**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**WASHINGTON, SC.** **SUPERIOR COURT**

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| **EDWARD P. BALBAT, DANIELLE BALBAT, STEVE DUBOIS, CHERYL DUBOIS, LOUIS PUCCI AND NANCY PUCCI** *Plaintiffs* | : | |
| **V.** | : | **C.A. No. WC-2012-0004** |
| **COPAR QUARRIES OF WESTERLY, LLC; WESTERLY GRANITE COMPANY, INC.; THE TOWN OF WESTERLY; and MAINE DRILLING AND BLASTING, INC.** *Defendants* | : | |

## DECISION

**STERN, J.** Before this Court is Plaintiffs' Motion for Summary Judgment on Westerly Granite Company, Inc.'s (Defendant or Westerly Granite) counterclaim and affirmative defenses eleven through seventeen as asserted in Defendant's answer to the Plaintiffs' revised second amended verified complaint. Plaintiffs assert immunity from the Defendant's above mentioned counterclaim and affirmative defenses pursuant to the Rhode Island Limits on Strategic Litigation Against Public Participation law (commonly referred to as the Anti-SLAPP statute). Further, Plaintiffs move this Court to award attorneys' fees and costs under the Anti-SLAPP statute. Jurisdiction is pursuant to G.L. 1956 § 9-33-2(c).

## I

## Facts and Travel

The above controversy emanates from the Defendant's use of the Defendant's property and its effect on the properties owned by the surrounding Plaintiffs. Plaintiffs are all residents of the Town of Westerly residing in the vicinity of Defendant's—Westerly Granite—property.

(Second Am. Compl. ¶ 1). Defendant is a Rhode Island corporation and owner of property on Quarry Road in Westerly, identified as Assessor's Plat 55, Lot 1 (the Property). Id. at ¶ 3. Defendant's property, consisting of a quarry, historically has been used for activities associated with the Extractive Industry as defined in G.L. 1956 § 45-24-31(25) (quarrying operations) (Def.'s Countercl. ¶ 7). Quarrying extraction on the Defendant's property existed long before the Defendant purchased the property and traces its origins back to the 1800s when the quarry was first opened by Sullivan Granite Company in 1834. Id. at ¶ 8. The current zoning district for the Defendant's property allows for light industrial use. (Second Am. Compl. ¶ 7). Quarrying operations are allowed in this zoning district upon receiving a Special Use Permit from the Town's Zoning Official. Id.

**Background to Plaintiffs' Lawsuit**

On August 15, 2007, Anthony R. Giordano—Westerly's former Zoning Offical—issued the Defendant a Zoning Certificate allowing for quarrying operations on the property without the Defendant having to obtain a Special Use Permit first. Id. at ¶¶ 7-8. Mr. Giordano found quarrying operations on the property predated the Town of Westerly's current zoning ordinance qualifying such activities as a pre-existing use. Id. at ¶ 8. In October 2010, Westerly Granite entered into a lease agreement with Copar Quarries of Westerly, LLC (Copar) granting Copar the right to carry out quarrying operations on the property. (Second Am. Compl. ¶ 6); see Pls.' Mem. Ex. F.

Starting in and around 2011, Copar began using Defendant's property in accordance with the lease agreement. Soon after Copar's quarrying operations commenced, the Plaintiffs began to notify the Town of Westerly of the adverse effects the noise and fugitive dust originating from quarrying operations on Defendant's property were having on their properties. (Second Am.

Compl. ¶ 30). The Plaintiffs notified the Town of Westerly that the migration of fugitive dust beyond the Defendant's property border was an illegal trespass and was in violation of Rhode Island Department of Environmental Management (RIDEM or DEM) regulations. Id.

On December 5, 2011, the Town Council for the Town of Westerly made reference to the fact that quarrying operations on Defendant's property had been previously abandoned prior to its 2007 Zoning Certificate being issued. Id. at ¶ 10. The Town of Westerly, through its Zoning Official—on August 7, 2012; February 12, 2013; and November 27, 2013—issued three separate Notices of Violation and Cease and Desist Orders to Defendant and their lessee, Copar. Id. at ¶¶ 17-19. The February and November 2013 Notices of Violation revoked the Zoning Certificate issued to the Defendant, finding its issuance was based on inaccurate information, and ordered all quarrying operations to cease immediately as the Defendant was not in compliance with the Town of Westerly's Zoning Ordinance. Id. at ¶¶ 18-19.

