

This decision generously provided by



Social Law Library members can access a  
comprehensive database of  
keyword searchable  
Business Litigation Session decisions,  
at

<http://www.socialaw.com>

Not a member and need access to the BLS databases?

[Join Social Law Today!](#)

**Docket: 1884CV01850-BLS1**

**Date: October 30, 2018**

**Parties: Stephen Scott Roth v. Grail Partners LLC et al.**

**Judge: Brian A. Davis Associate Justice of the Superior Court**

Decision and Order Regarding Plaintiffs Motion to Dismiss Counterclaim Pursuant to the Anti-SLAPP Statute, or in the Alternative, Pursuant to Mass. R. Civ. P. 12(b)(6) (Docket Entry No. 10.0):

Plaintiff Stephen Scott Roth ("Plaintiff" or "Mr. Roth") previously was an investor in Chalice Fund, L.P. ("Chalice Fund"), and in Chalice Fund's general partner, Grail Partners LLC ("Grail"). Mr. Roth redeemed his investment in Chalice Fund and Grail in April 2012. He subsequently filed this action in June 2018 alleging that Grail and its managing partners, defendants Donald H. Putnam and S. Craig Cagnetti (collectively, with Grail, "Defendants"), violated the terms of the Chalice Fund's Limited Partnership Agreement (the "LPA") by improperly charging Mr. Roth an incentive fee, and by misrepresenting to Mr. Roth and other investors the circumstances under which Defendants would charge incentive fees. Mr. Roth further alleges that Defendants violated the LPA by refusing to comply with their obligations to honor his exercise of certain put options included with warrants he obtained from Chalice Fund. Defendants, in turn, have asserted a single breach of contract counterclaim against Mr. Roth alleging that his commencement of this action violates, at least in part, a Settlement Agreement and Mutual Release (the "Settlement and Release") that Mr. Roth and Grail executed in connection with a separate lawsuit Mr. Roth filed in California Superior Court on October 27, 2016. See *Stapleton v. Grail Partners LLC*, No. CGC-16-555072 (Cal. Super. Ct. Oct. 27, 2016) (the "California Action").[1]

Some additional background facts concerning the California Action are necessary to an understanding of the parties' respective claims in this case. The California Action arose after Mr. Roth redeemed his investment in Grail and Chalice Fund in April 2012. At that time, he received warrants in exchange for his Chalice Fund units and a Subordinated Note ("Note") in exchange for his Grail units. Grail allegedly failed to pay any of the principal or interest due under the Note, prompting Mr. Roth to file the California Action, in which he accused Grail of breaching the terms of the Note.[2] The California court entered a default judgment against Grail on January 18, 2017. Thereafter, Mr. Roth and Grail engaged in discussions concerning settlement of the judgment, which resulted in the parties signing the Settlement and Release in May 2017. The Settlement and

-----

[1] Two other investors in Grail were co-plaintiffs with Mr. Roth in the California Action and also entered into the Settlement and Release.

[2] Roth further alleged that Grail had violated Grail's Fourth Amended and Restated Limited Liability Company Operating Agreement (which provided that Subordinated Notes issued in exchange for redeemed units in Grail accrued interest at the rate of 8% per annum) by unilaterally reducing the interest rate on the Note to 5% per annum.

-1-

Release provides, in relevant part:

1.2 Recitals: (a) On January 18, 2017, JUDGMENT CREDITORS obtained a judgment for \$1,046,132.45 against GRAIL.

(b) JUDGMENT CREDITORS have proceeded with enforcement of the Judgment, including levies and judgment liens and have seized a total of

\$23,674.30 from Grail accounts on March 23 and April 13, 2017  
JUDGMENT CREDITORS and GRAIL desire to satisfy the Judgment as set forth below:

- 2.7 The parties will mutually release all claims, known and unknown, against one another. The mutual release ... [is] more fully set forth below.
- 3.1 Mutual Release: In consideration of the execution of this Agreement, and for other good and valuable consideration, and except as specifically excluded in Section 3.2 hereof, each party hereby mutually releases and fully discharges one another, and each of their respective principals, shareholders, employees, employers, directors, officers, subsidiaries, affiliates, parent corporations, agents, representatives, heirs, executors, administrators, insurers, attorneys, predecessors, successors, assignors and assigns, from any and all claims, demands, debts, covenants not to compete, confidentiality and causes of action that might occur or exist, and arising from or in any way connected with the matters referred to in the Recitals set forth above at Part I [i.e., Section 1.2], including without limitation all claims, demands, debts, covenants, confidentiality and causes of actions of whatever kind or nature, whether known or unknown, suspected or unsuspected, mature or immature, which each party has against the other.

Plaintiffs Memorandum of Law in Support of Special Motion to Dismiss, Exhibit C.

Mr. Roth now has filed a special motion to dismiss Defendants' breach of contract counterclaim in this action pursuant to G. L. c. 231, § 59H (the "Anti-SLAPP Statute").<sup>[3]</sup> He contends that the Settlement and Release does not apply, on its face, to his present claims and that it is, therefore, evident that "the purpose of the [c]ounterclaim [is] to chill Roth's exercise of [his] right of petition"; i.e., his filing of this lawsuit. Id. at 6.

-----  
[3] SLAPP stands for "Strategic Litigation Against Public Participation."

-2-

Alternatively, Mr. Roth has moved to dismiss Defendants' counterclaim under Mass. R. Civ. P. 12(b)(6) on the same grounds.

Defendants oppose Mr. Roth's special motion. They assert that the text of the Settlement and Release forecloses Mr. Roth from pursuing any claims against Grail that existed at the time the Settlement and Release was executed, including any claims Mr. Roth may have concerning incentive fees. Thus, they argue that Mr. Roth's purported breach of the Settlement and Release provides "a substantial basis for Defendants' claims other than [Mr.] Roth's petitioning activities." Defendants' Opposition to Plaintiff's Special Motion to Dismiss at 7.

