

Term 

NOTICE: The slip opinions and orders posted on this Web site are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. This preliminary material will be removed from the Web site once the advance sheets of the Official Reports are published. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

BRICE ESTATES, INC. vs. Alan F. SMITH & others. [FN1]

No. 09-P-738.

January 14, 2010. - March 2, 2010.

MASS. *"Anti-SLAPP" Statute. Practice, Civil, Motion to dismiss. Trespass.*

CIVIL ACTION commenced in the Superior Court Department on October 26, 2004.

A special motion to dismiss was heard by *James R. Lemire, J.*

J. Mark Dickison for the defendants.

George P. Kiritsy for the plaintiff.

Present: Katzmann, Grainger, & Meade, JJ.

GRAINGER, J.

Shortly after the defendants, Alan F. Smith and James Donaldson, submitted documentation to the Massachusetts Division of Fisheries and Wildlife's Natural Heritage and Endangered Species Program (program) delaying the plaintiff's efforts to complete their development project, the plaintiff filed suit alleging trespass. [FN2] A judge of the Superior Court denied the defendants' special motion to dismiss under G.L. c. 231, § 59H, the "anti-SLAPP" statute, on the ground that the suit was not based solely upon protected petitioning activity. We now consider the defendants' interlocutory appeal from that ruling, and conclude that the trial judge did not err. Accordingly, we affirm.

Background. The plaintiff, Brice Estates, Inc. (Brice Estates), is a real estate developer seeking to establish a large residential subdivision in Rutland. In 2003, the Rutland Conservation Commission (commission) issued an [o]rder of [c]onditions pursuant to G.L. c. 131, § 40, the Massachusetts Wetlands Protection Act (act), denying Brice Estates an authorization to alter wetlands on the property. Among the reasons for the denial was Brice Estates' refusal to provide a wildlife habitat evaluation as requested by the commission in accordance with the act.

In 2004, Donaldson, an abutter, grew suspicious when he noted that the flagged boundary separating the parties' properties lay in part on aquatic vegetation. Retaining the services of Smith, a naturalist, Donaldson sought to confirm the wetlands boundary. While so doing, the defendants entered onto Brice's land-- *claiming* they did not observe any "no trespassing" signs or barriers --- and observed a female four-toed salamander, a rare species protected under the Massachusetts Endangered Species Act (MESA). The defendants photographed and recorded the observation, and submitted a rare animal observation form (observation form) to the program.

As a result of this submission, Brice Estates conducted a wildlife habitat evaluation of the property, seeking to map the habitat of the four-toed salamander. The evaluation resulted in the designation of a portion of Brice Estates' land as a [p]riority [h]abitat," subjecting the land to additional regulations under MESA. The designation required Brice Estates to redesign its subdivision layout, subjecting the project to substantial delays and costs. Upon learning of the defendants' actions, Brice Estates filed a trespass action in Superior

Court seeking monetary damages and injunctive relief.

Discussion. Denial of the special motion to dismiss. We review an appeal from a denial of a special motion to dismiss under the anti-SLAPP statute to determine whether there was an abuse of discretion or an error of law. *Moriarty v. Mayor of Holyoke*, 71 Mass.App.Ct. 442, 445 (2008). When considering a G.L. c. 231, § 59H, motion, the moving party bears the initial burden to demonstrate, through the pleadings and affidavits, that the claims sought to be dismissed are "based on [the party's] 'petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.'" *Wenger v. Aceto*, 451 Mass. 1, 5 (2008), quoting from *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167-168 (1998). If the moving party fails to make such a showing, the special motion must be denied. *Ibid*.

The defendants' submission of the observation form clearly comprised protected petitioning activity. See *Plante v. Wylie*, 63 Mass.App.Ct. 151, 156 (2005) ("[t]he typical mischief that the [anti-SLAPP] legislation is intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects"). However, Brice Estates possessed an independent basis for its complaint--that the defendants committed a trespass on the property. [FN3] And although the defendants' petitioning activities may have served as the genesis for the plaintiff's decision to file suit, we have repeatedly denied G.L. c. 231, § 59H, motions to dismiss where the underlying conduct involves both petitioning activity and activity not considered petitioning, in this case trespass. See *Ayasli v. Armstrong*, 56 Mass.App.Ct. 740, 748-749 (2002); *Garabedian v. Westland*, 59 Mass.App.Ct. 427, 432-433 (2003). The Supreme Judicial Court's decision in *Duracraft Corp. v. Holmes Products Corp.*, *supra* at 167-168 & n. 20, noted that the term "based on" does not mean "in response to;" thus, the mere fact that the defendants' submission of the form may have prompted Brice Estates' complaint does not necessitate dismissal pursuant to the anti-SLAPP statute.

We acknowledge the defendants' assertion that the claimed trespass is a mere pretense and that this suit in truth is based on petitioning activity; in support of this they further assert that the trespass itself caused no "actual injury" to Brice Estates, G.L. c. 231, § 59H. [FN4] We note that the trespass claim, even if entitling Brice to no more than nominal damages

[FN5] assuming it prevails, would potentially also merit injunctive relief. [FN6] Given these considerations the trial judge did not err in denying the defendants' special motion to dismiss.

Order denying special motion to dismiss pursuant to G.L. c. 231, § 59H, affirmed.

FN1. James Donaldson, John Doe, and Jane Doe.

FN2. John Doe and Jane Doe were named defendants in the event other trespassers were discovered.

FN3. "To support an action of trespass ..., it is necessary to prove the actual possession of the plaintiff, and an illegal entry by the defendant." *New England Box Co. v. C & R Constr. Co.*, 313 Mass. 696, 707 (1943), quoting from *Barnstable v. Thacher*, 3 Met. 239, 242 (1841).

FN4. This indicium of pretense asserted by the defendants would have legal relevance had they demonstrated that the claims against them were based on petitioning activities alone, thereby requiring the plaintiffs to demonstrate actual injury. G.L. c. 231, § 59H, first par.

FN5. The record evidences a demand by Brice for \$100,000 in damages.

FN6. "The readiness to grant injunctions in trespass cases derives from the historic notion that land is unique and that money is an inadequate substitute." *Franchi v. Boulger*, 12 Mass.App.Ct. 376, 380 (1981).

END OF DOCUMENT



Adobe Reader is required to view PDF images.

