2011 WL 3489566 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

Walter O'KEEFE, Jr., Plaintiff-Appellant,
v.
TD BANK, N.A., Defendant-Appellee.

No. 2011-P-0828.
July 20, 2011.

On Appeal from a Judgment of the Superior Court

Brief for the Defendant-Appellee, TD Bank, N.A.

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***I OWNERSHIP DISCLOSURE STATEMENT OF TD BANK, NATIONAL ASSOCIATION**

TD Bank, National Association, a national banking association formed under the laws of the United States of America, is a wholly-owned subsidiary of TD Bank US Holding Company.

TD Bank US Holding Company, a Delaware **financial** holding company, is a wholly-owned subsidiary of TD US P & C Holdings, ULC, an Alberta, Canadian unlimited liability company.

TD US P & C Holdings, ULC is a wholly-owned subsidiary of The Toronto Dominion Bank, a Canadian-charted bank.

There are no owners that hold ten (10%) percent or greater of The Toronto Dominion Bank.

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*1 STATEMENT OF THE ISSUES

I. Whether there was abuse of discretion or error of law in a Superior Court judge's allowance of the defendant Bank's special motion to dismiss pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, with respect to counts of a complaint alleging abuse of process and 93A violations where all of the conduct alleged to be unlawful fell within the broad definition of petitioning activity protected by the statute, where the Bank was exercising its own right of petition or seeking redress of a grievance for a party to whom the Bank owed a legal duty of care, and where the plaintiff failed to show by a preponderance of the evidence, that the petitioning activity was devoid of any reasonable factual support or any arguable basis in law?

II. Whether the Superior Court's award of attorney's fees and costs to the Bank pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, should be affirmed where the Superior Court judge neither abused her discretion nor made an error of law in granting the Bank's special motion to dismiss?

III. Whether the Bank should be awarded the additional fees and costs it has incurred defending this case through the plaintiff's unsuccessful motion to reconsider the Superior Court's allowance of the special motion to dismiss, as well as his unsuccessful emergency motions to delay entry of judgment, for ***2** relief from judgment, and for this appeal, pursuant to the provisions of G.L. c. 231, § 59H?

STATEMENT OF THE CASE

A. Nature of the Case

The plaintiff, Walter F. O'Keefe, Jr. (the "plaintiff"), brought this action for abuse of process and violations of G.L. c. 93A in the Superior Court against TD Bank, N.A. (the "Bank") [1] for exercising its right to petition in the Barnstable Probate and Family Court. The Bank filed suit against the plaintiff to restrain use of a power of attorney which the Bank had reasonable cause to believe he intended to use to **exploit** for his personal benefit the assets of the principal under management with the Bank. The Bank, based on the reasonable belief that the principal was no longer mentally competent, also petitioned to have a conservator appointed for her. A judge of the Probate Court issued a temporary restraining order (App. 210), followed by a preliminary injunction (App. 212), against the plaintiff's use of the power of attorney. The probate judge also determined that the Bank's client was incompetent to handle her own **financial** affairs, owing to medically documented mental weakness ***3** due to advanced dementia, and he appointed a conservator for her.

The Superior Court dismissed the plaintiff's claims on a special motion to dismiss filed by the Bank pursuant to G.L. c. 231, § 59H, the Massachusetts anti-SLAPP statute, which was enacted to protect individuals and organizations who exercise their right to petition the government from the expense of defending themselves against meritless suits brought to deter or punish them for their petitioning activities (App. 142). Upon allowance of the special motion to dismiss, the Superior Court awarded the Bank attorney's fees and costs pursuant to the anti-SLAPP statute (App. 154). The plaintiff brought a motion to reconsider the allowance of the special motion which the Court denied. The plaintiff now appeals the judgment granting the special motion to dismiss and awarding attorney's fees and costs to the Bank.

B. Course of the Proceedings

On April 11, 2005, the plaintiff, individually and as guardian [2] of his two minor daughters, filed a Multi-count First Amended complaint in the Middlesex Division of the Superior Court Department seeking damages on a ***4** variety of tort theories [3] against the Bank and Joyce Collins, Esq. ("Attorney Collins") (App. 28, S.A. 1). The case was assigned to the Fact Track (App. 1).

The plaintiff's claims against the Bank were based on petitions the Bank filed in the Probate Court in response to plaintiff's repeated demands, as attorney-in-fact under a power of attorney executed in 1999 by Mary Winn, the Bank's client, the plaintiff's aunt, that the Bank make gifts from Mrs. Winn's assets to the plaintiff for his daughters' college educations. Specifically, the Bank petitioned in the Probate Court for the appointment of a conservator for Mrs. Winn (App. 196) accompanied by a complaint in equity (App. 206) alleging, essentially, that the plaintiff was attempting to **exploit** Mrs. Winn **financially** by misuse of the power of attorney. On that basis, the Bank moved to restrain the plaintiff's use of the power of attorney. The plaintiff's claims against Collins, the attorney who prepared the power of attorney for Mrs. Winn, arise out of Collins's suggestion to the Bank that the gifts requested by the plaintiff exceeded his authority under the power of attorney, out of Collins's recommendation

that the Bank take action in ***5** the Probate Court to have a conservator appointed for Mrs. Winn, and for testimony she gave in the Probate Court (App. 182).

On June 8, 2005, the Bank filed a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) asserting that the plaintiff had failed to state a claim upon which relief can be granted (App. 57, Paper No. 6, S.A. 84).[4] On June 20, 2005, the plaintiff filed an opposition to the motion (Paper No. 7). On December 6, 2005, after hearing and review, a judge of the Superior Court, S. Jane Haggerty, Justice, allowed the Rule 12(b) (6) motion and dismissed all counts of the complaint except the count alleging abuse of process (Count VI) (App. 66, Paper No. 11).

On December 19, 2005, the Bank answered the complaint and counterclaimed for abuse of process (Paper No. 12).

On February 17, 2006, the plaintiff moved to further amend the complaint by adding a claim for G.L. c. 93A violations (App. 81, Paper No. 15). On February 23, 2006, after argument and review, a second Superior Court judge, Paul A. Chernoff, Justice, granted the motion with the stipulation that the 93A claim would be viable only if the plaintiff prevailed on the abuse of process theory (S.A. 107).

***6** On February 20, 2006, the plaintiff moved for reconsideration of the December 6, 2005 dismissal Order (Paper No. 14). On February 21, 2006, the Court, Haggerty, J., denied the motion.

The Second Amended Complaint, filed on February 23, 2006 (App. 82, S.A. 108), asserted the following claims against the Bank:

Count VI alleged that the Bank abused legal process when it petitioned the Probate Court by misrepresenting to the Court that Mrs. Winn needed her assets to pay for her living expenses and medical care (App. 111, ¶ 156), by seeking to mislead the Court by placing events out of chronological order and by not dating the events (App. 111, ¶ 157), and, finally, by submitting to the Court a medical certificate signed by Mrs. Winn's physician, Dr. Ann Gryboski ("Dr. Gryboski"), which stated that Mrs. Winn had advanced dementia and was no longer capable of managing her **finances** (App. 198), and was based on an examination which took place several weeks after Mrs. Winn allegedly authorized the gifts (App. 111, ¶ 157, 158).

