

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-24-378

KATHERINE FRATELLO,
Appellant,
v.
RUSSELL MANN
Appellee.

On Appeal from the Cumberland County Superior Court

BRIEF OF RUSSELL MANN – APPELLEE

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BACKGROUND INFORMATION AND FACTS

A. \$60,000 LOAN FROM FRATELLO TO MANN

Katherine Fratello and Russell Mann were friends. A. 59. On August 22, 2023, Mann executed a Secured Promissory Note in favor of Fratello in the amount of \$60,000. A. 9, 15. On that same day, Fratello gave Mann the \$60,000. A. 15. The Secured Promissory Note contains the following provisions:

6. SECURITY. In the event of default by the Borrower, *this Note shall be secured with the following property:* Property located at 418 Shaker Rd. Gray, ME 04039, with a legal description included in Exhibit A attached hereto and made a part hereof. . .

10. ALLOCATION OF PAYMENTS. Payments shall be *first* (1st) *credited to any late fees* due, second (2nd) any to interest due, and any remainder will be credited to the principal.

12. ATTORNEYS' FEES AND COSTS. Borrower shall pay all costs incurred by Lender in collecting sums due under this note after a default, including reasonable attorneys' fees. If Lender or Borrower sues to enforce this Note or to obtain a declaration of its right hereunder, *the prevailing party in any such proceeding shall be entitled to recover its reasonable attorneys' fees and costs incurred* in the proceeding (including those incurred in any bankruptcy proceeding or appeal) from the non-prevailing party.

16. INTEGRATION. There are *no agreements*, verbal or otherwise *that modify or affect the terms of this Note*. This Note may not be modified or amended except by a written agreement signed by Borrower and Lender.

21. ADDITIONAL TERMS & CONDITIONS.

- a. Exhibit A attached.
- b. Payments to be made by cash, *check* or electronic transfer. ...

22. ENTIRE AGREEMENT. This Note contains *all the terms agreed to by the parties relating to its subject matter*, including any attachments or addendums. This Note replaces all previous discussions, understandings, and oral agreements. The Borrower and Lender agree to the terms and conditions and shall be bound until the Borrower repays the Borrowed Money in full.

A. 29-31.

B. MANN MADE PAYMENTS TO FRATELLO, BUT FRATELLO CLAIMS NON-PAYMENT

The first payment under the Secured Promissory Note was due on October 15, 2023, and the amount due was \$799.04, with successive payments due on the fifteenth day of each month. A. 28.

After September 7, 2023, Fratello and Mann's friendship quickly dissipated. A. 60. While Mann was driving, Fratello texted him and when she didn't hear back, accused him of ignoring her. A. 60. Fratello's communications became increasingly agitated and attention seeking. A. 60.

Despite the drama, Mann met with Fratello on September 29, 2023, to give Fratello a *cashier's* check¹ made payable to himself *or* Fratello in the amount of

¹ A "'cashier's check' means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." 11 M.R.S. § 3-1104. In essence, a cashier's check is a check produced by the bank, in the bank's name, and guaranteed by the bank, in a manner distinguishable from a personal check which can be "bounced" or be turned down for insufficient funds. **A cashier's check is never bounced for insufficient funds.**

\$3,500.² A. 60, 133. When Mann provided the \$3,500 check to Fratello, Mann informed Fratello that the check was for the first two payments and repayment of other monies Fratello gave Mann prior to executing the Secured Promissory Note. A. 133.

In an email on October 6, 2023, Fratello claimed the cashier's check was refused by her bank. A. 133, 135. Thereafter, on October 10, 2023, Fratello threatened Mann that he "does not want to go up against [her] legally." A. 135. Later that day, Mann responded to the email and informed Fratello that he conferred with his credit union and that if there was an issue, the issue was with Fratello's bank. A. 133, 135. Fratello responded to Mann in the email chain and insisted that according to her bank the *cashier's* check "needs to be reissued." A. 135.

In an email dated October 18, 2023, Fratello claimed that she "brought the check to [his] bank" and that "[his] bank said there's an error with the check and that it cannot be read by their system and [his] bank refuses to honor the check." Mann A. 133, 136.

C. FRATELLO'S DEMAND LETTERS AND REQUEST FOR A MORTGAGE

In November 2023, after Mann told Fratello the check was valid, Fratello doubled down on her false allegations and served Mann with two demand letters. A.

² A cashier's check was a permitted form of payment under the Secured Promissory Note. *See* section 21.b. of the Secured Promissory Note. A. 33.

37-46, 133.

The first demand letter asserted that Mann breached the contract by failing to provide a mortgage. A. 37, 133. Prior to this time, Fratello had never asserted that a mortgage was necessary. A. 133. Rather, Fratello invented this requirement and pointed to Section 6 of the Secured Promissory Note to justify her new claim. A. 37. Section 6 of the Secured Promissory Note, however, does not require a mortgage. *See* A. 29. Instead, this section simply provides that in the event of a default by the borrower, the note shall be secured by Mann's home in Gray. A. 29, 32, 133. Indeed, a note itself can create a security interest without the necessity of a mortgage.

There is no provision in the Secured Promissory Note which requires Mann to execute a mortgage. *See* A. 28-32. Furthermore, elsewhere in the agreement, the Secured Promissory Note stipulates that "there are *no agreements*, verbal or otherwise *that modify or affect the terms of this Note*," and that "[t]his Note contains *all the terms agreed to by the parties relating to its subject matter*." A. 30, 31.

The second demand letter asserted that Mann failed to make any payment, and it ignored the fact that on September 29, 2023, Mann provided Fratello with a *cashier's check* for \$3,500. A. 43-44. In addition to the false claim that Mann failed to make any payments, Fratello assessed \$100 in late fees and \$3,220 in attorneys' fees onto Mann's debt obligation. A. 43. These assessments were contrary to

Fratello's rights under the Secured Promissory Note, and these actions constituted a breach of the agreement.

