MASSACHUSETTS Lawyers Weekly

# SJC: lis pendens statute provides for appellate fees

*Ruling will stem rush to seek review, lawyers say*

By: Kris Olson May 21, 2020

A party who prevails under the special motion to dismiss procedure of the lis pendens statute is entitled to an award of attorneys' fees not only in the trial court but also in the appellate courts, the Supreme Judicial Court has decided.

The relevant section of G.L.c. 184, §15(c) reads: "If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable attorneys' fees, including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery."

The defendant in *DeCicco, et al. v. 180 Grant Street LLC* had properly been awarded attorneys' fees and costs in the trial court, the SJC noted.

Ruling to give people 'pause'

To resolve the question of whether §15(c) also applies to appellate attorneys' fees, the SJC looked to nearly identical relevant statutory language governing a special motion to dismiss pursuant to the "anti-SLAPP statute," G.L.c. 231, §59H.

The SJC said it had interpreted the anti-SLAPP statute's fee provision to apply to both trial and appellate court fees, including in the 2000 case *McLarnon v. Jokisch*.

With respect to the appellate attorneys' fees, the court in *McLarnon* stated that the statutory provisions for reasonable fees "would ring hollow if it did not necessarily include a fee for the appeal."

In a rescript opinion, the SJC said the same rationale applied in *DeCicco*.

"Not only is the language of the two statutes almost exactly the same, but, importantly, the underlying policies are essentially the same," the court said. "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."

**Cause for pause**

*DeCicco* makes clear that there is risk to litigants who are of a mind to tie up pieces of real estate in the hopes of negotiating a better deal, said the defendant's attorney, Jon C. Cowen of Boston.

In his client's case, the buyers wanted to go ahead with the sale of the property on terms that had not been fully agreed upon, Cowen said. When they did not get their way, they filed a lis pendens, which had the effect of prohibiting the sale of the property for two and a half years.

"This decision will give more pause to people who are considering making a less-than-legitimate claim to tie up a piece of real estate," he said.

Cowen noted that lis pendens are easily obtained, with courts merely confirming that the litigation concerns land without considering the merits of the case. The special motion to dismiss exists so that improvidently granted lis pendens can be removed quickly.

"It's relatively easy for someone to go into court and claim a right to title to real estate," he said. "It's not as easy for an innocent property owner to fight back."

But to the plaintiffs' attorney, John J. Bonistalli of Boston, the ruling is just the latest in a series of mystifying decisions. Judges have concluded that his clients' claims were "frivolous," at least as the lis pendens statute defines the term — or, to use the SJC's word, "groundless" — on a sparse record in a case in which there was "not one interrogatory issued, not one deposition taken, and not one minute of testimony."

Bonistalli said the Appeals Court last fall had explained in a footnote in *Ferguson v. Maxim, et al.* that the "best practice" when dealing with a special motion to dismiss under G.L.c. 184, §15(c), might be to allow limited discovery on the disputed facts.

In his clients' case, Bonistalli said, such discovery may have altered the result on the motion to dismiss itself, rendering the fee award question moot.

In a letter to the SJC responding to the Real Estate Bar Association's amicus brief in support of the defendant, Bonistalli pointed to the case law on appellate attorneys' fees, which establishes a general rule that the imposition of such an award is left to the discretion of the court.

When there is a departure from that rule, it is usually due to a "compelling statutory policy," which Bonistalli said he does not believe is present with prospective homeowners such as his clients.

"Our case does not arise from the public policy objectives underpinning the anti-discrimination statute, the civil rights act, landlord tenant abuses, or the consumer protection and fair business practices legislation," he wrote.

But other attorneys say the SJC had properly drawn an analogy to the anti-SLAPP law.

> ***"Think hard before filing a frivolous lawsuit in pursuit of lis pendens, and think doubly hard before doubling down on appeal, because you may end up paying a big attorneys' fee award to your opponent in the end."***
>
> ***— Christopher R. Blazejewski, Boston***


Both statutes 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, said Boston's Johanna W. Schneider, co-chair of REBA's Litigation Section, adding that the SJC's decision "provides useful clarity and also makes sense as a matter of policy."

Schneider's co-chair, Daniel P. Dain, agreed with Bonistalli that the initial grant of the special motion to dismiss might have been "somewhat surprising."