Count VI of the amended Complaint alleged further that the Bank filed suit in the Probate Court for ulterior and improper motives such as to punish, embarrass and demean the plaintiff for accusations and for critical letters to the Bank dated January 29, 2002 and February 4, 2002 (App. 112, ¶ 162a), to discredit and get rid of the plaintiff so he could not hold the ***7** Bank responsible for alleged mismanagement (App. 112, H 162b), to prevent the plaintiff from transferring Winn's assets to another **financial** institution (App. 112, ¶ 162c), to have the Bank appointed as Mrs. Winn's conservator to generate fees for the Bank (App. 112, ¶ 162d), to prevent the plaintiff from fulfilling his duty to reduce Winn's estate to exposure to future nursing home expenses by gifting a significant amount of money from Winn's assets (App. 112, ¶ 162e), and, finally, to place the bank in the primary position to assist in probating Winn's estate when she died (App. 112, ¶ 162f).

Count IX of the amended complaint joined the abuse of process theory with a 93A claim by alleging that the Bank had engaged in unfair and deceptive trade practices in that it had unnecessarily and willfully abused the litigation process by filing suit in the Barnstable Probate Court with ulterior and illegitimate purposes, and, further, in that representatives of the Bank had made false accusations against (the plaintiff) and gave false, deceptive and misleading testimony before the court in conjunction with and to promote and facilitate that litigation (App. 119, ¶ 182).

On May 4, 2006, the Bank filed a special motion to dismiss the abuse of process and 93A counts pursuant to the anti-SLAPP statute, G.L. c. 231, § 59H, asserting that the plaintiff's claims are based solely on the ***8** Bank's petitioning activities (Paper No. 28). In support of its special motion, the Bank submitted an affidavit of the Bank's Compliance Officer, Stuart Nickerson (S.A.

229), a memorandum in support with exhibits (S.A. 232-310), and an attorney's affidavit (S.A. 311). The plaintiff responded with an opposition dated April 30, 2006 (S.A. 318).

On November 29, 2006, after hearing and review, the Court, Haggerty, J., allowed the Bank's special motion to dismiss upon a determination that the Bank had met its burden of showing plaintiff's claims were based solely on the Bank's petitioning activity and the plaintiff had failed to carry his burden of showing the petitioning activity lacked any reasonable basis in fact or any arguable basis in law and that the plaintiff had not suffered actual harm (App. 142).

On December 14, 2006, Attorney Collins filed a suggestion of bankruptcy (Paper No. 31). [5]

On January 5, 2007, pursuant to the Court's instruction, the Bank filed an affidavit of fees and costs pursuant to § 59H (App. 154).

***9** On January 25, 2007, the plaintiff moved for reconsideration of the November 29, 2006 Order allowing the special motion to dismiss (Paper No. 34). The Bank filed an opposition to the motion on January 30, 2007 (Paper No. 35). On February 16, 2007, the Court, Haggerty, J., denied the motion for reconsideration. On November 23, 2007, the Superior Court awarded $13,710.00 in attorney's fees and costs of $157.81 to the Bank in connection with its special motion pursuant to § 59H (App. 154).

On January 21, 2010, long after tracking orders had expired, the plaintiff moved to amend his complaint for a third time (Paper No. 45). On March 15, 2010, the Court, Chernoff, J., denied the motion (Paper No. 48).

On April 16, 2010, Attorney Collins, now discharged from bankruptcy, moved for summary judgment pursuant to Mass. R. Civ. P. 56 on all counts against her (Paper No. 51).

On February 4, 2011, after argument and review, a third judge of the Superior Court, Thomas P. Billings, Justice, granted Collins's motion for summary judgment (App. 161, Paper No. 61) and awarded judgment to Collins and the Bank. Final judgment entered on February 10, 2011 (App. 163). [6]

***10** On February 22, 2011, the plaintiff filed an emergency motion to delay entry of judgment (Paper No. 63). The Court, Billings, J., denied the motion.

On February 28, 2011, the plaintiff filed an emergency motion for reconsideration of the ruling allowing Collins's motion for summary judgment (Paper No. 64). The Court, Billings, J., denied the motion (App. 26).

On March 11, 2011, the plaintiff filed an emergency motion seeking relief from judgment pursuant to Mass. R. Civ. P. 60 with a memorandum (Paper No. 65). The Court, Billings, J., denied the motion (App. 27).

C. Final Disposition in the Superior Court

The Superior Court allowed the Bank's special motion to dismiss and awarded it attorney's fees and costs pursuant to G.L. c. 231, § 59H. The Court denied the plaintiff's motion for reconsideration. Final judgment for the Bank entered on February 10, 2011 (App. 163). Plaintiff's emergency motions to delay entry of judgment, for reconsideration of the Order on summary judgment and for relief from judgment were denied.

***11 D. Statement of the Facts**

At the heart of this case is a power of attorney given to the plaintiff by his **elderly** aunt, Mary Winn (App. 164, S.A. 30), and a complaint in equity to enjoin the plaintiff's use of the power of attorney filed by the Bank, Mrs. Winn's agent and asset manager, in the Probate Court (App. 206, S.A. 207). [7]

In the late 1980's, Mary Winn, recently widowed, relocated from New Hampshire to Cape Cod to be close to family and friends, including brothers, Walter F. O'Keefe, Sr. and Arthur O'Keefe, and a niece, the plaintiff's sister, Kaethe Maguire (App. 29, S.A. 332). In the early 1990's, Mrs. Winn moved into the independent living section of Thirwood Place, a continuing care facility in South Yarmouth, Massachusetts, as a private-pay resident (App. 29, S.A. 342). In the summer of 1991, Mrs. Winn, whose assets were substantial, established a banking relationship with the Bank (S.A. 277, S.A. 342).

Mrs. Winn had no children (App. 29, S.A. 332). Following Winn's move to Cape Cod, the plaintiff and his family developed a relationship with her (App. 29, S.A. 332). The plaintiff saw Winn at holiday, birthday and other family celebrations (App. 29, S.A. 332).

***12** In the fall of 1999, Mrs. Winn retained Joyce Collins, Esquire, a probate, guardianship and **elder** law attorney in Hyannis, to prepare a will, a health care proxy, and a durable power of attorney (App. 31, S.A. 343). The documents were signed on October 14, 1999. According to the will (App. 171), after some bequests of tangible personal property and a gift for her church in New Hampshire, the bulk of Winn's estate was to be distributed among thirteen of her nieces and nephews, including Maguire and the plaintiff. The health care proxy (S.A. 44) named Maguire as Winn's health care agent, with the plaintiff as alternate. The durable power of attorney (App. 164) designated the plaintiff as Winn's attorney-in-fact, with Maguire as his alternate. It also named the plaintiff to serve as Mrs. Winn's guardian or conservator, if the need arose, and as executor of her estate, with Maguire as the designated alternate for those roles (App. 169).