D. FRATELLO'S COMPLAINT AGAINST MANN

On January 4, 2024, Fratello filed a complaint with 125 individual paragraphs comprising eight counts³ against Mann. A. 9, 14-26. Fratello's basis for every count hinges on two important allegations (1) the contention that Mann was required to execute a mortgage and failed to do so, and (2) the allegation that Mann did not make payments under the Secured Promissory Note. A. 14-26 (*see* paragraphs numbered 37-38, 57-58, 77-78, 114, 118, 124). Both allegations are false.

First, the allegation that Mann did not make a payment is patently false. On September 29, 2023, prior to the first payment due date, Mann provided Fratello with a *cashier's* check! A. 15. This fact is not in dispute and was even alleged in Fratello's complaint. A. 15. Because it was a cashier's check, Mann made a valid payment to Fratello. *See* A. 31.

Second, the allegation that Mann was required to execute a mortgage is simply not supported by the Secured Promissory Note. The note *never* mentions any

³ Fratello's eight count complaint includes a count for fraud in the inducement, intentional misrepresentation, negligent misrepresentation, lack of consideration, conversion, unjust enrichment, intentional infliction of emotional distress, and breach of contract. A. 14-26. The relief Fratello seeks from the court includes repayment of the entire \$60,000 note, compensatory damages, *punitive damages*, attorney's fees, interests, and costs. A. 25-26. In Fratello's complaint she demanded full repayment of the outstanding principal, thereby accelerating the debt. *See Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 33 (a note holder who demands the total obligation in full has accelerated the debt and may only do so when the note contains an acceleration clause).

requirement of a mortgage. *See* A. 28-32. Rather, the Secured Promissory Note simply states that in the event of a default, it shall be secured by Mann's home. A note can create a security interest without the necessity of a mortgage.

Insomuch as the two important premises of the complaint are both incorrect, the complaint is meritless.

E. MANN'S COUNTERCLAIM AGAINST FRATELLO

Mann filed a *single* count counterclaim for breach of contract. *See* A. 59-62. In Mann's counterclaim, he refutes the narrative that the *cashier's* check was inauthentic, asserting that the *cashier's* check, which exceeded the monthly payment amount of \$799.04, covered the first *two* payments and other monies lent to him by Fratello. A. 60. Unlike Fratello's complaint, Mann's counterclaim includes details about the additional loans. A. 60.

Factually, Mann's breach of contract counterclaim is based on Fratello's refusal to redeem the *cashier's* check, her unlawful assessment of late fees and attorneys' fees, the acceleration of all amounts due under the note, and Fratello's demand that Mann sign a new agreement (the mortgage) while simultaneously attempting to obtain additional funds from Mann. A. 60-61.

Fratello, not Mann, breached the contract and she did so when:

- She refused a valid payment from Mann;
- She prevented Mann from performing his obligations;

- She assessed late fees against Mann without justification;
- She assessed attorneys' fees against Mann without justification; and
- She improperly accelerated the debt.

While Mann did make the first two payments,⁴ Fratello's prevention of Mann's performance under the Secured Promissory Note has forced Mann to withhold future payments until he restores his rights under the Secured Promissory Note. Were Mann to make any payment to Fratello after she improperly assessed the late fees and attorneys' fees, Mann's payment would apply first to the late fees and attorneys' fees before any remaining funds would be allocated to interest and principal. Mann A. 30. The correction of the amount due balance that Mann owes Fratello necessitated Mann's counterclaim.

Mann's counterclaim also rests on the premise that, "[e]very contract or duty within Maine's Uniform Commercial Code (U.C.C.) imposes an obligation of good faith in its performance and enforcement" and failure to act with good faith can constitute a breach of contract.⁵ *Chariter v. Farm Family Life Ins. Co.*, 2015 ME 29,

⁴ Fratello in her special motion to dismiss and her appeal tries to imply that Mann continues to breach the Secured Promissory Note because he has not made any payments since. Blue Br. 17, A. 69. However, Fratello accelerated the Secured Promissory Note. See A.25-26. Accordingly, "the acceleration of a promissory note is a contractual remedy akin to termination, novation, rescission, and other contractual remedies." *Finch*, 2024 ME 2, ¶ 35. Once accelerated, Mann was relieved of any obligation to continue paying until it is determined whether the acceleration was valid or improper. If improper, Mann's status under the contract is unchanged. *Id.*

⁵ The Secured Promissory Note is a negotiable instrument as defined by Maine's U.C.C., and therefore, the contract is subject to the good faith requirement. See 11 M.R.S. § 1-1304; 11 M.R.S. § 3-1104.

¶ 6. Mann properly pled that Fratello breached the contract by her failure to act with good faith. A. 62.

Fratello's breach of contract has caused injury to Mann and the accrual of damages – including the expense of defending and prosecuting this case by paying attorneys' fees. Pursuant to section 12 of the Secured Promissory Note, these attorneys' fees are contractual damages which Mann seeks to recover in his counterclaim, along with pre-judgment interest. A. 30.

F. FRATELLO REDEEMED THE CHECK

None of the versions of Fratello's claim about the bank or credit union's refusal to redeem the check are true.⁶ **On March 26, 2024**, after five months of claiming the *cashier's* check could not be redeemed, **Fratello cashed the check**. A. 137,139⁷. Indeed, contrary to Fratello's prior allegations, the *cashier's* check was

⁶ Fratello is not credible. She has changed her story and has claimed that the *cashier's* check was refused by her bank for deposit, and "upon information and belief, the bank refused the Check because it was not authentic." A. 15. However, in her affidavit for the special motion to dismiss, Fratello re-framed her claim to allege that the *cashier's* check endorsed to Fratello *or* Mann was "refused for deposit by both [her] bank and [Mann's] issuing credit union, [and that Mann's] credit union said it would only honor the check if [Mann] was present with [her] at the credit union and co-endorsed the Check together with [her]." A. 111.