On March 22, 2013, Westerly Granite, along with Copar, filed a verified amended complaint against the Town of Westerly and the Zoning Board of Review seeking to invalidate the Notices of Violation. (Second Am. Compl. ¶ 20). Before the date set for trial, the Town of Westerly withdrew most of the Notices of Violation and reached a settlement with Westerly Granite and Copar. Id. at ¶ 22. The Consent Order (Consent Order I) among the parties held quarrying operations on the Defendant's property constitutes a legal pre-existing use and can be carried out throughout the entire property.[1] Id.

**Current Action**

Copar has conducted quarrying operations on the Defendant's property since 2011.

[1] The issue underlying the settled case focused on the historical use of the Defendant's property. That issue is currently on appeal to the Rhode Island Supreme Court. (Pls.' Mem. In Supp. of Mot. For Summ. J., p. 2).

(Second Am. Compl. ¶ 30). Plaintiffs Edward and Danielle Balbat constructed their home in or about 2006 and allege that no quarrying activities were taking place at that time.[2] Id. at ¶ 23. Plaintiffs allege in their complaint that the continual quarrying operations conducted on Defendant's property have detrimentally affected the Plaintiffs and their property. Id. at ¶ 34. Plaintiffs commenced the instant action in January 2012, amending the complaint in February 2012.

On June 29, 2012, after the Plaintiffs filed a motion for a preliminary injunction, the parties entered into a Consent Order (Consent Order II) to govern the conduct of the parties until the Court ruled on the motion for injunctive relief. On March 25, 2013, this Court held that the Plaintiffs established a prima facie case for private nuisance, but not public nuisance, and entered an order pursuant to these findings. Such order was amended on May 24, 2013 and again on August 13, 2013. Plaintiffs moved for leave to file a second amended verified complaint which was granted in March 2014. In response to this Court granting Defendant's motion for a more definite statement, Plaintiffs filed a revised second amended verified complaint on May 15, 2014. In its revised second amended verified complaint, Plaintiffs allege the quarrying activity on the property owned by Westerly Granite structurally damaged Plaintiffs' properties and interferes with each Plaintiffs' comfort and use of their property. (Second Am. Compl. ¶¶ 53-54). Plaintiffs allege further that the conduct of Copar, authorized by Westerly Granite, constitutes a public and private nuisance and violates local and state regulatory and statutory provisions. Id. at ¶ 56.

On June 4, 2014 Westerly Granite answered Plaintiffs' revised second amended

[2] Defendant alleges in its counterclaim that Plaintiffs were aware or should have known with the exercise of due diligence, of the quarrying operations taking place on the property. (Def.'s Countercl. ¶ 11).

complaint, asserting twenty-nine affirmative defenses. In addition, Westerly Granite filed a counterclaim against the Plaintiffs. The counterclaim alleges Westerly Granite has not taken part in any quarrying operations since 1997 when it purchased the property. (Def.'s Countercl. ¶ 12). Further Westerly Granite alleges to have never directed or exercised dominion or control over any tenant or operator engaged in quarrying operations on the property. Id. at ¶ 13. Defendant contends the Plaintiffs' intent in the current action is to damage Defendant's reputation, mislead the public, and harm current and future business relations. Id. at ¶¶ 20-21. The Plaintiffs have subsequently brought this Motion in order to dismiss the Defendant's counterclaim and certain affirmative defenses pursuant to Rhode Island's Anti-SLAPP statute.

## II

## Standard of Review

A drastic remedy, a motion for summary judgment should be decided cautiously. DeMaio v. Ciccone, 59 A.3d 125, 129 (R.I. 2013). A motion for summary judgment shall be granted if "'no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law."' Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Super. R. Civ. P. Rule 56(c)). Alternatively, the nonmoving party "'has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010) (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). To meet this burden, "'[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as

distinguished from legal conclusions, to dispute the moving party on material issues of fact.'" Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 839 (R.I. 2012) (quoting Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998). "The purpose of the summary judgment procedure is issue finding, not issue determination[;] . . . [t]hus, the only task of a trial justice in passing on a motion for summary judgment is to determine whether there is a genuine issue concerning any material fact. Indus. Nat. Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979) (citing R.I. Hosp. Nat'l Bank v. Boiteau, R.I., 119 R.I. 64, 66, 376 A.2d 323, 324 (1977).

