

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
Civil No. 21-205-BLS1

216-218 NEWBURY STREET REALTY LLC  
Plaintiff

vs.

TIVOLI AUDIO, INC.  
Defendant

**MEMORANDUM AND ORDER**  
**ON DEFENDANT’S MOTION FOR EXPENSES**  
**AND INTEREST UNDER G.L. c. 231 § 6F**  
**AND ORDER FOR ENTRY OF FINAL JUDGMENT**

After I granted summary judgment to Tivoli Audio, Inc. (“Tivoli”) on the claims by 216-218 Newbury Street Realty LLC (“Newbury”) and on Tivoli’s counterclaims, see Memorandum and Order on Motion for Summary Judgment and Application for Relief under Mass. R. Civ. P. 56(f) (“October Mem. and Order”) (Oct. 12, 2022) (Docket #30), Tivoli moved to recover its reasonable legal fees and expenses, plus interest, in a total amount of \$260,691.55, under G.L. c. 231, § 6F. For the following reasons, that motion is granted in large part.

**BACKGROUND**<sup>1</sup>

Newbury filed this action for declaratory and injunctive relief, claiming that there was a “genuine dispute,” Complaint ¶ 16 – or an “actual controversy” within the meaning of G.L. c. 231A, § 1, id. ¶ 15 – about “the meaning of the ‘gross sales’ definition” in the Lease for the Premises. Id. ¶ 16. The viability of the Complaint depended on Newbury’s factual allegation

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<sup>1</sup> This decision assumes familiarity with the Court’s October Mem. and Order and uses the terms defined in the October Mem. and Order as if they were defined herein.

asserted “[o]n information and belief” that “Tivoli sells and markets audio equipment over the internet from the subject premises in accordance with the language of the lease and has gross sales that exceed \$500,000.”<sup>2</sup> *Id.* ¶ 11. The identical allegations appear in plaintiff’s amended and second amended complaints. Neither of plaintiff’s amended pleadings add factual allegations to support the existence of a dispute. Both amended complaints allege the sole factual basis for the dispute “[o]n information and belief.”<sup>3</sup>

Tivoli counterclaimed for return of its \$58,548 security deposit and for a declaration that it was authorized to terminate the lease because its gross sales for calendar year 2020 did not exceed \$500,000.<sup>4</sup> Newbury’s asserted defenses to Tivoli’s counterclaim are essentially based on Tivoli’s alleged actions and as set-off against monies Newbury claimed Tivoli owed.

As it turns out, Newbury had no basis to assert that Tivoli owed it any money, that Tivoli marketed audio equipment over the Internet from the Premises, or that Tivoli’s gross sales from the Premises exceeded \$500,000. With document requests and interrogatories, Tivoli probed the basis for Newbury’s alleged information and basis to believe that Tivoli marketed audio equipment over the Internet from the Premises or that its gross sales from the Premises exceeded \$500,000. Newbury produced no documents or other information supporting that belief.<sup>5</sup>

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<sup>2</sup> Merely asserting that a controversy exists does not make it so. Trustees of Tufts College v. Volpe Constr. Co., Inc., 358 Mass. 331, 337 (1970); Scirpo v. McMillan, 355 Mass. 657, 661 (1969). A complaint for declaratory relief must allege facts that demonstrate an actual controversy exists.

<sup>3</sup> Regarding the differences between Newbury’s amended pleadings, see Memorandum of Law in Support of Tivoli Audio, Inc.’s Motion for Expenses and Interest Under G.L. c. 231, § 6F at 7 n.4 (Docket #32).

<sup>4</sup> Tivoli asserted that there was an actual controversy based on Newbury refusing to recognize Tivoli’s termination of the Lease and its filing of this action.

<sup>5</sup> Before filing suit, the parties and their counsel had substantive discussions about the issue. Tivoli provided Newbury with extensive documentation demonstrating that it had sales

Tivoli moved for summary judgment on Newbury's claims and its own counterclaims. Newbury did not oppose summary judgment other than to seek undefined discovery pursuant to Mass. R. Civ. P. 56(f), but without identifying any basis to expect that additional discovery would reveal information that would forestall entry of summary judgment. October Mem. and Order at 6-9. In deciding the summary judgment motion, I found that plaintiff had "not demonstrated a plausible basis to believe that the specified facts that it hopes to collect probably exist." Id. at 8.