⁷ Mann's opposition to the special motion to dismiss included an Affidavit of Russell Mann. This affidavit was four pages in length and all four pages were included in the submission to the Superior Court. However, page three of the affidavit was inadvertently not included in the scanned copy emailed to Fratello's counsel. As this missing page was submitted to the Superior Court, it is a part of the record and should be considered by this Court. Inasmuch as Fratello did not file a reply and the Superior Court decided the motion without oral arguments, Fratello was not prejudiced at the trial court level by having not reviewed and responded to this missing page. In her Blue Brief, Fratello does not cite to the Mann affidavit, instead relying almost exclusively on Fratello's affidavit. Accordingly, the missing page seems to have had no impact on Fratello's appellate arguments. Undersigned Counsel apologizes to the Court and Fratello for this inadvertent mistake, but fortunately, this oversight has caused no unfair prejudice and does not affect the resolution of this appeal. This missing page is attached to the Red Brief and marked as Appendix 139.

perfectly valid.⁸

Importantly, the *cashier's* check, which was issued on September 29, 2023, included a restriction that the check would be “void after 180 days.” A. 34. Since the check was issued on September 29, 2023, the check would be void on March 28, 2024. A. 34, 137. Fratello clearly knew her claims were fictitious and redeemed the check two days before it expired. *See* A. 137.

Even though Fratello redeemed the cashier's check, Fratello has not altered course. Rather, Fratello has persisted with this lawsuit and continued with her claims that Mann breached the note, requiring the imposition of attorneys' fees against him and the acceleration of all amounts due under the Secured Promissory Note.

G. FRATELLO'S SPECIAL MOTION TO DISMISS

On May 2, 2024, Fratello filed a special motion to dismiss seeking to dismiss Mann's singular counterclaim for breach of contract. Fratello argued in her motion that Mann's counterclaim was based on her written demand letters and her filing of the complaint, and thereby her conduct constituted petitioning activities protected by Maine's Anti-SLAPP statute. *See generally* A. 64-70. Additionally, she argued that Mann could not show that her conduct was devoid of any reasonable factual

⁸ Although the cashier's check from Mann was a valid cashier's check and was cashed by Fratello, Fratello has persisted in her claim regarding the check. Indeed, Fratello has failed to amend her complaint to correct the false allegations in her complaint.

support or any arguable basis in law, and that Mann has not suffered actual damages. *See generally* A. 64-112.

On May 24, 2024, Mann filed his opposition to Fratello’s special motion to dismiss. In his opposition, Mann established that the conduct which gave rise to the breach of contract claim was not petitioning activity, while equally demonstrating that Fratello’s activities were devoid of reasonable factual support or arguable basis in law, and that Fratello’s conduct caused actual injury to Mann. *See generally* A. 114-139.

Fratello chose not to file a reply brief, and the motion was decided without oral arguments. Justice Lipez, in a succinct and well-reasoned order, concluded that the demand letters were not petitioning activity, and that while Fratello’s complaint is petitioning activity, Mann’s counterclaim was “not ‘based on’ the filing of her Complaint.” A. 12-13. Accordingly, the Superior Court denied Fratello’s special motion to dismiss. Thereafter, Fratello appealed Justice Lipez’s order denying the special motion to dismiss.

MAINE’S ANTI-SLAPP STATUTE AND APPLICATION

A. THE PURPOSE OF ANTI-SLAPP STATUTES

“SLAPP is an acronym for Strategic Lawsuits Against Public Participation. SLAPP lawsuits are lawsuits that are filed with the goal ‘to stop citizens from exercising their political rights or to punish them for having done so.’”

Thurlow v. Nelson, 2021 ME 58, ¶ 8. “SLAPP plaintiffs *do not intend to win their suits*; rather they are filed solely for delay and distraction, and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances.” *Id.* (emphasis added).

“The typical mischief that the anti-SLAPP legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects.” *Thurlow*, 2021 ME 58, ¶ 8 (internal citations omitted). “The purpose of the statutes is ‘to provide swift and early dismissal of *frivolous lawsuits* that are meant to discourage the defendant’s exercise of his or her First Amendment right to petition.” *Leighton v. Lowenberg*, 2023 ME 14, ¶ 31(emphasis added).

“Anti-SLAPP statutes, however, have proven to be capable of abuse and tactical manipulation.” *Bradbury v. City of Eastport*, 2013 Me 72, ¶ 9 (quoting *Olsen v. Harbison*, 35 Cal. Rptr. 3d 909, at 913, 916 (Ct. App. 2005)) (the “ironic unintended consequence that anti-SLAPP procedures, enacted to curb abusive litigation, are also prone to abuse” and the possibility of “tactical manipulation of the stays that attend anti-SLAPP proceedings”).

The courts have “identified and struggled with the ‘tension between at least two coexistent constitutional rights’– the right to access the courts and the right to petition.” *Thurlow*, 2021 ME 58, ¶ 9. When the courts analyze the nonmoving

party's (Mann's) lawsuit, the court "must keep in mind that 'SLAPPS are by definition meritless suits.'" *Id.*

B. THE SHIFTING BURDEN ANALYSIS AND STANDARDS FOR SPECIAL MOTIONS TO DISMISS

The statute defines a "party's exercise of its right to petition" as:

any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government; any written or oral statement made in connection with a discrimination complaint pursuant to the Maine Human Rights Act; any written or oral statement made in connection with a complaint pursuant to Title 20-A, chapter 445 or the so-called Title IX provisions of the federal Education Amendments of 1972, Public Law 92-318; or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S. § 556.