By its terms, the power of attorney, was durable in nature, was to take effect on execution, and was to remain in effect until revoked (App. 164). The power of attorney expressly empowered the plaintiff to make gifts from Winn's assets to "such persons and institutions as shall appear to my attorney-in-fact to be consistent with my prior pattern of giving, or as shall be appropriate to reduce or eliminate Federal or State estate or inheritance taxes on my estate, or as shall be appropriate to reduce the exposure of my ***13** estate to nursing home expenses". It also authorized the plaintiff to "make gifts to himself, directly or indirectly" (App. 166).

In tax year 1999 and thereafter, Mrs. Winn had the Bank prepare her tax returns. The following summer, in July 2000, she became a client of the Bank's brokerage division and, finally, in March of 2001, she became a private bank client having the Bank's Trust Department manage her assets (S.A. 277). Until the spring of 2001, Mrs. Winn had handled her own investments (S.A. 333). In March 2001, the Bank took over responsibility for investing and managing her assets (App. 178). [8]

In the spring of 2001, Mrs. Winn was hospitalized with heart problems (S.A. 344). [9] Maguire arranged for Mrs. Winn's transfer from the independent living section of Thirwood Place to the assisted living unit where more help was available and meals were prepared (S.A. 334). [10] About this time, the plaintiff asked the Bank to take over paying Mrs. Winn's bills (S.A. 334).

***14** On or about April 30, 2001, the plaintiff instructed the Bank to distribute $200,000 from Mrs. Winn's assets as gifts in the form of checks of $10,000 each to twenty named individuals. The purpose of the gifts was to reduce the exposure of Winn's estate to Federal or State estate taxes (App. 32, S.A. 334). Winn's assets at the time were in the range of $800,000-$900,000 (App. 31, S.A. 342). [11] The gifts were not entirely consistent with the terms of Mrs. Winn's will. Although thirteen of the gifts were to beneficiaries named in Mrs. Winn's will, including the plaintiff, seven of the checks went to individuals not named in

the will, including some members of Maguire's family as well as the plaintiff's mother, the plaintiff's wife, and the plaintiff's minor daughters, Rachael and Samantha. On April 30, 2001, the Bank implemented the gifts at the plaintiff's direction as Mrs. Winn's attorney-in-fact on checks drawn by the Bank (App. 32, S.A. 334).

In the fall of 2001, the plaintiff proposed to Attorney Collins and to Elizabeth Highfield, the Bank's ***15** Senior Vice President ("Highfield"), that additional gifts be made for the purpose of reducing the exposure of Winn's estate to future nursing home expenses (S.A. 335).

On December 26, 2001, the plaintiff, accompanied by his wife and daughters, dined with Winn at Thirwood. The visit lasted several hours. Toward the end of the evening, after the plaintiff's wife and the children had gone out to warm up the car, the plaintiff stayed behind alone with Mrs. Winn. The plaintiff asked Mrs. Winn if she would mind if he made gifts from her assets to pay for his daughters' college educations. The plaintiff produced a note, which he had typed up in advance, and Mrs. Winn signed it (App. 180, S.A. 344). The note read:

"December 26, 2001

Dear Walter,

You have my permission to give your daughters, Samantha and Rachael, gifts from my assets for their college tuition. Sincerely,

Mary Winn" (App. 180)

On January 2, 2001, the plaintiff wrote a letter to Highfield in which he stated that Mrs. Winn had authorized gifts for his daughters' college educations and she had left it up to him to determine how much the gifts should be. The letter asked that two checks in ***16** the amount of $75,000 each, payable to the plaintiff as "Custodian" for each of the daughters, be sent to the plaintiff as soon as possible. The letter also informed Highfield that Mrs. Winn had become forgetful and her short term memory was failing (App. 181).

After Highfield received the January 2, 2001 letter, she visited Mrs. Winn at Thirwood Place. Following the meeting, Highfield informed the plaintiff by telephone that she was reluctant for the Bank to transfer funds to him directly, as he had requested, because of concern the other heirs might sue the Bank (App. 34, S.A. 346), but the Bank would honor a request to transfer an appropriate amount from Mrs. Winn's investment account to a checking account on which the plaintiff had signature authority, so he could write whatever checks he wanted (App. 34, S.A. 346). In this same conversation, Highfield told the plaintiff that the Bank did not approve of the gifts and she would be writing him a letter to that effect. The plaintiff asked Highfield to reconsider. The conversation ended with the question unresolved (S.A. 336).

Thereafter, Highfield spoke with Attorney Collins about the gifts (App. 35, S.A. 336). Following her conversation with Collins, Highfield spoke again with the plaintiff. She told him that she had spoken with Attorney Collins, that Collins was writing a letter and that the Bank was no longer willing to facilitate the gifts in any manner (App. 35, S.A. 346).

***17** By letter dated January 24, 2001 [12] (App. 182), Collins informed Highfield of her opinion, as Mrs. Winn's attorney, that the gifts the plaintiff had requested for his daughters exceeded his authority under the power of attorney, and that the distributions would alter the dispositive provisions of Mrs. Winn's will and possibly lead to challenges by the other beneficiaries. Attorney Collins closed by suggesting that the Bank immediately pursue a conservatorship or guardianship for Mrs. Winn pointing out that a conservator could revoke the power of attorney or obtain Probate Court authority to make gifts in accordance with Mrs. Winn's testamentary intent if appropriate.

On January 29, 2002, in a certified letter [13] to Highfield, the plaintiff expressed his disappointment at the Bank's decision not to assist with the gifts; he protested that Mrs. Winn was still a competent person, that she had not been declared incompetent, that the decision to make the gifts was hers, and that he had ***18** determined the gifts would not prevent Mrs. Winn receiving all of the care she requires. The letter warned that if the Bank failed to complete the gifts before Mrs. Winn died, the plaintiff would "hold (the Bank) legal *[sic]* liable for the full amount of the gifts, $150,000 plus interest and reasonable legal fees" (App. 184). The plaintiff also complained in this letter that the Bank had sent a year-end 1099 statement to Maguire, [14] and that the Bank's management fees were extremely excessive. The letter also informed Highfield that Mrs. Winn was easily upset by technically confusing issues and directed her not to contact Mrs. Winn. The plaintiff closed by saying "[b]ecause I find your bank to be incompetent and your charges excess, I will be looking to move Mary's account out of (the Bank)" (App. 185).

A week later, on February 4, 2002, the plaintiff sent a second certified letter to Highfield. In this letter he complained that an account statement for October 2001 had been sent to Maguire who had opened it and forwarded it to him. The letter stated, "[i]t is inconceivable to me how unprofessional and incompetent your bank has proven to be", warned that the plaintiff intended to hold the Bank responsible for damaging consequences, if any, and advised that he planned to meet with Fidelity Investments ("Fidelity") on February ***19** 6 to facilitate transfer of Mrs. Winn's accounts out of the Bank (App. 186).