## DISCUSSION

### **I. Applicability of G.L. c. 231, § 6F**

"In general, a prevailing party may not recover attorney's fees in the absence of statutory authorization or a contractual provision." Lincoln St. Realty Co. v. Green, 374 Mass. 630, 631 (1978). See Police Com'r of Boston v. Gows, 429 Mass. 14, 17 (1999) ("'American Rule' . . . denies recovery of attorney's fees absent a contract or statute to the contrary."). One statute that authorizes fee shifting is G.L. c. 231, § 6F. Under § 6F, if a court finds that "all or substantially all of the claims, . . . whether of a factual, legal or mixed nature, made by any party who was represented by counsel . . . were wholly insubstantial, frivolous and not advanced in good faith,"

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from the Premises of less than \$30,000. Newbury argues that, under G.L. c. 231, § 6F, the court may not consider pre-filing conduct, and that Tivoli improperly focuses on pre-filing conduct. See Plaintiff's Opposition to Defendant's Motion for Expenses, and Interest under G.L. Ch. 231 § 6F at 6-7 (Docket #34), citing PDC-El Paso Meriden, LLC v. Alstom Power, Inc., 2007 WL 756456 at \* 2 (Mass. Super. Jan. 2, 2007) (Van Gestel, J.). Based on these arguments, Newbury filed its Cross-Motion to Strike Portions of Defendant's Supporting Documents to Its Motion for Expenses and Interest Under G.L. c. 231, § 6F (Docket #36). I disagree that Tivoli is focused on pre-filing conduct. The core inquiry under § 6F is what Newbury knew when it filed and pursued this action, and whether it had a factual basis to pursue its claim. That inquiry obviously turns on the information Newbury had, and any investigation it did, before filing the case. For these reasons, and the reasons set out in Tivoli Audio Inc.'s Opposition to Plaintiff's Cross-Motion to Strike (Docket #37), Newbury's cross-motion will be denied.

then “the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims.” G.L. c. 231, § 6F, para. 1 & 2. If a defense or setoff is found to be “insubstantial, frivolous and not advanced in good faith,” “the court shall award to each party against whom such defenses [or] setoffs . . . were asserted” interest at 18% per annum,<sup>6</sup> plus reasonable counsel fees and expenses. G.L. c. 231, § 6F, para. 2. See Fronk v. Fowler, 456 Mass. 317, 325 (2010) (“If the judge finds that the claims meet that standard, ‘the statute mandates the award of reasonable counsel fees and other costs and expenses.’”), quoting Masterpiece Kitchen & Bath, Inc. v. Gordon, 425 Mass. 325, 330 (1997). “The proper vantage point for evaluating whether a claim is frivolous is from the time the claim was brought and over the course of the litigation.” Fronk, 456 Mass. at 329.

“A claim is frivolous if there is an ‘absence of legal or factual basis for the claim,’” Fronk, 456 Mass. at 329, quoting Demoulas Super Mkts., Inc. v. Ryan, 70 Mass. App. Ct. 259, 267 (2007), and it lacks “even a colorable basis in law.” Lewis v. Emerson, 391 Mass. 517, 526 (1984). It is not enough simply that the claim advanced “a novel or unusual argument or principle of law,” G.L. c. 231, § 6F, para. 5, however, fees are properly awarded if a claim is advanced without supporting evidence. Massachusetts Adventura Travel, Inc. v. Mason, 27 Mass. App. Ct. 293, 299 (1989).

Whether a claim is advanced in good faith may be determined by the trial court based on “the claimant’s experience and training, his knowledge of relevant circumstances . . . , the extent to which advice and participation of counsel was available to him, the quality and significance of

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<sup>6</sup> Section 6F sets the interest rate at 150% of the 12% rate set in G.L. c. 231, § 6C. See G.L. c. 231, § 6F, para. 2.

the claimant's grounds advanced for opposing an award under §[ ] 6F [ ], and similar criteria." Id. See Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 337 (1988) ("Good faith implies an absence of malice, an absence of design to defraud or to seek an unconscionable advantage."). "A subjective belief of a person in his claim" does "not [ ] preclude an award under" § 6F. Id.

Newbury filed this case without an evidentiary basis to believe that Tivoli's on-line sales occurred on the Premises or that its sales exceeded \$500,000. Tivoli had made extensive disclosures to Newbury before Newbury filed this case. Those disclosures showed that Tivoli's sales from the Premises did not exceed \$30,000. Newbury had no information contradicting Tivoli's disclosures.

This case did not involve an interpretation of an ambiguous contractual provision. Instead, it was a manufactured dispute based on suspicion that some factual predicate might exist to apply an unambiguous contractual provision for Newbury's benefit. Litigation cannot be used as a fishing expedition to obtain discovery, or as a tactic to coerce another party to settle in lieu of incurring litigation costs. This case appears to have been designed as a vehicle to harass Tivoli into paying something to Newbury, although Newbury had no basis in fact to bring the action.

