

## COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2574CV00002XERXES AGHASSIPOUR & another<sup>1</sup>

vs.

MARY BUDINGER CORMIE & others<sup>2</sup>**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'  
SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS**

Xerxes Aghassipour ("Aghassipour") and the company he owns, 97 Spring Street, LLC ("97 Spring St.") (collectively "plaintiffs"), initiated the instant action against Mary Budinger Cormie ("Mary"), Leigh Paul Cormie ("Leigh") (collectively, "the Cormies"), Amy Upton ("Upton"), and Benjamin Robinson ("Robinson") (collectively "defendants") alleging that: the Cormies actions constituted abuse of process (Count I); Upton violated the plaintiffs' substantive and procedural due process rights, pursuant to 42 U.S.C. § 1983 (Count II); Upton and Robinson engaged in a civil conspiracy to violate the plaintiffs' substantive and procedural due process rights (Count III); and all the defendants engaged in a civil conspiracy against the plaintiffs (Count IV). The Cormies move by special motion to dismiss, pursuant to G. L. c. 231, § 59H, the anti-SLAPP statute, arguing that the claims against them pertain to petitioning activity they initiated in the Land Court. Upton and Robinson separately move to dismiss the claims against them, pursuant to Mass. R. Civ. P. 12(b)(6), arguing that the allegations in the Complaint fail to state claims upon which relief can be granted. On April 24, 2025, the court held a hearing on the defendants' motions and took the matters under advisement.<sup>3</sup> For the reasons that follow, the

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<sup>1</sup> 97 Spring Street, LLC

<sup>2</sup> Leigh Paul Cormie, Amy Upton, and Benjamin Robinson

<sup>3</sup> After the hearing, the plaintiffs and the Cormies filed supplemental briefs. See Paper Nos. 34-38.

Cormies' Special Motion to Dismiss is ALLOWED, and Upton and Robinson's Motion to Dismiss is ALLOWED.

### BACKGROUND

The Cormies live at 93 Spring Street in Tisbury, which abuts property owned by the plaintiffs at 97 Spring Street ("the Property"). Robinson is a member of the Town of Tisbury ("Town") Planning Board ("Planning Board"), and was chair of the Planning Board until the summer of 2024. He is also a commissioner of the Martha's Vineyard Commission ("MVC"), a regional planning authority for Dukes County. Upton is the Planning Board's administrator.<sup>4</sup>

Aghassipour owns and manages several properties in Tisbury and throughout Martha's Vineyard. The plaintiffs want to use the Property to provide workforce housing to Vineyard Wind 1, LLC ("Vineyard Wind"), an offshore wind energy project.<sup>5</sup> However, the Town and the MVC approved a permit for a Single Family Residence at the Property. The defendants, among others, are critics of this project at the Property.

The Complaint alleges that upon information and belief, Robinson used his position as MVC commissioner to re-open its favorable decision after the MVC approved it. A text exchange between Robinson and Upton<sup>6</sup> provided as follows:

Robinson: It will be interesting to see how Xerxes moves forward[.] I don't think Vineyard [W]ind will have the appetite to sue and they still need to meet their housing requirements for the [MVC] and I'm more and more concerned that what we thought at first was going to be a benefit to the year-round community jobs outside of the tourism industry looks more and more like dormitory housing to import a workforce which is concerning.

Upton: 100% agreed. Not just a duck, but a very big duck.

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<sup>4</sup> The Complaint alleges that Upton and Robinson are only being sued in their individual capacities.

<sup>5</sup> The Complaint alleges that Vineyard Wind's project will result in the construction of sixty-two wind turbines that will provide clean, renewable energy to the Commonwealth's citizens.

<sup>6</sup> The Complaint attached a copy of the referenced text exchanges herein as Exhibit 1.

A later text message from Upton to Robinson stated, "I can meet you in the morning, by nine. It will give you a chance to read all of the ridiculous back-and-forth emails today. It would appear that [Town Administrator Jay Grande], [Building Commissioner Greg Monka], and [Aghassipour] are all in a big circle jerk. Hard to tell what [Town Counsel's] role is, other than that he's watching." The text concluded with a vomit emoji. The Complaint alleges that, upon information and belief, Robinson did not produce any of the requested text messages or emails in response to a public records request submitted to the Town.