But given that outcome, the SJC took a straightforward approach to answering the narrow question about the fee award, Dain said.

"The court's decision seems appropriate in light of the language of the statute, the purpose behind the statute, and analogizing to other statutes," he said.

Boston attorney Christopher R. Blazejewski said the lesson to be drawn from the decision is clear.

"Think hard before filing a frivolous lawsuit in pursuit of lis pendens, and think doubly hard before doubling down on appeal, because you may end up paying a big attorneys' fee award to your opponent in the end," he said.

Boston attorney Kurt S. Kusiak said if he had any issue with the decision, it would be the lack of notice to the plaintiffs that they might be on the hook for an automatic award of counsel fees. Here in particular, a prospective ruling might have been warranted, he said.

"It's a little bit of an ambush that is hard to take back to the client," Kusiak said.

**Long, lingering list**

Defendant 180 Grant Street, LLC purchased a home in Lexington in October 2016, which it proceeded to tear down to build a seven-bedroom home on the site.

The defendant listed the property for sale in April 2017, and plaintiffs Jack and Sandra DeCicco quickly showed interest.

The day after they had been shown the property, the plaintiffs offered to purchase it for $2.26 million.

But one of the three documents that comprised their offer was a page captioned "180 Grant Street Offer Summary," which contained a bulleted list of alterations to the home, the import of which the parties disputed.

The defendant's general manager, Peter Daus-Haberle, construed the document as a list of the DeCiccos' requests for work to be done on the house as a condition of their offer on which the parties never agreed.

The plaintiffs believed the offer summary memorialized the parties' agreement with respect to work to be done on the house as part of the plaintiffs' offer.

After the parties executed the offer on Sept. 8, 2017, they continued to discuss a purchase and sale agreement, but the discussions were unsuccessful.

After the defendant pulled out of the deal, the DeCiccos filed suit on Sept. 22, 2017, and obtained a lis pendens on the property.

In ruling on the defendant's motion to dissolve the memorandum of lis pendens and dismiss the plaintiffs' complaint pursuant to G.L.c. 184, §15(c), Superior Court Judge Christopher K. Barry-Smith found that the plaintiffs' offer could be legally binding, if the offer summary indeed was a memorialization of the parties' agreement.

"But here, the plaintiffs lack 'reasonable factual support' for their (colorable) legal argument," he wrote, in part because many of the terms in the offer summary were "neither sufficiently complete nor definite."

The defendant was awarded attorneys' fees at the trial level, as the lis pendens statute mandates.

The Appeals Court then upheld Barry-Smith's ruling on the special motion to dismiss, but it exercised discretion it believed it had to deny the defendant's request for appellate attorneys' fees and costs.

The plaintiffs sought further appellate review of the granting of the special motion to dismiss, while the defendant requested review of the fee award denial. The SJC decided to take up only the issue of the entitlement to fees.

The case has now been remanded to the Appeals Court to determine the reasonable and appropriate amount of fees to be awarded.

**DeCicco, et al. v. 180 Grant Street LLC, Lawyers Weekly No. 10-082-20 (4 pages)**

**THE ISSUE:** Is a party who prevails under the special motion to dismiss procedure of the lis pendens statute entitled to an award of attorneys' fees not only in the trial court but also at the appellate level?

**DECISION:** Yes (Supreme Judicial Court)

**Context matters**

The SJC acknowledged that it had held that an award of appellate attorneys' fees are not necessarily required with certain other statutes that provide for counsel fees in the trial court but are silent as to appellate fees.

**LAWYERS:** John J. Bonistalli and Jennifer M. Lee, of Law Offices of John J. Bonistalli, Boston (plaintiffs)

Jon C. Cowen of Donovan Hatem, Boston (defense)

For example, in the 2005 case *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, the court found that when 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."

That case involved G.L.c. 93A, §11, which provides for "reasonable attorneys' fees and costs incurred" once a violation of the statute has been proven.

But the SJC said that *DeCicco* and *Twin Fires* arise in far different contexts. In the lis pendens and anti-SLAPP statutes, the Legislature provided an expeditious means to challenge an action and protect certain rights, the court noted.

"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 court wrote.


LAWYERS WEEKLY NO. 10-082-20

Massachusetts Lawyers Weekly

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Full-text Opinions

DeCicco, et al. v. 180 Grant Street, LLC (Lawyers Weekly No. 10-082-20)

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