The Court conducted an initial Rule 16 conference in this action on September 26, 2018. The parties discussed, but did not argue, Mr. Roth's special motion to dismiss at the conference. The Court agreed to review the motion package and notify the parties if it believed that oral argument would be helpful. Having now reviewed Mr. Roth's special motion to dismiss and Defendants' opposition, the Court is of the mind that it can resolve the motion on the papers without oral argument. Thus, upon consideration of the written submissions of the parties, Mr. Roth's special motion to dismiss is DENIED for the reasons summarized, briefly, below.

SLAPP suits "are ... meritless suits that use litigation to intimidate opponents' exercise of rights of petitioning and speech." *Vittands v. Sudduth*, [49 Mass. App. Ct. 401](#), 413 (2000) (internal quotations and

citations omitted). To stop such suits "early in [their] tracks," the Anti-SLAPP Statute enables a litigant to secure expedited dismissal of a SLAPP suit through a "special motion to dismiss." *Blanchard v. Steward Carney Hosp., Inc.*, [477 Mass. 141](#), 147, 157 (2017). Special motions to dismiss, however, are not "to be used ... as a cudgel to forestall and chill the legitimate claims - also petitioning activity - of those who may truly be aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity." *Id.* at 157. Thus, the Massachusetts Supreme Judicial Court has established an elaborate burden-shifting framework that is designed to "distinguish between meritless claims targeting legitimate petitioning activity and meritorious claims with no such goal." *Id.* at 156-157.

Under the SJC's Anti-SLAPP analytical framework, Mr. Roth, as the moving party, bears the initial burden of demonstrating, through pleadings and affidavits, "that the claims against [him] are based on [his] petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Id.* at 147 (internal quotations and citation omitted). At this stage, "the motive behind the petitioning activity is irrelevant ... [t]he focus solely is on the conduct complained of." *Office One, Inc. v. Lopez*, [437 Mass. 113](#), 122 (2002). If Mr. Roth satisfies this threshold requirement, the burden then shifts to Defendants, as the non-moving parties, to make one of two showings. Defendants can either: (1) establish by a preponderance of the evidence that

-3-

Mr. Roth "lacked any reasonable factual support or any arguable basis in law for [his] petitioning activity" and that the petitioning activity caused them actual injury; or (2) "establish, such that the motion judge may conclude with fair assurance, that [their] primary motivating goal in bringing [their] claim, viewed in its entirety was not to interfere with and burden [Mr. Roth's] ... petition rights, but to seek damages for the personal harm to [them] from [Mr. Roth's] alleged ... [legally transgressive] acts." *Blanchard*, 477 Mass. at 148,160 (internal quotations and citations omitted).

In this case, Mr. Roth argues that Defendants' breach of contract counterclaim must be based solely on his petitioning activity (i.e., the filing of this lawsuit) because the Settlement and Release, on its face, does not preclude his claims in this lawsuit and, therefore, the counterclaim is necessarily groundless. More specifically, he argues that under the plain terms of the Settlement and Release, he only relinquished his right to pursue claims for breach of contract against Grail based on the Subordinated Note and not claims, like the ones asserted here, which arise from his investment in Chalice Fund and Defendants' alleged breach of Chalice Fund's LPA.

The Court finds that the inapplicability of the Settlement and Release to Mr. Roth's present claims is not as clear as he suggests. As noted above, Section 2.7 of the document provides that the "parties will mutually release all claims, known and unknown, against one another" in accordance with the "mutual release ... more fully set forth" in Section 3.1. Settlement and Release, § 2.7 (emphasis added). The language of Section 3.1, however, is narrower. It says only that the parties release and discharge, any and all claims, demands, debts, covenants not to compete, confidentiality and causes of action that might occur or exist, and arising from or in any way connected with the matters referred to in the Recitals set forth above at Part I [i.e., the Judgment obtained by Mr. Roth in the California Action], including without limitation all claims, demands, debts, covenants, confidentiality and causes of actions of whatever kind or nature, whether known or unknown, suspected or unsuspected, mature or immature, which each party has against the other.

Id., § 3.1 (emphasis added).

The broad language of Section 2.7, viewed in conjunction with the conflicting and more restrictive "arising from or in any way connected with" language of Section 3.1, renders the Settlement and Release patently ambiguous as to its intended scope. See *Flannery v. McNamara*, [432 Mass. 665](#), 668 (2000) ("A patent ambiguity is one created by

-4-

obvious conflicts in the language" of a document). One simply cannot tell by a facial examination of the Settlement and Release whether the parties intended that document to serve as a "mutual[] release [of] all claims, known and unknown, against one another," or as something less expansive. Given this ambiguity, the Court is unable to conclude, as a matter of law, that the Settlement and Release does not bar Mr. Roth's present claims and that Defendants' counterclaim is, therefore, wholly without merit. See *Seaco Ins. Co. V. Barbosa*, [435 Mass. 772](#), 779 (2002) ("Where ... the contract ... has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial.").

Accordingly, the Court finds that Mr. Roth has not satisfied his initial burden under the Anti-SLAPP Statute of showing that Defendants' counterclaim is "based on [Mr. Roth's] petitioning activities alone and [has] no substantial basis other than or in addition to [his] petitioning activities." *Blanchard*, 477 Mass. at 147. His special motion must be denied as a result.

For the same reason, Mr. Roth also has not shown that Defendants have failed to state a claim under Mass. R. Civ. P. 12(b)(6), and his motion to dismiss on this second, alternative ground must be denied as well.

Brian A. Davis Associate Justice of the Superior Court

-5-