The complaint alleges that Upton has been more actively involved in the Plaintiff's projects than her position otherwise requires. Specifically, the Complaint alleges that Upton engaged in "egregious misconduct," such as (1) ignoring her role as the Planning Board's independent administrator; (2) attending the Town's Zoning Board of Appeal ("ZBA") hearing for the Property and actively participating in the Cormies' zoning enforcement appeal; (3) lying to the Planning Board by telling its members that occupancy at another of Aghassipour's properties, at 123 Beach Road, occurred before a temporary certificate of occupancy issued; (4) trespassing on the Property; (5) attempting to intimidate Aghassipour's tenants; (6) making intentionally false statements to the MVC concerning Aghassipour's projects; and (7) making false allegations and assertions of collusion and improper actions by Aghassipour.

On January 8, 2024, the plaintiffs secured a building permit for the Property to demolish the existing structure and construct a new house. The new house was constructed within the protected footprint and in compliance with existing setback requirements, as opposed to the prior structure, which was a pre-existing, non-conforming use. The plaintiffs also obtained approval from the Town's Board of Health for a new septic system to support a nine-bedroom structure. No one challenged or appealed the septic's approval.

The complaint further alleges that after the existing house on the Property had been demolished, and construction began on the new building, the Cormies initiated “a public outcry” that the new building come down and the construction at the Property be referred to the MVC. On May 24, 2024, the Town’s Building Commissioner/Inspector of Buildings and Zoning Enforcement Officer issued a temporary stop work order and requested a meeting with the plaintiffs, among others, to ensure that the Property would be a single-family home (“Stop Work Order”).<sup>7</sup> The Stop Work Order identified that while the initial building permit for the Property was issued to construct a single-family residence, it had since been learned that the Property would be used as a rental building for employees. The Massachusetts Building Code, pursuant to 780 Code Mass. Regs. 105.3(3), requires a building permit application to include a statement of use and occupancy for the proposed building. At the time of the Stop Work Order, the plaintiffs had not yet applied for, and the Building Commissioner had not yet issued, a certificate of occupancy. After a hearing, the temporary Stop Work Order was lifted on June 5, 2024 (“Removal Order”).<sup>8</sup> In the Removal Order, the plaintiffs acknowledged that they would need a certificate of occupancy that would comply with the zoning by-law and building code before anyone could occupy the Property.

The Cormies appealed the Removal Order to the ZBA, pursuant to G. L. c. 40A. The Complaint alleges that Upton was actively involved in the Cormies’ ZBA appeal. On October 10, 2024, the ZBA denied their appeal, concluding it was premature.<sup>9</sup> On November 19, 2024, the Cormies appealed the ZBA’s decision to the Land Court.<sup>10</sup> The Complaint alleges that the

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<sup>7</sup> A copy of the Stop Work Order is attached to the Complaint at Exhibit 2.

<sup>8</sup> A copy of the Removal Order is attached to the Complaint at Exhibit 3.

<sup>9</sup> A copy of the ZBA decision is attached to the Complaint at Exhibit 4 and 6.

<sup>10</sup> A copy of the Cormies’ Verified Complaint is attached to the Complaint at Exhibit 5.

Land Court action is “outrageous in its breadth and allegations,” and that Upton and Robinson encouraged this “meritless” action.

## **DISCUSSION**

### **I. The Cormies’ Special Motion to Dismiss, pursuant to G. L. c. 231, § 59H**

The Cormies argue that the claims against them should be dismissed because they are solely based upon their petitioning activity in the Land Court action and the plaintiffs cannot establish their burden that such action was devoid of any reasonable factual support or arguable basis in law, causing the plaintiffs actual injury. The court agrees.