Newbury was represented by experienced counsel when the case was filed. Counsel appears to have attempted to some extent to drive up Tivoli's costs to gain leverage. For example, Newbury unsuccessfully sought a preliminary injunction principally to obtain discovery (access to Tivoli's employees' computers). Newbury also filed a motion to deposit Tivoli's security deposit into court and, when unsuccessful, filed an interlocutory appeal which also was denied. Newbury then did not pursue timely discovery and filed an ineffectual motion under Mass. R. Civ. P. 56(f) to try to forestall summary judgment. In this context, I find that

Newbury's claims, and its assertion of defenses and set-off, were wholly insubstantial, frivolous and not advanced in good faith.

## **II. The Reasonableness of Tivoli's Fees and Expenses**

Based on my findings, Section 6F entitles Tivoli to an award of "the reasonable counsel fees and other costs and expenses incurred in defending against" Newbury's claims and in of prosecuting its claims. Tivoli is also entitled to interest at the 18% statutory rate on the amount at issue in Tivoli's counterclaim "from the date the claim was due . . . pursuant to the substantive rules of law pertaining thereto"<sup>7</sup> "until the claim is paid in full." G.L. c. 231, § 6F, para. 2.

Although Tivoli's memorandum of law states that it seeks \$260,691.55 in fees and expenses, in support of its motion, Tivoli only submits a declaration of Julie V. Silva Palmer, together with a contemporaneous time record of the lawyers' time on the case, which describes Tivoli's legal fees of \$242,790.30.<sup>8</sup> Most of this time was incurred by Julie Silva Palmer and Matthew McDonough, who billed Tivoli at an hourly rate of \$643.50 and \$615, respectively. These hourly rates are a considerable discount from these lawyers' ordinary hourly rates and are comparable to the hourly rates of lawyers at other similar Boston law firms. Newbury does not contest the reasonableness of these hourly rates.<sup>9</sup>

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<sup>7</sup> Tivoli does not ask the Court to determine when the security deposit should have been returned, but seeks interest from the later date when it filed its counterclaim.

<sup>8</sup> Tivoli has not explained what makes up the difference between \$260,691.55 and its legal fees of \$242,790.30. It has not submitted any backup or any other explanation for expenses or costs other than lawyers' and legal professionals' time.

<sup>9</sup> Other lawyers or legal professionals also billed time on this matter. Although Tivoli has not explained the background or reasonableness of the rates for those professionals other than to say that more junior attorneys and staff billed time at lower rates, Newbury does not contest either the reasonableness of using those more junior legal professionals or the rates charged by them. Tivoli has not explained why Charles Solomont billed time at \$900/hour to this matter. His time, which totals \$1,170, will be disallowed.

Newbury's main complaint with the bills submitted by Tivoli is about Tivoli charging \$70,000 for 55 hours "solely for the time they spent responding to a mere three motions." Plaintiff's Opposition to Defendant's Motion for Expenses, and Interest Under G.L. Ch. 231 § 6F at 11 (Docket #34). Newbury's complaint in this regard is non-specific and is not tied to particular time entries. It is also incorrect. These charges were for considerably more than 55 hours of work. I have carefully reviewed the contemporaneous time records submitted by Tivoli's counsel. I find the time incurred in responding to plaintiffs motions, and generally, to be reasonable, given the nature, extent, and duration of the work performed.

**ORDER**

Plaintiff's Cross-Motion to Strike Portions of Defendant's Supporting Documents to Its Motion for Expenses and Interest Under G.L. c. 231, § 6F (Docket #36) is **DENIED**.

Defendant's Motion for Expenses and Interest Under G.L. c. 231 §6F (Docket #32) is **ALLOWED** insofar as judgment shall enter for Tivoli Audio, Inc. in an amount of \$58,548, with interest thereon at the rate of 18% per annum from May 10, 2021, to the date of the judgment, plus legal fees, expenses and costs of \$241,620.30. Pursuant to G.L. c. 231, § 6F, para. 2, interest shall continue to run on the principal sum of \$58,548 at the rate of 18% per annum after the date of the judgment until the sum is paid in full.

Pursuant to the Court's ruling on summary judgment, it is hereby **DECLARED** and **ADJUDGED** that Tivoli Audio, Inc. satisfied the conditions required to exercise its right to terminate the Lease.

Dated: July 17, 2023

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Peter B. Krupp  
Justice of the Superior Court