On February 6, 2002, the plaintiff met with representatives of Fidelity and executed a Fidelity Transfer of Assets Form (App. 35, S.A. 337).

On February 7, 2002, Stuart Nickerson, the Bank's Vice President and Compliance Officer for Personal **Financial** Services, responded to the plaintiff's letter of January 29, 2002. In this letter, Mr. Nickerson stated that it had become obvious that the plaintiff was abusing the power of attorney given to him by Mrs. Winn and that his attempt to transfer $150,000 to his minor children was, in effect, a transfer to himself which could only be viewed as a breach of the plaintiff's fiduciary responsibility as attorney in fact for Mrs. Winn. For this reason, Mr. Nickerson wrote, the Bank would no longer recognize the plaintiff's authority under the power of attorney and would ignore any attempt by the plaintiff to transfer Mrs. Winn's assets to another institution so he could accomplish his own personal goals (App. 189).

On February 11, 2002, the plaintiff saw Mrs. Winn at Thirwood Place and secured her signature on a letter, addressed to Highfield, stating that Mrs. Winn had decided to transfer her assets to Fidelity Investments, that the plaintiff had initiated all of the paperwork on her behalf and that all of her mail should be forwarded to the plaintiff. At the same ***20** time, the plaintiff procured Mrs. Winn's driver's license and her passport which he later presented, together with the letter addressed to Highfield, now bearing Mrs. Winn's apparent signature, to a Fidelity representative who, in turn, endorsed the letter with a signature guarantee under the NYSE, Inc., Medallion Signature Program (App. 190, S.A. 337).

On February 13, 2002, Mrs. Winn was examined by her physician, Dr. Gryboski. [15] Following the examination, Dr. Gryboski issued a Medical Certificate appropriate for conservatorship. The certificate stated the Doctor's opinion, based on a diagnosis of advanced dementia, that Mrs. Winn was unable to properly care for her property due to mental weakness and that she was no longer capable of managing her **finances** (App. 198, S.A. 338).

On February 20, 2002, the Bank filed a petition in the Barnstable Probate and Family Court Department, supported by Dr. Gryboski's Medical Certificate, seeking, as Collins had suggested, the appointment of a suitable person as conservator for Mrs. Winn. The petition was signed by Nickerson and Highfield as petitioners with Maguire's assent (App. 196). The petition was accompanied by an affidavit from Nickerson (App. 200), a Complaint in Equity, which named the ***21** plaintiff and Mrs. Winn as defendants (App. 206), and a motion for a temporary restraining order against the plaintiff's use of the power of attorney (App. 208). The equity complaint was signed by the Bank's attorney, Laura McDowell-May ("Attorney McDowell-May") (App. 207).

Attorney McDowell-May filed the papers with the Probate Court on February 20, 2002 and appeared *ex parte* on the motion for temporary restraining order. A judge of the Probate Court granted the temporary restraining order and issued a summons and order of notice to Winn and the plaintiff for a hearing on preliminary injunction (App. 200). That same day, the probate judge also appointed a temporary conservator for Mrs. Winn (App. 147, S.A. 307-Event No. 8).

On March 4, 2002, a hearing on the preliminary injunction was held in the Barnstable Probate and Family Court. Highfield testified that she found Mrs. Winn incompetent when she met with her in January 2002 (S.A. 338). Attorney Collins appeared for Mrs. Winn (App. 211) and testified that the gifts were not in keeping with Mrs. Winn's prior pattern of giving (App. 147). The plaintiff appeared *pro se* (S.A. 338). There is no evidence in the record to suggest that Mrs. Winn attended or participated in the proceedings. Upon hearing all testimony, the probate judge issued a preliminary injunction against the plaintiff's use of the power of attorney. In his Order, the probate judge ***22** ruled that the plaintiff's continued use of the power of attorney could cause irreparable injury to the Bank (App. 212). That same day, the probate judge appointed a Guardian ad Litem [16] to investigate (S.A. 302-Event No. 15).

On April 1, 2002, the plaintiff filed an answer to the complaint in equity and counterclaims against the Bank (S.A. 302-Event No. 18). The counterclaims were later dismissed, either on the Bank's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) (S.A. 303-Event No. 25, S.A. 290), or on the plaintiff's voluntary motion.

On July 16, 2002, the Bank moved to withdraw from the probate litigation and to substitute Mrs. Winn's niece, Janet Hill, and her nephew, William O'Keefe, as petitioners (S.A. 303-Event No. 32). The motion was allowed by the Court (S.A. 303-Event. No. 38) and the case was assigned for trial on October 24, 2002 (S.A. 303-Event No. 36).

On October 24, 2002, [17] the day the case was to be tried, the plaintiff entered into an Agreement for Judgment (App. 214, S.A. 339) with the substituted litigants whereby he voluntarily resigned and waived compensation as Mrs. Winn's attorney-in-fact and as her ***23** nominated conservator, guardian, and executor (App. 147, S.A. 304-Event No. 44-45). Mrs. Winn died on December 16, 2002 (S.A. 349). Maguire was appointed executrix of the estate. [18]

On April 5, 2005, the plaintiff filed the Superior Court suit leading to this appeal claiming as damages, among other things, compensation he might have earned if he had not resigned as Mrs. Winn's nominated guardian, conservator, or executor (App. 28, S.A. 1).

STANDARD OF REVIEW

The standard of review on a special motion to dismiss is whether the motion judge abused discretion or made an error of law. *Kalter v. Wood*, 67 Mass. App. Ct. 584, 586 (2006).

ARGUMENT

The Superior Court motion judge did not abuse discretion or make an error of law when she granted the special motion to dismiss and ordered the plaintiff to pay attorney's fees and costs pursuant to G.L. c. 231, § 59H. The judge properly applied the relevant provisions of the anti-SLAPP statute as interpreted by the Massachusetts Appeals Court and the Supreme Judicial Court. The Superior Court judgment should therefore be affirmed.

***24 I. The anti-SLAPP statute**

A. The anti-SLAPP statute was designed to protect precisely the kind of activity the Bank engaged in when it petitioned the Probate and Family Court. There was no abuse of discretion or error of law in the Superior Court's determination that the filings in the Probate Court constituted "petitioning activities" as defined in the statute and interpreted by our appellate courts.