The Supreme Judicial Court (“SJC”), in *Bristol Asphalt Co., Inc. v. Rochester Bituminous Prods. Inc.*, 493 Mass. 539, 542 (2024) (hereinafter “*Bristol Asphalt*”), simplified the framework for analyzing cases under the anti-SLAPP statute. Pursuant to a special motion to dismiss, the special movant must make a threshold showing that the claims against them are based on “petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities” (citation omitted). *Id.* at 555. See *477 Harrison Ave., LLC v. Jace Boston, LLC*, 477 Mass. 162, 168 (2017) (providing that “key inquiry” is whether conduct complained of consists only of petitioning activity). If the special movant satisfies its burden, the court proceeds to the second step of the analysis requiring the special motion opponent to show that the special movant’s “exercise of [their] right of petition was devoid of any reasonable factual support or any arguable basis in law” and “caused actual injury to the special movant opponent” (citation and modifiers omitted). *Bristol Asphalt*, 493 Mass. 557. See *Columbia Plaza Assocs. v. Northeastern Univ.*, 493 Mass. 570, 577 (2024) (“If the special motion opponent makes both showings, the special motion is denied. Otherwise, the special motion is allowed.”). On a

special motion to dismiss, the court considers the facts derived from the Complaint and the exhibits attached thereto. *Bristol Asphalt*, 493 Mass. at 542.

**a. The Cormies' threshold burden**

At this stage of the analysis, the court “only conduct[s] a facial review of a special motion opponent’s pleading to identify which factual allegations serve as the basis for a particular claim.” *Id.* at 561. Here, there is no dispute between the parties that the plaintiffs’ claims in the instant action against the Cormies (for abuse of process and civil conspiracy) are based on the litigation brought by the Cormies in the Land Court action. Plaintiffs concede that this is petitioning activity, but claim it is not legitimate petitioning activity. See Paper 15, Plaintiffs’ Opposition to Special Motion to Dismiss at 9. As such, the court proceeds to step two of the anti-SLAPP framework.

**b. The plaintiffs’ burden to show the petitioning activity was devoid of reasonable factual support or arguable legal basis**

As to step two, the court considers whether the plaintiffs have shown, by a preponderance of the evidence, that the Cormies petitioning activity lacked any reasonable factual support or arguable legal basis. *Bristol Asphalt*, 493 Mass. at 563. The parties have submitted for the court’s review the Verified Complaint from the Land Court action, various filings associated therewith, and a transcript of the April 16, 2025 hearing on the motion to dismiss in the Land Court action.

The plaintiffs have failed to sustain their burden. As to the abuse of process claim, “[w]hile an unsuccessful lawsuit is not an element of an abuse of process claim, to survive an anti-SLAPP motion a plaintiff in an abuse of process action based solely on petitioning activity (as here) will have to show a lack of reasonable basis—in many cases, a difficult showing where the challenged claim has not yet been decided.” *Hidalgo v. Watch City Constr. Corp.*, 105 Mass.

App. Ct. 148, 154 n.6 (2024), citing *Bristol Asphalt*, 493 Mass. at 543-546 (“[T]he plaintiff’s lawsuit seeking compensation for the defendant’s prior claims was not brought until after those prior claims had been adjudicated, and failed[.]”). Here, the motion to dismiss the Cormies’ lawsuit in the Land Court action, at the time of this decision, is still under advisement. It would be inappropriate for this court to weigh-in on the Cormies petitioning activity in that case without the benefit of a final resolution.<sup>11</sup> See *Hidalgo*, 105 Mass. App. Ct. at 154 n.6. See also *Allegaert v. Harbor View Hotel Owner, LLC*, 105 Mass. App. Ct. 1123, No 24-P-267, slip op. at 3-4 (Rule 23.0 Decision) (reversing denial of special motion to dismiss where challenged claims in underlying lawsuit remained unresolved).

Thus, as the plaintiffs cannot sustain their burden by a preponderance of the evidence, the claims against the Cormies must be dismissed. See *Hidalgo*, 105 Mass. App. Ct. at 155.