**III**

**Analysis**

The instant Motion relates to Plaintiffs' claim of immunity under the Anti-SLAPP statute from the Defendant's counterclaim and certain affirmative defenses. Conversely, the Defendant argues its counterclaim was only in response to the Plaintiffs' revised second amended verified complaint and was not an attempt to prevent the Plaintiffs from exercising their protected right to petition. This Court will now address whether the Anti-SLAPP statute applies to bar Defendant's counterclaim and certain affirmative defenses.

**Anti-SLAPP**

The Anti-SLAPP statute grants conditional immunity from vexatious civil claims to citizens exercising their First Amendment rights of free speech and legitimate petitioning. Sisto v. Am. Condo. Ass'n, 68 A.3d 603, 614 (R.I. 2013) (citing Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004)); see U.S. Const. amend. I; R.I. Const. art. I, § 21. The legislative intent behind the statute's enactment was to reduce the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Sec. 9-33-1. Under the Anti-SLAPP statute, a

party is conditionally immune from civil claims, cross-claims, and counterclaims, while exercising "his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern." Sec. 9-33-2(a). The rights under the statute are not infinite, and conditional immunity will not apply to a petition or free speech constituting a sham. Id. Although the Anti-SLAPP statute plays an important role in protecting private citizens who exercise their fundamental constitutional rights, the statute should be applied cautiously, balancing a plaintiff's right to bring suit with a defendant's right to be protected from frivolous claims. Sisto, 68 A.3d at 615; Palazzo v. Alves, 944 A.2d 144, 150 n.11 (R.I. 2008); see also John C. Barker, Common-Law and Statutory Solutions to the Problem of SLAPPs, 26 Loy. L.A. L. Rev. 395, 397-98 (1993).

**A**

**Petitioning Activity**

Conditional immunity granted under the Anti-SLAPP statute applies when a party seeking protection is engaged in free speech or petitioning activity. Exercising the right to petition is defined in the Anti-SLAPP statute 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; or any written or oral statement made in connection with an issue of public concern." Sec. 9-33-2(e).

Petitioning the government "'for the redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights."' Cove Road Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1236 (R.I. 1996) (quoting United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967)). Immunity from liability for exercising one's

constitutional right to petition traces its roots to two United States Supreme Court cases: E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). The Noerr-Pennington doctrine, as it came to be known, provided immunity from liability under the Sherman Antitrust Act to those parties exercising their First Amendment right to petition to governmental agencies, even if those parties possessed anticompetitive motives intended to interfere with potential competitors' abilities to enter the field. Pound Hill Corp. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996). In Rhode Island, the Supreme Court has applied this doctrine to prevent state law tort-based claims from being raised against a party seeking redress from the courts. Hometown Props., Inc. v. Fleming, 680 A.2d 56, 60 (R.I. 1996) (citing Cove Road, 674 A.2d at 1236). For example, in Cove Road, the Rhode Island Supreme Court expressly found the constitutional protection of the right to petition applied to tort claims, thus preventing Cove Road from alleging the defendant engaged in malicious prosecution and abuse of process when the defendant appealed the Town of Cranston's zoning amendment in Cove Road's favor. 674 A.2d at 1237.

Here, the Plaintiffs argue their complaints to local and state officials regarding the quarrying operations on the Defendant's property, along with the filing of its second verified amended complaint, constitute valid petitioning activities under the Anti-SLAPP statute. Alternatively, the Defendant argues that the Plaintiffs are pursuing only legal claims and that, since the Plaintiffs' petitioning activities have concluded, the Defendant's counterclaim was filed in response to these legal claims.

This Court finds that a party alleging to have suffered damages has the right to come before the Court to petition for redress and recover from those deemed liable. Pound Hill, 668 A.2d at 1263. The Plaintiffs are seeking damages from the Defendant under alleged nuisance,

trespass and strict liability theories and has exercised their right to petition the Court for redress. The Defendant's contention that the Plaintiffs are not engaged in petitioning activity since the Plaintiffs are not making a petition to any local, state, or federal agency is without merit. However, it is well settled that constitutional protections regarding a party's right to petition extend to a party's access to the courts. Cove Road, 674 A.2d at 1237-38. Therefore, the Plaintiffs' prior complaints regarding the operations on the Defendant's property, along with the filing of the instant matter, constitute written statements submitted to a judicial body invoking protection under the Anti-SLAPP statute. See § 9-33-2(e).

