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SJC-12831

JACK DeCICCO & another<sup>1</sup> vs. 180 GRANT STREET, LLC.

May 11, 2020.

Lis Pendens. Practice, Civil, Motion to dismiss, Appeal, Attorney's fees, Costs.

Background. The plaintiffs, Jack and Sandra DeCicco, offered to purchase property from the defendant, 180 Grant Street, LLC. The parties executed a written offer to purchase, but discussions related to the purchase and sale agreement were unsuccessful and the defendant ultimately notified the plaintiffs that it could not "make [the] deal work." The plaintiffs then commenced this action in the Superior Court, claiming breach of contract, breach of the implied covenant of good faith, and misrepresentation, and seeking specific performance. The plaintiffs also applied for a memorandum of lis pendens, which a judge approved. The defendant subsequently filed a motion to dissolve the lis pendens and a special motion to dismiss the action, pursuant to G. L. c. 184, § 15 (c). A second judge denied the motion to dissolve the lis pendens but allowed the special motion to dismiss.

The plaintiffs appealed from the allowance of the special motion to dismiss. In a memorandum and order pursuant to its rule 1:28, the Appeals Court affirmed the judgment of dismissal but denied the defendant's request for appellate attorney's fees and costs. DeCicco v. 180 Grant Street, LLC, 95 Mass. App. Ct.

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<sup>1</sup> Sandra DeCicco.

1113 (2019). The case is now before this court on further appellate review on the issue of appellate attorney's fees.<sup>2, 3</sup>

Discussion. General Laws c. 184, § 15 (c), provides in relevant part that "[i]f the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery." Although there is no question that the statute provides for attorney's fees and costs in the trial court (which the defendant here was properly awarded), there is a question whether this provision also applies to appellate attorney's fees. We answer that question yes.

As the defendant notes, the relevant statutory language governing a special motion to dismiss under G. L. c. 184, § 15, is almost exactly the same as the relevant statutory language governing a special motion to dismiss pursuant to the "anti-SLAPP" statute, G. L. c. 231, § 59H. That statute provides, in relevant part, that "[i]f the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters."

We have interpreted the anti-SLAPP statute's fee provision to apply to both trial and appellate court attorney's fees. See McLarnon v. Jokisch, 431 Mass. 343, 350 (2000). The McLarnon case involved an appeal by the plaintiff from the allowance, in the trial court, of the defendant's special motion to dismiss pursuant to G. L. c. 231, § 59H. See id. at 343. The court affirmed the judgment and addressed the issue of attorney's fees both in the trial court and on appeal, concluding that the defendant was entitled to fees in both courts. See id. at 350. As to the appellate attorney's fees, the court stated that

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<sup>2</sup> In denying the motion to dissolve lis pendens, the judge noted that upon filing, at the registry of deeds, the decision and order allowing the special motion to dismiss, the memorandum of lis pendens would be dissolved on expiration of the appeal period. There is no indication in the record whether the memorandum was dissolved, but in any event, the issue is not relevant to the appeal before us.

<sup>3</sup> Our order allowing the defendant's application for further appellate review indicated that the issue to be considered would be that of appellate attorney's fees. The parties address both attorney's fees and costs, and we address both as well.

"[t]he statutory provisions for . . . 'reasonable attorney's fee[s]' would ring hollow if it did not necessarily include a fee for the appeal." Id., quoting Yorke Mgt. v. Castro, 406 Mass. 17, 19 (1989). See Fabre v. Walton, 436 Mass. 517, 525 (2002), S.C., 441 Mass. 9 (2004).

The same rationale applies here. Not only is the language of the two statutes almost exactly the same, but, importantly, the underlying policies are essentially the same. Both the lis pendens statute and the anti-SLAPP statute provide for a special motion to dismiss that is designed to weed out groundless litigation early on, and both are designed to ensure that the successful defendant is made whole by being reimbursed for the legal fees it has incurred in its defense of the summarily dismissed case.

We recognize that this court has held that certain other statutes that provide for attorney's fees in the trial court, but which are silent as to appellate attorney's fees, do not necessarily require an award of appellate attorney's fees. See, e.g., Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 432 (2005), citing Patry v. Liberty Mobilehome Sales, Inc., 394 Mass. 270, 272 (1985). In the Twin Fires case, for example, we noted that "[w]here a statute provides for the payment of reasonable attorney's fees, an award of attorney's fees on appeal is within the discretion of an appellate court." Twin Fires Inv., LLC, supra. The statute at issue in that case was G. L. c. 93A, § 11, which provides for "reasonable attorneys' fees and costs incurred" in proving a violation of the statute.

The difference between those cases and this one is the context in which they arise. The lis pendens and anti-SLAPP statutes provide an expeditious means -- the special motion to dismiss -- to challenge an action and to protect certain rights. Where the Legislature has seen fit to provide a special and specific means to raise an early defensive challenge and has, as well, provided for an award of attorney's fees when that challenge is successful, it reasonably follows that the award of fees ought to apply at every stage, whether in the trial or appellate court. The very nature of the special motion to dismiss, in other words, distinguishes these cases from cases where appellate attorney's fees are discretionary or based on whether an appeal is frivolous.<sup>4</sup>

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<sup>4</sup> Because we conclude that G. L. c. 184, § 15 (c), provides for appellate attorney's fees and costs, we need not consider

Conclusion. We conclude that the defendant is entitled to an award of appellate attorney's fees and costs. In the somewhat unique circumstances of this case, where the Appeals Court decided the substantive merits of the underlying appeal and we transferred the case to this court to decide only the question of the entitlement to fees and costs, the Appeals Court is in the better position to decide the appropriate amount of the fees and costs to be awarded; the Appeals Court is more familiar with the underlying legal issues, the work performed by the defendant's counsel on appeal, and the other considerations that go into a calculation of the appropriate amount. The case is therefore remanded to the Appeals Court for consideration of the question of a reasonable and appropriate amount to be awarded. The parties should be afforded a reasonable time to file the application, supporting documentation, and opposition if any.<sup>5</sup>

So ordered.

The case was submitted on briefs.

John J. Bonistalli & Jennifer M. Lee for the plaintiffs.

Jon C. Cowen for the defendant.

Dylan Sanders & Alessandra W. Wintergerter for Real Estate Bar Association of Massachusetts, Inc., & another, amici curiae.

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whether, if the statute did not so provide, the defendant would nonetheless be entitled to appellate costs pursuant to Mass. R. A. P. 26 (a), as amended, 378 Mass. 925 (1979).

<sup>5</sup> With respect to fees associated with prosecuting the appeal in this court, the defendant may file, in this court, a request for fees with supporting documentation within thirty days.