## **II. Upton and Robinson’s Motion to Dismiss, pursuant to Rule 12(b)(6)**

A plaintiff’s failure to state a claim upon which relief can be granted warrants dismissal. Mass. R. Civ. P. 12(b)(6). At the pleading stage, a plaintiff must make “factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief” (quotations and citations omitted). *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 792-793 (2015). The court accepts the factual allegations in the Complaint as true, along with “any favorable inferences reasonably drawn from them.” *NES Rentals v. Maine Drilling & Blasting, Inc.*, 465 Mass. 856, 860 (2013). “While ‘detailed factual allegations’ are not required at the pleading stage, mere ‘labels and conclusions’ will not survive a motion to dismiss.” *Burbank Apts. Tenant Assoc. v. Kargman*, 474 Mass. 107, 116 (2016), quoting *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citation omitted). Exhibits attached to the Complaint and matters of public record may also be

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<sup>11</sup> For this reason, the civil conspiracy claim fares no better.

taken into consideration, *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000), as well as documents upon which the plaintiffs had notice and upon which the Complaint relies, *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004).

**a. Section 1983 Claims against Upton (Count II)**

The Complaint alleges that Upton violated the plaintiffs' procedural and substantive due process rights under 42 U.S.C. § 1983, alleging broadly that Upton abused her power as the Planning Board administrator to thwart the project at the Property. Upton argues that the § 1983 claim fails because she was not acting under the color of state law and her alleged conduct does not shock the conscience. In their opposition to the motion to dismiss, the plaintiffs concede that the allegations do not allege a violation of procedural due process. See Paper 25, Plaintiffs' Opposition to Motion to Dismiss at 8 n.4. As such, that portion of the claim is dismissed. As to the substantive due process portion of the § 1983 claim, the plaintiffs argue that Upton's abuse of authority triggers bedrock principles of § 1983 liability and her actions shock the conscience. The court agrees with Upton.

"To establish a claim under § 1983, [the] plaintiff[s] must allege (1) that [Upton] acted 'under color of state law' and (2) that [Upton] deprived them of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Appleton v. Hudson*, 397 Mass. 812, 818 (1986). See *Gutierrez v. Massachusetts Bay Transp. Auth.*, 437 Mass. 396, 401 (2002). To assert a substantive due process claim under § 1983, the plaintiffs must show that they "suffered the deprivation of an established life, liberty, or property interest, and that such deprivation occurred through governmental action that shocks the conscience" (citations omitted). *Lambert v. Fiorentini*, 949 F.3d 22, 28 (1st Cir. 2020).



The allegations in the Complaint do not establish that Upton, sued only in her individual capacity, acted under the color of state law. “A defendant may ‘act[] under color of State law’ but not ‘within the scope of [her] employment’ if [she] misuses or abuses the authority given to [her] by the government.” *Doyle v. Quincy*, 104 Mass. App. Ct. 761, 769 n.9 (2024), quoting *Maimaron v. Commonwealth*, 449 Mass. 167, 178 (2007). To support the factual allegation that Upton had “apparent disdain” for Aghassipour, the Complaint solely relies on Upton’s text message, detailed above, addressing “ridiculous back-and-forth emails.” From this, the Complaint alleges that Upton’s pursuit to stop the project at the Property led her to consistently engage in the “egregious misconduct” outlined in detail above.

Even taking as true the allegation that Upton had “apparent disdain” for Aghassipour from her text message to Robinson, there are no other factual allegations to show that she misused or abused her position. Many of the instances identified by the Complaint that Upton engaged in “egregious misconduct” provide only labels and conclusions with no factual detail, which are insufficient to survive a motion to dismiss. See *Iannacchino*, 451 Mass. at 636. That Upton allegedly ignored her role as administrator, lied, trespassed, and made various false statements and assertions about the plaintiffs and the Property fail to show how she used her position as Planning Board administrator to deprive the plaintiffs of an established life, liberty or property interest. While the Complaint suggests that Upton participated in the Cormies’ appeal to the ZBA and the Land Court litigation, there are no factual details that Upton actively participated in either. Upton did not participate in the ZBA hearing and is not mentioned in the Cormies’ Verified Complaint to the Land Court. See Exhibits 4-6.