The Law Court has implemented a "multi-step procedure that applies to the consideration and disposition of such special motions to dismiss." *Leighton*, 2023 ME 14, ¶ 32. "The [moving party] must file a special motion to dismiss and establish,

based on the pleadings and affidavits, that the claims against him are based on his exercise of the right to petition pursuant to the federal or state constitutions.”

Weinstein v. Old Orchard Beach Fam. Dentistry, LLC, 2022 ME 16, ¶ 5.

If the moving party meets the initial burden, “the burden shifts to the [nonmoving party] to establish through the pleadings and affidavits, prima facie 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] petitioning activity caused actual injury to the [nonmoving party].” *Id.*

After the shifting of the burden to the nonmoving party (Mann), when determining whether there is any reasonable factual support or interpretation of the facts, courts are to focus on what the nonmoving party (Mann) considers reasonable factual support or interpretation of the facts. *Thurlow*, 2021 ME 58, ¶ 26. If the nonmoving party (Mann) “presents ‘prima facie evidence that at least one of the moving party’s (Fratello’s) petitioning activities was devoid of any reasonable factual support or any argument basis in law and caused actual injury to the nonmoving party (Mann),” the court must deny the special motion to dismiss.⁹ *Id.* at ¶ 20.

⁹ The multi-step procedure that the Law Court adopted has changed several times. For a thorough history and reasoning for the changes, see *Thurlow*, 2021 ME 58, ¶¶ 12-16. The most recent change occurred in *Thurlow*, whereby the Law Court “abandon[ed] the third step [it] adopted in *Gaudette I* and return[ed] to the framework [it] adopted in *Nadar I* and restated in a per curiam decision in *Nadar II*.” *Id.* at ¶ 19. Accordingly, the Appellants reference to the third step of limited discovery and a hearing, is not applicable. See Blue Br. 12-14.

The Law Court has defined “actual injury” to mean “a reasonably certain monetary valuation of the injury suffered by the plaintiff.” *Leighton*, 2023 ME 14, ¶ 33. “A plaintiff is not required to provide ‘an actuarial analysis of [his] damages,’ but the determination of damages ‘must not be left to mere guess or conjecture.’” *Id.* “Damages may be determined based on ‘the exercise of judgment applied to facts in evidence’ as long as those facts allow a calculation based on ‘reasonable, as distinguished from mathematical, certainty by the exercise of sound judgment.’” *Id.*

On appeal, the Law Court “review[s] de novo a ruling on a special motion to dismiss by performing the same two-step analysis required by the trial court.” *Thurlow*, 2021 ME 58, ¶ 22.

SUMMARY OF ARGUMENT

Fratello’s special motion to dismiss was properly denied by the Superior Court. Her appeal is unavailing for each of the following independent reasons.

First, Fratello cannot establish that the counterclaim against her is based on her exercise of her right to petition pursuant to either the state or federal constitution and the applicable statute. Indeed, the demand letters she sent to Mann are not petitioning activity protected by Maine’s anti-SLAPP statute.

Second, the counterclaim is merely a breach of contract action. Fratello should not be allowed to create new law by expanding the application of Maine’s anti-SLAPP statute to breach of contract claims.

Third, Mann’s counterclaim was not based on Fratello’s demand letters or filing of a complaint. Rather, the counterclaim is based on her conduct related to the Secured Promissory Note, demanding attorney fees, etc., which is merely memorialized in the demand letters and complaint.

Fourth, even if the counterclaim is based on Fratello’s petitioning activity, Mann has established by a *prima facie* showing that Fratello’s actions – which include alleging that Mann failed to make payments under the Secured Promissory Note – were devoid of reasonable factual support or arguable basis under the law, and that Fratello’s actions have caused Mann actual damages.

Fifth, Fratello’s special motion to dismiss was not filed to effectuate the purpose of the statute. Instead, it was filed to abuse the statute and process and to create unreasonable delay and costs.

To prevail in this appeal, Mann needs to only win one of the above arguments. In contrast, Fratello must win on each argument, which she will not be able to accomplish.

ARGUMENT

A. FRATELLO’S DEMAND LETTERS ARE NOT PROTECTED PETITIONING ACTIVITIES

Under Maine Law, Fratello’s special motion to dismiss requires that in the “multi-step procedure” she must first “establish based on the pleadings and affidavits that the claims against [her] are based on [her] exercise of the right to petition

pursuant to the federal or state constitution.” *Weinstein*, 2022 ME 16, ¶ 5. Without question, Fratello cannot meet this initial burden, and this Court should affirm the denial of her special motion to dismiss.

Fratello claims that her demand letters are protected as “written statements ... made preparatory to, submitted to, or during a judicial proceeding.” Blue Br. 10 (citing *Klein v. Demers-Klein*, No. CV-18-0377, Me. Super. Lexis 66, at *13-14 (April 17, 2019)). Fratello’s argument fails for the following reasons.

First, this argument ignores the purpose of the anti-SLAPP statute which is “to provide swift and early dismissal of *frivolous lawsuits*,”¹⁰ not to help perpetuate Fratello’s frivolous lawsuit based on fictitious claims.

Second, and contrary to Fratello's assertion, her demand letters were not required default notices, a precondition of the lawsuit, or an element of the breach of the Secured Promissory Note claim. Blue Br. 4, 5, 6, 12, 14, 15, 19. In support of her repetitive assertion, Fratello cites paragraph 11 of the Secured Promissory Note. Blue Br. 5, 19. This paragraph is the acceleration clause, and while it states that Mann is entitled to a default notice and a cure period consistent with “the minimum allotted time by law,” Fratello fails to accurately cite applicable law reflecting the purported mandatory notice and cure period. Rather, Fratello cites “Sec 9-A M.R.S

¹⁰ *Leighton*, 2023 ME 14, ¶ 31.

510; 511 (¶¶ 1,2),¹¹ 14 M.R.S 6111” and *Pushard v. Bank of Am. N.A.*, 2017 ME 230. Blue Br. 5.