The anti-SLAPP statute, G.L. c. 231, § 59H was enacted to protect a party's constitutional right to petition the government by providing a mechanism for "expedient resolution to suits designed to deter or retaliate against individuals who seek to exercise their right of petition." *Keegan v. Pellerin*, 76 Mass. App. Ct. 186, 189 (2010), quoting *Wenger v. Aceto*, 451 Mass. 1, 4 (2008). The statute provides "broad protections for individuals who exercise their right to petition from harassing litigation and the costs and burdens of defending against retaliatory lawsuits." *Kalter v. Wood*, 67 Mass. App. Ct. 584, 591 (2006), quoting *Fabre v. Walton*, 436 Mass. 517, 520 (2002). The statute allows a court to dismiss a lawsuit via a special motion to dismiss when the plaintiff's cause of action is "based on ... [a] party's exercise of its right of petition." G.L. c. 231, § 59H.

Five broad categories of statements comprising "a party's exercise of its right of petition" are identified in the statute. *Id*. The category most relevant to the abuse of process claim in the instant ***25** case is that a party's right of petition includes "any-written or oral statement made before or submitted to a legislative, executive or judicial body." *Id*.

Here, the Superior Court determined as a factual matter that the Bank's statements in the Probate Court were offered to a judicial body for the purpose of resolving the dispute that had arisen between the plaintiff and the Bank concerning the plaintiff's use of the power of attorney (App. 148). There was no abuse of discretion or error of law in the Superior Court's determination that the anti-SLAPP statute is applicable to this case and the plaintiff does not argue otherwise in his appeal brief.

B. The Superior Court correctly determined that the Bank satisfied its threshold burden of showing that the claims against it are based on petitioning activities alone with no other substantial or additional basis.

To succeed on a special motion to dismiss under § 59H, the moving party must make a threshold showing, through pleadings and affidavits, that the claims against it are based on its petitioning activities alone and have no other substantial or additional basis. *Duracraft Corp. v. Holmes Prods*. Corp., 472 Mass. 156, 167-168 (1998). *Office One, Inc. v. Lopez*, 437 Mass. 113, 122 (2002). In Count VI of the amended complaint, the plaintiff alleged that the Bank had abused legal process by making misrepresentations to the Probate Court, by seeking to mislead the Court, and ***26** by submitting a medical certificate to demonstrate Winn's lack of mental competency based on an examination that took place shortly after Winn allegedly approved the gifts.

In support of its special motion to dismiss, the Bank submitted an affidavit from its compliance officer, Stuart Nickerson, stating that the Bank filed the equity complaint and petitioned to have a conservator appointed for Mrs. Winn only after the plaintiff directed the Bank to pay $150,000 from Winn's assets to him as custodian of his two minor children for their college education, that the plaintiff had threatened to sue the Bank for $150,000 plus interest and legal fees if it failed to make the gifts before Mrs. Winn died, that the Probate Court had issued a preliminary injunction against the plaintiff's use of the power of attorney and that, shortly thereafter, the Bank had withdrawn from the case and relatives of Winn took over the litigation against the plaintiff (S.A. 229-230). The plaintiff filed an affidavit in opposition to the special motion (S.A. 332-339) stating, among other things, that he had asked Mrs. Winn if she would like to give him gifts to pay for his daughters' college education and she had told him it would be wonderful, that the gifts were part of his plan to reduce the exposure of Winn's estate to nursing home expenses, that the gifts would have no detrimental effect on Winn, that the, plaintiff was dissatisfied ***27** with the Bank's management of Winn's assets and he thought its fees excessive. With regard to the complaint in equity, the affidavit asserted that the temporary restraining order was granted because the Bank falsely alleged an emergency existed and Winn would be substantially harmed.

In her decision on the special motion, the Superior Court judge expressly determined that the Bank had met its threshold burden of showing that the claims against it are based on petitioning activities alone with no substantial basis other than or in addition to

the petitioning activities. She concluded as a factual matter that the actions complained of were taken by the Bank in the context of a court proceeding and, further, that regardless of the motivation behind the probate action or the veracity of the Bank's representatives' testimony, the Bank is covered under the anti-SLAPP statute (see generally App. 148). The judge correctly found the plaintiff's contention that his complaint is based on conduct other than the litigation unpersuasive and she gave no weight to plaintiff's assertions that the complaint contained sufficient allegations of ulterior motive to survive a special motion to dismiss noting that the argument had been rejected by the Supreme Judicial Court in *Fabre v. Walton*, 436 Mass. 517 (2002) (dismissal of abuse of process claim under the anti-SLAPP statute upheld on appeal). *Fabre* held that: "[n]otwhithstanding (plaintiff's) allegations ***28** concerning the motive behind (defendant's) conduct, the fact remains that the only conduct complained of is (defendant's) petitioning activity." *Fabre, supra*, at 524.

In the instant case, the Superior Court correctly concluded that the plaintiff had failed to demonstrate that his claims were based on actions other than the Bank's petitioning activities (App. 149). There is nothing in the plaintiff's appeal brief to demonstrate error or abuse of discretion in the Superior Court's determination that the abuse of process claim was based solely on petitioning activity. The plaintiff's allusions in his appeal brief to acts or conduct, which the plaintiff contends are sufficient to legitimize the abuse of process claim (Pl's. Br. pp. 29-35), are devoid of fact and speak to motive. Thus, the references are irrelevant to the implicated petitioning activity and to this appeal. The case of *Keystone Freight Corp. v. Bartlett Consolidated, Inc.*, 77 Mass. App. Ct. 304 (2010), cited by plaintiff to support his other substantial conduct argument, is easily distinguished. In *Keystone*, the plaintiff had amassed evidence that the defendant had engaged in substantial or additional conduct, apart from its petitioning activity. (a district court collection action), consisting of misrepresentations, inflated billings and other questionable practices, both before and after the petitioning activity.

***29** Here, in contrast, the Bank's activities were limited to probate filings resulting in restraint of the plaintiff's use of the power of attorney and the appointment of a conservator. The record discloses no other, additional, or subsequent action by the Bank. The plaintiff offers nothing in his brief to counter the Superior Court judge's well-documented findings. The Superior Court's determination that the claims against the Bank were based solely on the Bank's petitioning activity with no other or additional substantial basis should, therefore; be upheld.

C. The Superior Court correctly found that the plaintiff failed to prove by a preponderance of the evidence that the Bank's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law or that the plaintiff suffered actual harm as a result of the Bank's conduct. The findings have factual support in the record and the plaintiff does not contest them.

Once the moving party establishes that the claims against it are based solely on petitioning activity, the burden shifts to the non-moving party to show by a preponderance of the evidence that the moving party's petitioning activity was "devoid of any reasonable factual support or any arguable basis in law," and that the moving party's activities "caused actual injury to the responding party." See *Keegan v. Pellerin*, 76 Mass. App. Ct. 186, at 189 (2010) and *Wenger v. Aceto*, 451 Mass. 1, *supra*, at 5 (2008), quoting from § 59H. In the instant case, the motion judge correctly ***30** concluded that the plaintiff had not made such a showing The judge properly rejected the plaintiff's allegation that the Bank's petition had no factual support and she noted in her memorandum that dispensing a substantial portion of a person's assets is not necessarily in his or her best interest. The judge also ruled that the preliminary injunction barring the plaintiff from exercising the power of attorney was strong evidence that the petitioning activity was legally sound and factually supported (App. 149, citing *Fabre, supra*, 436 Mass. at 524).

