

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO 15-02074-B

[REDACTED]

Plaintiff

vs.

[REDACTED]

Defendant

**ORDER ON PLAINTIFF'S SPECIAL ANTI-SLAPP MOTION TO DISMISS THE c. 93A
COUNTERCLAIM AND PLAINTIFF'S MOTION FOR JUDGMENT ON THE
PLEADINGS AS TO ALL THE OTHER COUNTERCLAIMS**

The plaintiff, [REDACTED], a non-profit organization that provides residential and community-based care for children and adults with emotional and behavioral issues, entered into a ten-year lease for commercial premises at [REDACTED], [REDACTED], which premises are owned by the [REDACTED], for which the defendant, [REDACTED]. [REDACTED] brought the instant action against the defendant, advancing claims of breach of the covenant of quite enjoyment/constructive eviction, two counts of breach of the lease (one relating to the alleged presence in the office space of mold and carcinogenic and harmful chemicals and the other to the defendant's alleged failure to provide the allotted number of parking spaces for [REDACTED] usage), and violation of G.L. c.93A. [REDACTED] also seeks declaratory relief regarding its right to terminate the lease. The defendant has brought counterclaims for breach of the lease, for [REDACTED] alleged failure to provide proper notice regarding both the alleged contamination of the premises and the alleged inadequate parking (Counterclaims Counts One and Two), anticipatory breach of the lease (Counterclaim Count Three), and

violation of G.L. c. 93A (Counterclaim Count Four). [REDACTED] has filed a special motion to dismiss the c. 93A counterclaim pursuant to G.L. c. 231, § 59H (the so-called "anti-SLAPP" statute). It has also filed a motion pursuant to Mass. R. Civ. P. 12(c) or judgment on the pleadings as to the remaining three counterclaims. A hearing on the motions was held on May 24, 2016. For the reasons that follow, both motions are **ALLOWED**.

A. Special Motion to Dismiss G.L. c. 93A Counterclaim

In her c. 93A claim, the defendant asserts: "[REDACTED] conduct, as set forth herein, including, among other things, making false or exaggerated claims of poor air quality at the offices for the ulterior motive of obtaining a release of its obligations under the lease agreement, constitute unfair and deceptive acts or practices." [Counterclaim Par. 44.] The underlying supporting factual assertions in the counterclaim are limited to an earlier near verbatim assertion of the same ilk, albeit one which provided the modest additional specification that [REDACTED] alleged false or exaggerated claims regarding poor air quality issues at the office were made "in public." [Counterclaim Par. 13.] [REDACTED] with affidavit support, contends that the only public statements it made about the contamination issues at the leased premises were at hearings before the [REDACTED] and in its pleadings in the instant suit, and it avers that it also communicated privately on such issues with the [REDACTED], and with various city employees, such as the City Engineer, the City Code Inspector, the Building Commissioner, and the City Solicitor. [REDACTED] characterizes all such communications as protected petitioning activity upon which liability under c. 93A cannot be predicated.

The anti-SLAPP statute, G.L. c. 231, s. 59H, provides in pertinent part:

In any case in which a party asserts that the civil claims, counterclaims, or cross

claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

G.L. c. 231, s. 59H. As the "special movant" pursuant to § 59H, [REDACTED] bears the initial burden of establishing that it engaged in petitioning activity, that the defendant's c. 93A counterclaim is based on such activity alone, and that such claim has no substantial basis other than that activity. See *Office One, Inc. v. Lopez*, 437 Mass. 113, 122 (2002); *Duracraft Corporation v. Holmes Product Corporation*, 427 Mass. 156, 161-162 (1998). If [REDACTED] succeeds, the burden then shifts to the defendant to establish that [REDACTED] petitioning activity was devoid of any reasonable factual support or any arguable basis in law and that it caused her actual injury, *Office One, Inc.*, 437 Mass. at 121-122.

The anti-SLAPP statute defines petitioning activity as follows:

As used in this section, the words 'a party's exercise of its right of petition' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; 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; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

G.L. c. 231, § 59H. Unquestionably, [REDACTED] complaints to the [REDACTED] and to various [REDACTED] officials regarding the conditions at its leased premises come within the broad ambit of

petitioning activity, as too does its various statements in support of the claims it is advancing in the case at bar. *See North American Expositions Company Limited Partnerships v. Corcoran*, 452 Mass. 852, 861-863 (2009). The defendant does not appear to contest that conclusion.

Rather, she asserts:

[The c. 93A counterclaim] is multifaceted and not solely predicated on allegations raised during [REDACTED] petitioning activity to the [REDACTED], and to this Court. In the counterclaim the Landlord does not make any claim that [REDACTED] petitioning activity was devoid of any rights pursuant to Massachusetts law. Nor are [REDACTED] actions pursuant to those petitioning activities a prime factor in the Landlord's counterclaim. In fact [REDACTED] alleged petitioning activity . . . is clearly not the only, nor the primary basis for the Landlord's counterclaim. Defendant (sic) counterclaim of unfair practices . . . are the direct results of the plaintiff's utilization of false and exaggerated claims or poor air quality alleged significantly beyond those alluded to, at, or during legitimate public petitioning activities. Additional claims have been made by [REDACTED] in regard to the leased property not previously mentioned, or not relevant, nor pursued during the Plaintiff's petitioning activity. Additionally, [REDACTED] challenges a number of additional violations of the lease by the Landlord including but not limited to alleged parking issues for its actions in abandoning its responsibilities under the lease. These additional issues raised outside [REDACTED] petitioning activities are also unproven allegations made part of [REDACTED] complaint only to further serve [REDACTED] ulterior motives for [REDACTED] obtaining a release from its obligations under the lease agreement.