Neither *Pushard* nor 14 M.R.S. § 6111 required Fratello to send a default notice to Mann. A default notice under 14 M.R.S. § 6111 and *Pushard* are only required when a mortgagee seeks to foreclose upon a primary residential property. This is not a foreclosure case, and as Fratello has repeatedly acknowledged, there is no mortgage. Accordingly, there was no requirement for Fratello to send a default notice as she was not foreclosing on the property. Moreover, Fratello has failed to cite any authority requiring a cure period.

Third, as Justice Lipez aptly noted these demand letters were “not ‘made before or submitted to,’ ‘made in connection with an issue under consideration or review by’ or ‘reasonably likely to encourage consideration or review’ by a *governmental body*.” A. 12. Rather, Justice Lipez stated that “a letter to a private person regarding a private dispute is not, standing alone, petitioning activity.” A. 12.

In *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, ¶ 13, the Law Court declined to protect a person’s conduct – sending letters – when that conduct was part of a string of conduct and statements specifically aimed at third parties, not

¹¹ This citation in the Blue Brief is incomplete. Title 9-A is divided by articles, with the citation to each article and section together. For example, 9-A M.R.S. § 2-510 is the complete citation for a statute pertaining to a “rebate upon prepayment.” Mann’s counsel has reviewed the various articles in title 9-A that include a “section 510” or “section 511,” and counsel has not found any relevant authority in which Fratello attempted to cite.

governmental entities. *See Hearts with Haiti, Inc.*, 2019 ME 26, ¶ 13 (holding that Kendrick’s potentially defamatory letters to third parties, not governmental entities, were not part of any protected petitioning activity).

Similarly in this case, Fratello’s demand letters were part of a “string of conduct and statements” that cannot reasonably be considered part of protected governmental petitioning activity. *See Id.* The demand letters were aimed at a third party, not governmental entities.

Contrary to Fratello's assertion, all of Mann’s allegations are not *based on* the demand letters. Blue Br. 7. The demand letters themselves were not the breach of contract. Rather, the demand letters merely memorialized Fratello’s conduct, which constituted the breach of contract – the refusal to honor the *cashier’s* check and the assessment of the late fees and attorneys’ fees. Fratello’s subsequent communications cannot insulate her from the liability she faces for her breach of the contract.

Fratello’s actions were egregious, abusive, and unwarranted. Mann could have independently filed a breach of contract claim against Fratello any time after November 2023.

B. FRATELLO’S EXPANSION OF THE ANTI-SLAPP LAW INTO BREACH OF CONTRACT CLAIMS IS DANGEROUS AND UNTENABLE.

Fratello’s argument that her demand letters constituted protected petitioning activity is extreme and untenable. If the Court accepts Fratello’s argument, no party

would be permitted to file any counterclaim after receiving a demand letter without being subjected to anti-SLAPP laws and a special motion to dismiss. This would perpetuate the very “abuse” and “tactical manipulation” that the Law Court has expressed concern over regarding the use of these special motions to dismiss. *See Bradbury*, 2013 Me 72, ¶ 9.

Even more, Fratello has failed to establish or demonstrate any instance in Maine where a special motion to dismiss has been applied to a breach of contract claim. It is generally customary in contracts to require a notice and cure opportunity before a party can file a lawsuit for breach of contract.¹² It is also typical in breach of contract litigation, for both parties to claim the other has breached the contract. Were the Court to accept Fratello’s argument that a demand letter is protected petitioning activity in a breach of contract case, it would undermine established contractual norms.

Furthermore, we are unaware of any case where a special motion to dismiss has been applied for a breach of contract claim. Indeed, the one case we were able to find which involved a special motion to dismiss being brought against a breach of contract claim, the trial court and the appellate court both imposed sanctions for filing a frivolous motion and then appealing the motion’s denial. *See Clarity Co.*

¹² As previously noted, the Secured Promissory Note did not require a notice and cure period. The Secured Promissory Note only required a notice and cure period consistent with what is required by law, and in this case, there was no law which required a notice and cure period.

Consulting, LLC v. Gabriel, 77 Cal. App. 5th 454, 292 Cal. Rptr. 3d 532, 535 (2022) (holding an “anti-SLAPP motion was not designed for [] contractual dispute[s]”).

In Maine, the application and analysis of the anti-SLAPP statute has been confined to allegations of defamation,¹³ libel,¹⁴ slander,¹⁵ intentional infliction of emotional distress,¹⁶ negligent infliction of emotional distress,¹⁷ abuse of process,¹⁸ wrongful use of civil proceedings,¹⁹ false light,²⁰ and tortious interference with advantageous business relationship.²¹ Fratello’s attempt to apply a special motion to dismiss to a breach of contract claim is novel and unpersuasive. The Court should not expand the application of this statute to breach of contract claims.

Considering Fratello’s clear breaches of the contract, e.g. her false claim of an unredeemable check, this Court should conclude that Fratello’s actions are not protected petitioning activities and affirm the denial of her special motion to dismiss.

C. MANN’S COUNTERCLAIM WAS NOT BASED ON FRATELLO FILING A COMPLAINT.

Justice Lipez concluded that the filing of a complaint is petitioning activity under 14 M.R.S. § 556, but that “Mann’s breach of contract claim is not directed at

¹³ See *Weinstein*, 2022 ME 16, ¶ 2; *Franchini v. Investor’s Bus. Daily, Inc.*, 2022 ME 12, ¶ 6; *Thurlow*, 2021 ME 58, ¶ 1; *Gaudette v. Davis*, 2017 ME 86, ¶ 2 (*Gaudette I*); *Schelling v. Lindell*, 2008 ME 59, ¶ 2; *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 1.

¹⁴ See *Weinstein*, 2022 ME 16, ¶ 2.