The plaintiff does not contest the conclusion that he failed to demonstrate the probate litigation lacked factual or legal basis or that he suffered no actual damage. His failure to appeal and argue the actual damage issue carries significant consequences. In order to survive a motion to dismiss under § 59H, or to establish the common law tort of abuse of process, the plaintiff must demonstrate by a preponderance of the evidence that the defendant's actions caused him actual harm. G.L. c. 231, § 59H. See *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 414 (2000). Here, the Superior Court found that the plaintiff failed to prove this critical element. The record supports the judge's findings. First, the plaintiff does not deny that he signed a consent decree in the Probate Court whereby he voluntarily resigned or waived service as Winn's nominated conservator, guardian or executor (App.

215). ***31** Rather, he argues, in essence, that he is not bound by the decree because it contained no general release (Pl's. Br. p. 47). Furthermore, there is compelling evidence in the record, apart from the consent decree, to demonstrate that the plaintiff was damaged, not by the Bank's actions, but by his own hand. The plaintiff acknowledges that he had signing authority on Winn's checking account (S.A. 336). He acknowledges also that, when Highfield told him she was reluctant for the Bank to write the checks directly to him, she also told him that the Bank would transfer funds from Winn's asset account to the checking account so the plaintiff could write whatever checks he wanted (S.A. 336). In that instant, the plaintiff could have accomplished the gifts by simply instructing Highfield to make the transfer. Instead, he demanded that the Bank draw the checks. He launched a barrage of criticism and threats at the Bank for the apparent purpose of coercing the Bank into making the gifts. The inference is clear: the plaintiff wanted the money *and* immunity. Therein lies the casuistry.

The conclusion is inescapable on this record that the plaintiff suffered no actual harm from the Bank's action. Any harm the plaintiff may have suffered was, ironically, of his own doing. The absence of actual harm and the plaintiff's failure to notice and argue damage on appeal are. sufficient, without more, to affirm the Superior Court judgment.

***32 D. The plaintiff's argument that the anti-SLAPP statute does not apply because the Bank was acting to protect the rights of someone other than itself, is plainly wrong.**

The plaintiff concedes that the complaint in equity constitutes petitioning activity within the context of G.L. c. 231, § 59H (Pl's. Br. p. 20). Rather, he argues that anti-SLAPP immunity should not be extended to the Bank because it was petitioning for Winn, not itself (Pl's Br. p. 21).

For this proposition, the plaintiff relies heavily on the Supreme Judicial Court's decision in *Kobrin v. Gastfriend*, 443 Mass. 327, 330 (2005) (Pl's. Br. p. 21). The plaintiff interprets *Kobrin* narrowly to mean that § 59H protects only the right to petition on one's own behalf (Pl's. Br. p. 21). Parsing *Kobrin* so closely ignores its broader implications. In *Kobrin*, the Supreme Judicial Court concluded that the defendant's activities were not immune "[b]ecause the defendant was not seeking from the government any form of redress for a grievance of his own or *otherwise petitioning* on his *own behalf...*" *Kobrin, supra*, 443 Mass. at 330 (emphasis added). In *Kobrin*, the defendant, Gastfriend, a psychiatrist and paid consultant retained by the government to assist with an investigation into and render an expert opinion concerning the medical practices of another psychiatrist, Kobrin, was later sued for giving allegedly false, misleading and fraudulent testimony. ***33** *Id*. at 329, 330. The Supreme Judicial Court concluded that it would considerably alter the Legislature's intent with regard to the anti-SLAPP statute if the Court were "to interpret the statute so as to expand its scope to protect the statements of a *disinterested paid witness.*" *Id*. at 330 (emphasis added). What distinguishes *Kobrin* from the current case is, first, unlike the Bank, Gastfriend "had no other connection to, or interest in the allegations against the plaintiff," *Id*. at 337, and, second, the Bank, unlike Gastfriend, was not a governmental petitioner. The lesson to be taken from *Kobrin*, at least as far as the plaintiff's self-petition argument is concerned, is that to qualify for protection under the anti-SLAPP statute, the party seeking immunity cannot be "disinterested" but rather must have a connection to or in interest of its own in the allegations.

Applying that standard to the instant case, the Superior Court correctly concluded that the Bank acted to protect its own rights as well as those of Winn. This conclusion is factually and legally supported. In her memorandum of decision, for example, the judge, Citing *Campbell v. Cook*, 193 Mass. 251, 253-254 (1906), concluded that the Bank, under contract to manage and invest Mrs. Winn's assets, owed a fiduciary duty to act in her best interests, *Mass. Bay Transp. Auth. Ret. Bd. v. State Ethics Comm.*, 414 Mass. 582, 585 (1993), and, further, that the duty included "not acquiescing to the ***34** misdeeds of other fiduciaries," *Rutanen v. Ballard*, 424 Mass. 723, 731 (1997) (App. 150-151).

Furthermore, the record supports the conclusion that the Bank petitioned for itself as much as for Winn. The scheme to protect Mrs. Winn's estate from nursing home expenses, through substantial gifts to the plaintiff, was clearly the plaintiff's idea, not Winn's. (S.A. 345). Apart from the plaintiff's self-serving statements and letters he fabricated for Mrs. Winn's signature, there is no independent evidence in the record to demonstrate that Winn was even aware of the gifting scheme, or that she attended the probate hearing, despite being summonsed, or that she initiated contact with Attorney Collins or with Highfield or with anyone

else about the gifts or any other matter, not even when she allegedly became "very angry" because the Bank had refused to make the gifts (S.A. 337). There is, on the other hand, record evidence of Winn's physical and mental decline. Collins, for example, during a visit in the fall of 2001, long before Winn allegedly approved the gifts and signed the letters, observed that Winn was unable to keep a conversation going and was no longer able to manage her own affairs (S.A. 347). Moreover, after her heart problems in the spring of 2001, Winn was moved to Thirwood's assisted living unit (S.A. 334). Notably, the plaintiff himself commented on Winn's decline. In his January 2, 2002 letter to Highfield, he observed that Winn's short-term ***35** memory was failing (App. 181). In another letter, he acknowledged that Winn was confused about technical matters (App. 184). In short, by the time the dispute over the gifts came to a head in January 2002, the Bank had ample reason to believe that Winn was vulnerable and that the plaintiff's intention all along had been to **exploit** her **financially** and to insulate himself from liability by making the Bank responsible for the gifts.