The quoted passage contains conclusory assertions that the defendant's c. 93A counterclaim is premised on non-petitioning activity, but, tellingly, the defendant never specifies what that is. If the defendant intended to draft the counterclaim to predicate c. 93A liability on for example, such alleged conduct as claiming a breach of the contractual term requiring the provision of a certain number of parking spaces to [REDACTED], she failed to do so. As written, the counterclaim speaks only of [REDACTED] alleged false or exaggerated claims in public regarding poor air quality issues at the office. Accordingly, [REDACTED] has met its initial burden of establishing that the asserted c. 93A liability has no substantial basis other than protected petitioning activity alone. Inasmuch

as the defendant has expressly eschewed any contention that [REDACTED] petitioning activity was devoid of any reasonable factual support or any arguable basis in law, it follows that [REDACTED] special motion to dismiss the c. 93A counterclaim must be allowed.¹

B. Motion for Judgment On the Pleadings As to All Other Counterclaims

[REDACTED] motion for judgment on the pleadings as to the defendant's remaining three counterclaims is, in effect, a motion to dismiss for failure to state a claim. *See Welch v. Sudbury Youth Soccer Association*, 453 Mass. 352, 353 (2009). Thus, the court will apply the principles articulated in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008).

[REDACTED] maintains that the two breach of lease counterclaims are fatally infirm because the lease did not contain a notice provision pertaining to the defendant's alleged breaches, nor any right to cure. Thus, [REDACTED] posits, it could not have breached the lease in the manner alleged. The defendant responds by citing *Wesson v. Leone Enterprises, Inc.*, 437 Mass. 708, 721-722 (2002),

¹ The defendant argues that the anti-SLAPP statute's reach is limited by the legislative intent in enacting it to protect the petitioning activities of ordinary citizens from meritless suits brought by large private interests who seek to deter them from exercising their rights or to punish them for doing so. She asserts that her c. 93A claim against [REDACTED] is different in kind from the type of petitioning activity that the statute was designed to protect. While the plaintiff may well be correct regarding the types of scenarios that provided the impetus for legislative action, such as citizens petitioning to stop a proposed development who were then sued by the developer, the Supreme Judicial Court has recognized that as enacted the statute is not nearly so limited:

Although it is true that "[t]he typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects," *Duracraft Corp. v. Holmes Prods. Corp.* supra at 161, 691 N.E.2d 935, the statute provides broad protection for other petitioning activities as well. *See id.* at 162-163, 691 N.E.2d 935 ("In [G.L. c. 231, § 59H,] as enacted, the Legislature ... did not address concerns over its breadth and reach, and ignored its potential uses in litigation far different from the typical SLAPP suit").

Office One, Inc., 437 Mass. at 121-122. Simply put, corporations engaged in petitioning activity related to private economic concerns are not excluded from the statute's protections.

for the principle that, in order to state a claim for constructive eviction or breach of mutually dependent covenants, the tenant must prove a failure to perform after notice of the alleged deficiency in the premises had been provided. The defendant also cites a statute, G.L. c. 186, § 19, which requires a landlord or lessor to correct an unsafe condition within a reasonable time after receipt of written notice of the condition. While such notice requirements might be relevant to the defendant's defense to [REDACTED] breach of lease claims, they are not a legally viable basis for the defendant's affirmative counterclaim against [REDACTED] for its alleged breach of the lease for failing to provide notice. Such counterclaims can only be based on a contractual notice provision, and there is none that mandated notice of the sort at issue here. The motion to allow Counterclaims Two and Three will therefore be allowed.

The remaining counterclaim, for anticipatory breach, is foreclosed by *275 Washington Street Corp. v. Hudson River International LLC*, 465 Mass. 16, 21-23 (2013), in which the Supreme Judicial Court reaffirmed the longstanding doctrine in Massachusetts that, in the absence of a rent acceleration or liquidation clause that would alter the usual rule, "a landlord cannot recover losses under an indemnification clause until the end of the period specified in the lease." Here, the lease contained a standard indemnification provision of the very same sort as was construed in *275 Washington Street Corp.*, and, like the lease in that case, it has no acceleration or liquidation clause. The fact that in this case it was the tenant, in the first instance, that declared a breach by the landlord and then initiated suit for such alleged breach does not, in the court's view, alter the applicability of the holding of *275 Washington Street Corp.* However she may wish to characterize her cause of action, the defendant's anticipatory breach counterclaim is a claim on for recovery of lost rent on account of [REDACTED] purported breach of its

payment obligations under the lease. As such, the defendant must wait until the end of the lease term. That is so even though efficiency considerations would militate in favor of permitting the defendant to litigate the liability issue regarding this counterclaim at the same time and in the same suit in which she is defending herself against [REDACTED] breach of lease claims. The court is compelled by *275 Washington Street Corp.* to dismiss the anticipatory breach counterclaim.

For the foregoing reasons, the plaintiffs special motion to dismiss the defendant's G.L. c. 93A counterclaim and the plaintiffs motion for judgment on the pleadings as to the defendant's remaining three counterclaims are **ALLOWED**.

So Ordered.

Dated: May 25,2016