¹⁵ See *Weinstein*, 2022 ME 16, ¶ 2.

¹⁶ See *Gaudette I*, 2017 ME 86, ¶ 2; *Maietta Constr., Inc.*, 2004 ME 53, ¶ 1.

¹⁷ See *Franchini*, 2022 ME 12, ¶ 6; *Gaudette I*, 2017 ME 86, ¶ 2.

¹⁸ See *Leighton*, 2023 ME 14 ¶ 8

¹⁹ See *Leighton*, 2023 ME 14, ¶ 8; *Morse Bros. v. Webster*, 2001 ME 70, ¶ 1.

²⁰ See *Hearts with Haiti, Inc.*, 2019 ME 26; *Maietta Constr., Inc.*, 2004 ME 53, ¶ 1.

²¹ See *Hearts with Haiti, Inc.*, 2019 ME 26; *Maietta Constr., Inc.*, 2004 ME 53, ¶ 1.

the filing of the Complaint; rather, it centers on conduct that predates the filing of the Complaint.” A. 13.

On appeal, Fratello has failed to raise any argument attempting to contradict Justice Lipez’s conclusion that Mann’s counterclaim was not based on Fratello filing her complaint. Accordingly, any argument about Mann’s counterclaim as it relates to Fratello filing her complaint is waived.

In any event, there is no good response to this issue as Justice Lipez’s conclusion is factually and legally sound. A. 13; *see Town of Madawaska v. Cayer*, 2014 Me 121, ¶¶ 6, 13-14 (holding the Town of Madawaska’s land use enforcement against landowners who had a history of disputes with the Town was not “based on” those disputes). As Justice Lipez noted, “not every pleading that chronologically follows petition activity is ‘based on’ that petitioning activity.” A. 13. To hold otherwise, would create dangerous and untenable case law, which would embolden “abuse [of the anti-SLAPP statute] and tactical manipulation.” *Bradbury*, 2013 Me 72, ¶ 9.

D. EVEN IF FRATELLO’S ACTIVITIES WERE PROTECTED PETITIONING ACTIVITY WARRANTING A SHIFT OF THE BURDEN, FRATELLO’S ACTIVITIES WERE DEVOID OF REASONABLE FACTUAL SUPPORT AND MANN HAS SUFFERED ACTUAL DAMAGES.

If Fratello can meet her initial burden to show the counterclaim is based on protected petitioning activity, the denial of her special motion to dismiss must still be affirmed. Fratello’s actions were devoid of reasonable factual support or basis in

law and Mann suffered actual injury. When analyzing Mann’s lawsuit, this Court “must keep in mind that SLAPPs are by definition meritless suits.” *Thurlow*, 2021 Me 58, ¶ 9. Mann’s counterclaim is not meritless.

Furthermore, the Court in analyzing this assertion must view the factual support of Mann’s lawsuit in Mann’s favor, and upon doing so will find *prima facie* evidence which supports the conclusion that Fratello’s activities were devoid of reasonable factual support and that Mann has suffered actual injury. *See Thurlow*, 2021 Me 58, ¶ 26.

1) Fratello’s Brief Cites Inapplicable Facts to Determine if Her Activities were Devoid of Reasonable Factual Support or Arguable Basis in Law

Fratello asks the Court to “look at the entire record, not just the facts presented by Mann to determine whether Fratello’s position is devoid of a factual basis.” Blue Br. 16. Fratello’s position is contrary to superseding Law Court precedent.

The Law Court previously adopted as part of the shifting burden analysis, a third step in *Gaudette I* whereby the trial court would entertain limited discovery and examine the entire record, to adjudicate the special motion to dismiss. However, in the *Thurlow* case, the Law Court explicitly set aside this standard. *See Thurlow*, 2021 ME 58, ¶ 19. When the Law Court did so, it “return[ed] to the framework adopted in *Nadar I* and restated in a per curiam decision in *Nadar II*.” *Thurlow*, 2021 ME 58, ¶ 19.

Accordingly, the Court now looks to Mann's evidence to determine whether Mann has presented *prima facie* evidence that Fratello's petitioning activities are devoid of any reasonable factual support or any argument basis in law; and that Fratello caused actual injury to Mann. *See Thurlow*, 2021 ME 58, ¶ 20. Once Mann demonstrates these facts, *by prima facie evidence*, then this Court must affirm the denial of Fratello's special motion to dismiss.

2) Fratello's Activities were Devoid of Reasonable Factual Support or Arguable Basis in Law

Fratello's alleged petitioning activity is premised on two fictions – that Mann was required to execute a mortgage and that Mann did not make payments under the Secured Promissory Note.

Fratello asserts that "Mann cannot and does not deny that he failed to sign and provide a notarized mortgage acceptable for recording at a County Registry of Deeds." Blue Br. 8; *see also* Blue Br. at 15 and 17. However, Mann was never asked to execute a mortgage prior to the demand letters (which also included a false allegation that the *cashier's check* was defective and that he must pay Fratello's attorneys' fees). Moreover, Mann was never required to execute a mortgage.

Fratello's demand letter, asserting that Mann failed to execute a mortgage and that he is in breach of contract, is devoid of reasonable factual support or arguable basis in law. The Secured Promissory Note is fully integrated, and it is the entirety of all agreements between Fratello and Mann. A. 30-31 (sections 16 and 22). Indeed,

the Secured Promissory Note provides that “there are *no agreements*, verbal or otherwise *that modify or affect the terms of this Note*,” and “[t]his Note contains *all the terms agreed to by the parties relating to its subject matter*.” A. 30-31.

Fratello’s assertion that section 6 of the Secured Promissory Note required Mann to execute a mortgage is meritless. At the time of execution, Mann believed that he executed all documents necessary for the transaction, and that the transaction was complete. A. 132. Furthermore, the first time Fratello raised this allegation was in her demand letter. A. 37, 133.