Against this background, in January 2002 the Bank was besieged on one flank by threat of suit from Winn's heirs and on the other by plaintiff's increasingly vitriolic letters and threats to sue if it did not make the gifts (App. 184). Confronted with this Hobson's choice, with Winn suffering from dementia and Collins sidelined due to conflict, the Bank petitioned the Probate Court. The conservatorship petition was signed by Bank representatives as "friends" of Mrs. Winn (App. 196). The equity complaint was signed by Bank counsel on behalf of the Bank (App. 196). In both instances, therefore, the Bank was exercising its *own* right of petition. Furthermore, as argued above and as the Superior Court judge correctly found, the Bank was duty-bound to protect Winn's rights. In addition, the judge correctly found that the Bank had a demonstrated connection to and an interest of its own in the probate allegations. The Superior Court correctly concluded that the Bank is protected by the anti-SLAPP statute in the circumstances of this case. Plaintiff's argument ***36** to the contrary, based on his narrow interpretation of *Kobrin*, for the reasons mentioned above, is plainly wrong.

The plaintiff's reliance on the cases of *Fustolo v. Hollander*, 455 Mass. 861, 867 (2010) (Pl's. Br. pp. 25-27), *Fisher v. Lint*, 69 Mass. App. Ct. 360 (2007) (Pl's. Br. p. 27) and *Plante v. Wylie*, 63 Mass. App. Ct. 151 (2005), is similarly misplaced. The plaintiff cites *Fustolo* to support the proposition that a citizen is protected by the anti-SLAPP statute *only* when he petitions to redress a grievance of his own. As discussed above, the Superior Court correctly concluded that the Bank was petitioning on its own behalf and had an interest in the proceedings. To the extent that the plaintiff's argument might nevertheless possess a modicum of traction, it should be noted that the *Fustolo* decision involved other distinguishing considerations. In *Fustolo*, for example, the defendant, Hollander, a newspaper reporter, published articles critical of a real estate developer. The case turned, in part at least, on the question of whether Hollander was a petitioner at all given her self-proclaimed objectivity (Pi's. Br. p. 26). The *Fisher* decision is distinguishable because the defendant, Lint, a State Police Officer, was carrying out his governmental duties in connection with an investigation and thus was deemed by the Appeals Court not to be a petitioner. The plaintiff acknowledges, by reference in his brief ***37** to the Appeal Court's decision in Plante (anti-SLAPP protection extended to an attorney petitioning on behalf of client) that anti-SLAPP protection may be extended to citizens even if they are not petitioning on their own behalf. The plaintiff suggests such immunity is limited to attorneys who represent clients. Although the Appeals Court, through Plante, may have established, as a general rule, that attorneys who petition on behalf of clients are entitled to the same protection clients would receive if they petitioned on their own, the Court did not rule out the possibility that similar protections might be extended to non-attorneys who assist others with their petitioning activities.

In the recent case of *Keegan v. Pellerin*, 76 Mass. App. Ct. 186 (2010), a case not cited in the plaintiff's brief, the Appeals Court, citing *Plante v. Wylie, supra*, clarified that "when a nongovernmental person or entity is the petitioner, the (anti-SLAPP) statute protects one who is engaged to assist in the petitioning activity...". *Keegan, supra*, at 192. The facts in Keegan are as follows: Pellerin, a security guard at a Shrewsbury condominium, and also a condominium resident, observed Keegan peeking in windows at the complex and contacted the Shrewsbury Police Department. Police brought charges of disorderly conduct against Keegan which were later dismissed. Keegan filed a district court civil action for ***38** defamation against Pellerin alleging that he had made false reports to the police. Pellerin responded with a special motion to dismiss which was allowed. On appeal, Keegan, relying on *Kobrin v. Gastfriend, supra*, asserted that, although residents of the condominium would have had a right to take advantage of the anti-SLAPP statute, had *they* made the report to the police, Pellerin was not petitioning on his own behalf and, therefore, had no such right. See *Keegan, supra*, at 191. The Appeals Court, in affirming the allowance of

the special motion, reasoned that cases such as *Kobrin* and *Fisher* were not helpful to Keegan because "at bottom they rest on the commonsense principle that a statute designed to protect the constitutional right to petition has no applicability to situations in which the government petitions itself." *Keegan, supra*, at 192. The Appeals Court concluded that Pellerin "was petitioning either on his own behalf, and entitled to the statute's shelter for his individual activity," or, on behalf of his employer (the condominium). *Id*. The Court also determined that Pellerin's employer, a trust, could petition only through agents to exercise its right of petition, see *Keegan, supra*, at 192 and cases cited, and concluded that, in the circumstances of the case before it, Pellerin was entitled to the statute's protection as a nongovernmental petitioner engaged to assist in petitioning activity. Although the Appeals Court decided *Keegan* after the ruling on ***39** the special motion in the instant case, the circumstances are strikingly similar and the Superior Court's decision here is fully consistent with the rule enunciated in *Keegan*. In the instant case, the plaintiff does not dispute that Winn had the right to petition on her own behalf. Given Winn's illness and Attorney Collins's unavailability, the Bank, a nongovernmental petitioner with a vested interest of its own, initiated the petitioning activity.

For the reasons stated, the Superior Court neither abused discretion or committed an error of law in ruling that the anti-SLAPP statute applicable to the Bank's petitioning activity, either for Mrs. Winn, or on its own behalf.

E. The Superior Court correctly dismissed Count IX of the complaint, alleging violations of G.L. c. 93A, as the viability of the 93A claim was, both factually and by court order, subordinate to the abuse of process claim.

Late in the case the plaintiff was permitted to amend his complaint to add a count for violations of G.L. c. 93A (App. 81, Paper No. 15). The Superior Court granted the motion with the stipulation that the 93A claim could proceed only if the plaintiff established a case for abuse of process (S.A. 107). In his second amended complaint (App. 82, S.A. 108), the plaintiff alleged that the Bank had engaged in unfair and deceptive trade practices "in that" it had "abused the litigation process," i.e., in other words, by ***40** exercising its right of petition. Thus, the 93A claim, subordinated factually and by court order to the abuse of process claim, was properly dismissed. No error or abuse of discretion being apparent in the record, the Order dismissing Count IX should be affirmed.

F. The plaintiff's other arguments with respect to Count VI and Count IX are without merit.

The plaintiff next argues: 1) that the equity complaint was unnecessary because the indemnification clause in the power of attorney document would have protected Winn and the Bank (Pl's. Br. p. 22); and 2) that Count VI of the complaint, abuse of process, should not have been dismissed (Pl's. Br. p. 38) because the claim was "validated" when the Superior Court denied the Bank's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) (App. 66). For support of the latter proposition, the plaintiff asserts that dismissing an abuse of process claim on a special motion to dismiss after the claim survived a Rule 12 motion to dismiss the same claim, would materially change or repeal the common law tort of abuse of process (Pl's. Br. pp. 39-41). This argument is irrelevant to the appeal and demonstrates lack of appreciation for the dissimilar burdens of persuasion applicable to Rule 12 and § 59H motions. Finally, the plaintiff argues, speciously, that the Superior Court afforded *res judicata* or preclusive effect to the probate consent decree. Speculating that the issue *may* ***41** arise on remand, the plaintiff urges this Court to examine the Superior Court's decision on a Rule 12(b)(6) motion which is not part of this appeal. Alone or together, these arguments are irrelevant to the present appeal, are facially risible, do not rise to the level of appellate argument, and the Court need not consider them.

