under G. L. c. 258E, § 3), the plaintiff met his burden to show that the defendant's petitioning was devoid of any reasonable factual support or legal basis, given that the defendant failed to plead sufficient facts to obtain a c. 258E order.

⁸ The anti-SLAPP statute requires the award of attorney's fees if the trial court grants a special motion to dismiss. G. L. c. 231, § 59H. See Bristol Asphalt, 493 Mass. at 555 (describing the award of attorney's fees under § 59H as "mandatory"). Hidalgo submitted two motions for attorney's fees in the trial court, and he appeals from the denial of these motions. As Hidalgo's special motion to dismiss should have been granted, we reverse the denial of Hidalgo's motions for attorney's fees and remand that issue to the District Court.

Hidalgo also requests reasonable attorney's fees and costs for work performed in connection with this appeal. In accordance with the procedure set forth in Fabre, 441 Mass. at 10-11, Hidalgo may file with the clerk of this court a submission detailing and supporting his reasonable appellate attorney's fees and costs sought, within fourteen days of the date of this opinion. Watch City shall have fourteen days thereafter to respond.