There is no arguable basis in the law for Fratello to claim that section 6, nor any other section in the Secured Promissory Note, requires as a condition of the loan to Mann to execute a mortgage. Rather, the Secured Promissory Note creates an unperfected security interest in Mann’s real property.²² (“this Note shall be secured with the following property...”) A. 29, 133, 139.

Accordingly, her activities of demanding Mann sign a mortgage is devoid of reasonable factual support or an arguable basis in the law.

²² Fratello also mischaracterizes Mann’s argument stating that Mann asserts “the unnotarized Note itself is somehow a mortgage.” Blue Br. 8. Mann has never asserted that the Secured Promissory Note is a mortgage. Rather, Fratello has an unperfected security interest in the property. Had she required at the time of execution that the Secured Promissory Note be notarized, she could have recorded the Secured Promissory Note and it may have simultaneously acted as a mortgage. *See Collins v. Bradbury*, 64 Me. 37, 38 (1875); *see also Rampino v. Redline Props*, No. BCD-CIV-2023-00025, Me. Bus. & Consumer LEXIS 24, at *7 (July 14, 2023). Whereas Fratello did not require the Secured Promissory Note be notarized, nor did she draft the Secured Promissory Note to require a mortgage, it is unequivocally clear Fratello did not intend to be a mortgagee. A. 132-133, 139.

Fratello's allegation that Mann did not make payments under the Secured Promissory Note is also without merit and is devoid of any factual support. Fratello acknowledges that she received the \$3,500 *cashier's* check. A. 110. Additionally, Fratello has redeemed the *cashier's* check. A. 137, 139.

Fratello's wild claims about her inability to redeem the *cashier's* check for over five months are meritless and without factual support. There is no reasonable factual support that Fratello can assert to support her allegations that a credit union refused to honor a *cashier's* check the credit union itself issued. Additionally, Fratello's claims that the credit union required Mann and Fratello to both be present for redemption is belied by the endorsement on the *cashier's* check – "Pay to the Order of Katrina Fratello *or* Russell Mann." A. 34.

Fratello's argument that Mann breached the Secured Promissory Note and was responsible for attorneys' fees, late fees, and interest is similarly devoid of reasonable factual support. There was no good reason for Fratello to claim that Mann owed \$3,220 in attorneys' fees, plus \$100 in late fees, and interest when she had been paid with a perfectly valid \$3,500 *cashier's check*. Fratello's claim for the attorneys' fees, late fees, and additional interest are frivolous.

Accordingly, both of Fratello's meritless claims – that Mann was required to execute a mortgage and that Mann did not make payments under the Secured Promissory Note – and her purported protected petitioning activities are devoid of

any reasonable factual support or arguable basis in the law. There is clearly *prima facie* evidence to support this conclusion, especially when viewing the evidence in Mann's favor.

3) Mann has suffered an actual injury.

Mann has suffered undisputable actual injury because of Fratello's actions. Fratello argues that the late or attorneys' fees articulated in the demand letter do not constitute actual injury because Mann has not paid them. Blue Br. 8, 18. This argument ignores clear Law Court precedent and is unpersuasive.

The Law Court's definition of actual injury is not whether the damages have been paid to date, but whether the damages have "a reasonably certain monetary valuation of the injury suffered to the [nonmoving] party." *Leighton*, 2023 ME 14, ¶ 33. The court, after reviewing the facts in evidence, exercises sound judgment to calculate the damages. *Id.*

This Court will without any difficulty be able to calculate a certain monetary valuation of Mann's injury. While Mann has incurred at least \$100 in late fees and \$3,220 in attorneys' fees pursuant to the demand letters sent by Fratello, Mann has also incurred over \$7,530 in his own attorneys' fees. A. 139. The use of simple arithmetic makes Mann's injuries easily calculated, and not speculative.

Additionally, Fratello argues that the late and attorneys' fees are derivative of the Secured Promissory Note and the complaint, not the demand letters. However,

Fratello's argument is incongruent with her argument that the demand letter *is petitioning activity*. Fratello cannot claim that the demand letter is petitioning activity, and equally claim that the demanded monies in the demand letter are not part of the petitioning activity. Accordingly, if the demand letters are petitioning activity, the late fee and attorneys' fees that the demand letters seek to collect are irreconcilably connected. Accordingly, the demand letter can cause actual damage to Mann.

Considering Mann's actual injury, and the *prima facie* evidence that Fratello's purported protected petitioning activities are devoid of any factual support or reasonable basis in the law, the denial Fratello's special motion to dismiss must be affirmed.

E. FRATELLO'S SPECIAL MOTION TO DISMISS IS AN ABUSE OF PROCESS AND THE DISCOVERY STAY.

Fratello's special motion to dismiss and her appeal of the denial of the special motion to dismiss are abuses of the statute and process. The special motion to dismiss was not the first questionable pleading or motion Fratello filed.

Fratello's complaint contains 125 individual paragraphs, in an eight-count complaint, which can be simplified to two fictitious claims – Mann was required to execute a mortgage (which he is not) and that Mann did not make payments under the Secured Promissory Note (which he did). *See generally* A. 14-26. Not only did Fratello's complaint contain eight different counts, but it also included a count of

“Intentional Infliction of Emotional Distress” stemming from a purported breach of contract. While the basic facts contained in the complaint are fictitious, the IIED claim stemming from a purported breach of contract is wild. *See generally* A. 14-26.

Once Mann retained counsel and sought a one-week extension to file his responsive pleading, in compliance with the Maine Rules of Civil Procedure, Mann requested Fratello’s position on the motion to enlarge the time to file a responsive pleading. *See* Def.’s Opp. to Notice of Default. When Mann received no response, he followed up a second time. *See* Def.’s Opp. to Notice of Default. Rather than answer Mann, Fratello rushed and filed a Notice of Default. *See* Def.’s Opp. to Notice of Default. Fratello then properly served the Notice of Default on Mann’s counsel. *See* Def.’s Opp. to Notice of Default.