II. There was no error or abuse of discretion in the award of attorney's and costs to the Bank.

Upon the granting of a special motion to dismiss under G.L.c. 231, § 59H, the award of attorney's fees, "including those incurred for the special motion and any related discovery matters," *Id.*, is mandatory. See *North American Expositions Company Limited Partnership v. Corcoran*, 452 Mass. 852 at 872 (2009), citing *McLarnon v. Jockisch*, 431 Mass. 343, 350 (2000) (judge has no discretion whether to make award). A fee award will be upheld unless it is clearly erroneous. See *North American Expositions Company Limited Partnership, supra*, at 872, citing *Kennedy v. Kennedy*, 400 Mass. 272, 274 (1987). The purpose of the statute

is to reimburse the moving party for costs and attorney's fees if the judge determines that the anti-SLAPP statute is applicable and allows the motion to dismiss. See *McLarnon v. Jockisch*, 431 Mass. 343, at 350 (2000).

Here, the motion judge awarded attorney's fees of $13,710.00 and costs of $157.81. She took care to limit the award to fees incurred by the Bank through ***42** December 7, 2005 (App. 154). The plaintiff has not contested the amount of the award. On this appeal, apart from seeking to reverse the Superior Court's allowance of the underlying special motion, the plaintiff asserts no argument against the award. There is no reason in the record to reverse the motion judge's determination of allowable fees.

III. The Bank should be awarded appellate fees and costs.

The Supreme Judicial Court has held that the provision for reasonable attorney's fees in G.L. c. 231, § 59H would "ring hollow" if it did not include a fee for the appeal. See *McLarnon v. Jockisch*, 431 Mass. 343, 350 (2000), citing *Yorke Mgt. v. Castro*, 406 Mass. 17, at 19 (1989).

The appropriate procedure for a party seeking attorney's fees and costs on appeal from the granting of a special motion to dismiss under § 59H is to request them in the appellate brief. *McLarnon, supra*, at 350.

Accordingly, the Bank respectfully requests that this Court order the plaintiff to pay all of the Bank's attorney's fees and costs for the additional fees and costs incurred after December 7, 2005 in defending against the plaintiff's motion to reconsider allowance of the special motion to dismiss, for monitoring the case through final judgment, for the plaintiff's dilatory tactics in the Superior Court, including his ***43** emergency motion to delay entry of final judgment, and for fees and costs related to this appeal. The Bank further respectfully requests this Court to double the award, if appropriate, upon a determination that the plaintiff's appeal is frivolous or that the plaintiff had no reasonable expectation that he would prevail or for other just cause.

CONCLUSION

On this record, for the reasons stated above, the plaintiff cannot succeed. The judgment of the Superior Court on the Bank's special motion to dismiss and the award of attorney's fees and costs in connection therewith should be affirmed. Appellate attorney's fees and costs should be awarded to the Bank pursuant to G.L. c. 231, § 59H as requested in this brief.

Footnotes

1 The plaintiff also sued a co-defendant Joyce Collins, Esquire in the Superior Court for exercising her right of petition. Judgment entered for Collins on motion for summary judgment on all of plaintiff's claims against her. Collins is not part of this appeal.

2 The record discloses no official appointment of plaintiff as guardian for his children. The plaintiff filed the suit *pro se*.

3 The First Amended complaint contained eight counts as follows: I (Negligent Breach of Duty), II (Intentional Interference with Contractual Relations), III (Intentional Interference with Prospective Business Relations), IV (Intentional Interference with Advantageous Relations), V (Intentional Interference with Expectancy of a Gift), VII (Intentional Infliction of Emotional Distress), and VIII (Negligent Infliction of Emotional Distress).

4 "Paper" references indicate document numbers assigned to filings in the Superior Court Docket.

5 As a result of Collins's bankruptcy, further action in the Superior Court was stayed for an extended period of time. On January 15, 2010, with Attorney Collins's bankruptcy unresolved and all counts against the Bank having been dismissed by the Orders of December 6, 2005 and November 29, 2006, the Bank moved for separate and final judgment pursuant to Mass. R. Civ. P. 54(b) (Paper No. 40) accompanied by a conditional voluntary motion to dismiss the Bank's abuse of process counterclaim (Paper No. 41). On March 15, 2010, the Court, Chernoff, J.; denied the Bank's motion for separate judgment (Paper No. 48).

6 In his Order (S.A. 340), the motion judge anticipated, accurately, that the Bank would voluntarily dismiss its counterclaim as it had offered to do earlier when it moved for entry of separate judgment (Paper No. 48).

7 The facts are summarized from the judges' memorandums, orders and decisions, supplemented by the pleadings and affidavits in the record. See G.L. c. 231, § 59H.

8 Reference to this document is found in the plaintiff's Record Appendix. Although the Bank has been unable to locate the document in the trial record, the genuineness of the document is not questioned for purposes of this appeal.

9 Precisely when Mrs. Winn was hospitalized, unclear on the record, is irrelevant to the appeal, but it likely occurred shortly before the plaintiff began exercising his authority under the power of attorney (App. 164).

10 On June 10, 2001, the plaintiff wrote to a Bank representative requesting that Maguire be reimbursed for expenses incurred in connection with Mrs. Winn's move to assisted living at Thirwood. The letter also asked whether excess funds in Mrs. Winn's checking account might be moved into a money market account to obtain better interest (App. 179). The genuineness of this document or its existence in the trial record has not been determined.

11 Regardless of the exact amount, the plaintiff and the Bank apparently agreed that Winn's assets at the time exceeded the then-existing state and federal estate tax thresholds.

12 The date is clearly in error. It should be January 24, 2002.

13 The summary of this letter is taken from the document appearing in the Record Appendix assembled by the plaintiff (App. 184). The letter purports to be a duplicate of the letter attached to the plaintiff's second amended complaint as Exhibit “I.” Although the letters in the First and Second Amended Complaints purport to be identical and bear the exact same certified mail receipt number, the content of the two Exhibit “I” letters is markedly different (S.A. 55, S.A. 185). In short, the letter in the trial record and the letter taken from plaintiff's Record Appendix, appear to be two different documents.

14 As previously stated, Maguire was Mrs. Winn's alternate attorney-in-fact (App. 169).

15 How Winn came to be examined is unclear on the record. It is likely that Maguire, as Mrs. Winn's health care agent, facilitated it. The question is irrelevant to the issues on appeal.

16 The Guardian ad Litem filed his report on April 16, 2002 (S.A. 302-Event No. 23). The report is found at S.A. 283.

17 On the same date, the Probate Court appointed a permanent conservator for Mrs. Winn (S.A. 309-Event 50).

18 Appointment of Maguire as executrix is not available in the record. Her first (final) account in that capacity is shown in the plaintiff's Record Appendix (App. 230).

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