Furthermore, the allegations attributed to Upton do not shock the conscience. Conduct that “shocks the conscience” must “at the very least be extreme and egregious, or, put another

way, truly outrageous, uncivilized, and intolerable” (quotations and citations omitted). *Pagán v. Calderón*, 448 F.3d 16, 32 (1st Cir. 2006). “Mere violations of state law, even violations resulting from bad faith,” do not rise to the level of conscience-shocking behavior. *DePoutot v. Raffaelli*, 424 F.3d 112, 119 (1st Cir. 2005). See *Freeman v. Planning Bd. of West Boylston*, 419 Mass. 548, 560 (1995) (“standards for finding a violation of substantive due process are not precise, . . . [but it is] clear that what is required is misconduct that is stunning, evidencing more than humdrum legal error” [quotations and citations omitted]); see also *Coyne v. Somerville*, 972 F.2d 440, 444 (1st Cir. 1992) (“It is bedrock law in [the First] Circuit, however, that violations of state law—even where arbitrary, capricious, or undertaken in bad faith—do not, without more, give rise to a denial of substantive due process under the U.S. Constitution.”).

As discussed above, due to the lack of factual allegations, the Complaint is insufficient to show that Upton engaged in conscious-shocking behavior. See *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991) (“Charges that substantive due process was denied cannot rest on conclusory allegations or rhetoric alone (even impassioned rhetoric).”). Moreover, even if the Complaint established sufficient factual allegations to show that Upton’s actions led to the revocation of the Property’s building permit, such revocation, standing alone, would be insufficient to sustain the substantive due process claim. See *Mongeau v. Marlborough*, 492 F.3d 14, 19-20 (1st Cir. 2007), cert. denied, 552 U.S. 1131 (2008) (affirming judgment on pleadings where actions of city’s commissioner of inspectional services did not rise to level of conscious-shocking behavior where he denied building permit and interfered in zoning process for improper reasons); see also *Licari v. Ferruzzi*, 22 F.3d 344, 349-350 (1st Cir. 1994) (revoking building permit due to hostility and animus not conscious-shocking behavior).

Accordingly, the allegations in the Complaint, and the reasonable inferences derived therefrom, do not plausibly suggest an entitlement to relief on the § 1983 claim substantive due process claim. Therefore, the claim must be dismissed.

**b. Civil Conspiracy Claims against Upton and Robinson (Count III) and all four Defendants (Count IV)**

The Complaint also alleges that Upton and Robinson engaged in a civil conspiracy to violate the plaintiffs' substantive and procedural due process rights (Count III) and that all four defendants engaged in a civil conspiracy to ensure the plaintiffs were not involved in the development of Martha's Vineyard, specifically as it relates to their involvement in the Cormies' Land Court litigation (Count IV). Both claims fail. A civil conspiracy claim "requires a showing that the defendant[] (1) knew that the conduct of [the alleged tortfeasor] constituted a [tort] and (2) substantially assisted in or encouraged that conduct." *Baker v. Wilmer Cutler Pickering Hale and Dorr LLP*, 91 Mass. App. Ct. 835, 847-848 (2017), citing *Kurker v. Hill*, 44 Mass. App. Ct. 184, 189 (1998).<sup>12</sup>

As Count II failed against Upton, so must the underlying civil conspiracy claim against Upton and Robinson (Count III) where there are no factual allegations to support that Upton violated the plaintiffs' substantive due process rights. As to the civil conspiracy claim in Count IV, the claims against the Cormies are being dismissed, and thus, there is no underlying tort. Moreover, even if the Complaint alleged a tort on behalf of the Cormies, the Complaint solely concludes, without providing any factual allegations to support, that Upton and Robinson

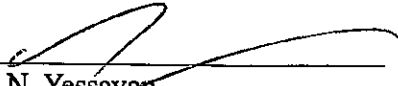
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<sup>12</sup> There is another form of civil conspiracy involving coercion. See *Kurker*, 44 Mass. App. Ct. at 188-189. However, the Complaint neither alleges coercion nor do the plaintiffs argue coercion in their memorandum. Thus, the court does not address that type of civil conspiracy.

substantially assisted or encouraged the Cormies to pursue the Land Court litigation. Therefore, both civil conspiracy claims must be dismissed.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Cormies' Special Motion to Dismiss is **ALLOWED**. It is also hereby **ORDERED** that Upton and Robinson's Motion to Dismiss is **ALLOWED**.

  
Raffi N. Yessayan  
Justice of the Superior Court

DATED: June 30, 2025