Prior to filing the special motion to dismiss, Fratello filed a motion to dismiss Mann’s counterclaim for failure to state a claim. In her motion, Fratello perfectly recited the standard for a motion to dismiss under M.R. Civ. P. 12(b)(6), and then completely disregarded the standard and cited *Fratello’s* complaint to support her motion to dismiss Mann’s counterclaim. In doing so, Fratello clearly ignored the standard recited in the preceding paragraphs of her motion.

After filing his answer and counterclaim, Mann served Fratello with discovery documents including requests for production, interrogatories, and requests for admission. Once Fratello filed the special motion to dismiss, the case was subject to

an automatic discovery stay. *See* 14 M.R.S. § 556. Nonetheless, Fratello’s special motion to dismiss will have no outcome on the trajectory of the litigation.

Both Mann and Fratello have filed claims of breach of contract against each other. As such, the scope of discovery related to these bilateral claims of breach of contract will be inclusive of both parties’ conduct and activities. Dismissing Mann’s breach of contract counterclaim will not alter the scope of discovery already served on her.

If the Court affirms the denial of Fratello’s special motion to dismiss, the discovery stay will be lifted, and Fratello will be required to answer the discovery requests. If the Court overrules the denial of Fratello’s special motion to dismiss, the discovery stay will be lifted, and Fratello will be required to answer the discovery requests.

Clearly, this motion was “filed solely for delay and distraction, and to punish [Mann] by imposing litigation costs on [him] exercising [his] constitutional right to speak and petition the government for redress of grievances.” *Thurlow*, 2021 ME 58, ¶ 8. “SLAPP plaintiffs do not intend to win their suits,” *Thurlow*, 2021 ME 58, ¶ 8, and query whether Fratello even intends to win her special motion to dismiss as the outcome of her motion will not impact the future path of the discovery in this case.

One unassailable fact – Fratello’s special motion to dismiss has unreasonably ratcheted up attorneys’ fees for both parties. As of May 16, 2024, prior to the filing of his opposition, Mann incurred \$7,530 in attorneys’ fees. A. 139. Fratello’s motion is nothing more than an attempt to force Mann to spend more of his money on attorneys’ fees.

Furthermore, the prevailing party in any litigation under the Secured Promissory Note will be awarded reasonable attorneys’ fees from the non-prevailing party. A. 30. By perpetuating meritless appeals of meritless motions in a meritless case, Fratello is attempting to use the mounting attorneys’ fees for both sides to place unreasonable pressure on Mann, likely hoping he will settle on favorable terms to Fratello rather than spend more of his money on his attorneys and risk paying her attorneys’ fee should he lose. This is the very essence of abuse of process, and this Court should consider measures to prevent future abuse of process. *See See Clarity Co. Consulting, LLC v. Gabriel*, 77 Cal. App. 5th 454, 292 Cal. Rptr. 3d 532, 535.

CONCLUSION

Fratello’s special motion to dismiss was properly denied. The Superior Court correctly concluded that her actions were not petitioning activities. Fratello’s brief is unpersuasive to establish otherwise. Justice Lipez accurately assessed that Mann’s counterclaim was not based on the demand letters or the filing of a complaint, but

rather Fratello's conduct. Additionally, Fratello has cited no authority expanding the use and application of a special motion to dismiss to a contract dispute case.

Even if the Superior Court erred, and Fratello's actions were petitioning activity, Mann has demonstrated by a *prima facie* showing that her actions were devoid of reasonable factual support or arguable basis under the law, and that Fratello's actions caused Mann actual damages.

Fratello's special motion to dismiss defies the purpose of Maine's anti-SLAPP statutes. Accordingly, Fratello should not be rewarded with an appellate victory for abusing the statute and process.

For all the reasons herein, the Law Court should affirm the denial of Fratello's special motion to dismiss.

Dated: January 14, 2025

/s/ Matthew H. Bowen

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CERTIFICATE OF SERVICE

I, Bruce W. Hepler, Attorney for Appellee Russell Mann hereby certify that I have today caused two copies of the Brief of Appellee to be served upon the following party by first class mail:

Jeffrey Bennett, Esq.

Dated: January 14, 2025

/s/ Matthew H. Bowen

Matthew H. Bowen, Esq.

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contracts or agreements. And similarly, I don't believe paragraph 6 of the Secured Promissory Note requires a mortgage either.

16. The second Notice of Default, Right to Cure, and Demand letter states that I failed to make payments and that I owed \$1,598.08 in payments along with \$100 in late fees and \$3,220 in attorney fees.
17. On or about April 7, 2024, I asked my issuing credit union for information on the cashier's check at issue. The credit union confirmed that the cashiers' check was cashed on March 26, 2024. A true and correct copy of the evidence the credit union provided me is attached as Exhibit G.
18. Fratello falsely claimed there were irregularities with the cashier's check, withheld cashing the cashier's check I provided her, and in doing so breached the contract by not acting with good faith and fair dealing.
19. Fratello failed to cash the check and assessed late fees and attorneys' fees at the same time Fratello tried to force me to sign a new agreement.
20. I have brought my counterclaim breach of contract against Fratello due to her lack of good faith and fair dealing.
21. As of November 29, 2023, I have incurred damages in the form \$100 of improperly assessed late fees and \$3,220 of improperly assessed attorney fees.
22. As of May 16, 2024, I have incurred damages in the form of \$7,530 in my own attorney fees for this matter. This matter is ongoing, and I will continue to incur more damages and attorneys' fees.
23. The Secured Promissory Note states that the prevailing party in any litigation related to the Secured Promissory Note will be able to recover reasonable attorneys' fees from the non-prevailing party.