**B**

**Sham Petitioning**

A party falling within the scope of the Anti-SLAPP statute is protected from civil claims, counterclaims, and cross-claims if his or her petition or free speech does not constitute a sham. Sec. 9-33-2(a). The Anti-SLAPP statute provides that a petition or free speech "constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose." Id. The statute further states a petition will be deemed a sham only if it is both

> "(1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and
> "(2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects." Secs. 9-33-2(a)(1)&(2) (emphasis added); see Karousos v. Pardee, 992 A.2d 263, 269-70 (R.I. 2010).

If an objective litigant could reasonably expect to have a successful outcome, the Court will find that the petition does not constitute a sham. Further, the Court must determine if the litigants are

using the process itself rather than the outcome to impede an adverse party. Karousos, 992 A.2d at 270-71 (citing Pound Hill, 668 A.2d at 1264).

In this case, the Defendant argues the companion case, WB-2013-0136[3], constitutes a final ruling over the historical use of the property, and that any further related petitioning by the Plaintiffs is a sham meant only to harass the Defendant. Furthermore, Defendant alleges their involvement with the property is only that of a landowner who is not engaged in any quarrying operations and thus is not liable for the damages Plaintiffs allege in his or her complaint. The Defendant's argument fails. First, at the preliminary injunction hearing, this Court found the Plaintiffs had established a prima facie case for private nuisance from the ongoing quarrying operations. The Court did not, however, determine who is liable for the Plaintiffs' alleged damages. Further, it is well settled that a landowner owes a duty of reasonable care to prevent outsiders from being harmed by activities taking place on his or her property. Volpe v. Gallagher, 821 A.2d 699, 705 (R.I. 2003) (citing W. Page Keeton, et. al., Prosser and Keeton on the Law of Torts, § 57 at 387 (5th ed. 1984)).

At issue before this Court is whether the Plaintiffs reasonably expect a successful outcome against the landowner Defendant. Copar Quarries, as lessee, is the entity carrying out the quarrying operations. Although not involved directly in quarrying operations, this Court believes an objective litigant could reasonably expect to succeed on claims against the landowner Defendant. A landowner not in control of the property could be held liable for a nuisance if the nature of the property becomes one by its use. Keeler v. Lederer Realty Corp., 26 R.I. 524, 59 A. 855, 857-58 (1904). Therefore, the Plaintiffs' claims against the Defendant are not objectively baseless in that the property is used as a quarry, and a nuisance could easily develop from its use

[3] Westerly Granite Company, Inc., et al v. The Zoning Board of Review for the Town of Westerly, et al., C.A. No. WB-2013-0136.

as such. See Cove Road, 674 A.2d at 1239 (landowners appeal not objectively baseless in that a litigant could have expected success); Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1210-13 (R.I. 2000) (statements not objectively baseless since based on personal knowledge and publicly available information).

This Court also does not find Plaintiffs' claims against the Defendant to be subjectively baseless. The Defendant does not provide evidence suggesting the Plaintiffs' claims were motivated by any reason other than for the outcome of the process. Karousos, 992 A.2d at 271-72. The Defendant argues that there has not been any finding by the Court that would suggest liability to the Plaintiffs for their alleged damages, and the only conclusion to be reached is that the suit is meant to harass the Defendant. Although viewing the facts in the light most favorable to the non-moving party, the Plaintiffs have presented evidence with respect to fugitive dust entering and interfering with the use and enjoyment of their properties, not contradicted other than by mere denial by the Defendant. Without pointing to an ulterior motive as to why the Plaintiffs have brought the instant action, it seems apparent that the action was brought for a desired outcome; namely, to cease the nuisance and trespass. See Id. (mere allegations were insufficient to meet burden of showing the existence of a material fact). Therefore, without competent evidence suggesting Plaintiffs are motivated by the process rather than the outcome, the Court finds the Plaintiffs' claims are not subjectively baseless.

**C**

**Public Concern**

A party exercising his or her right of petition or free speech is conditionally immune from civil claims, counterclaims, and cross-claims under the Anti-SLAPP statute if a party's actions are in connection with a matter of public concern. Sec. 9-33-2(a). An issue of public concern

has been described by the United States Supreme Court as any issue "fairly considered as relating to any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983); see Global Waste, 762 A.2d at 1214. Whether speech involves a matter of public concern is a question of law to be determined by the "content, form, and context" revealed by the whole of the record. Connick, 461 U.S. at 147-48. If the petition for redress or speech relates to an issue of importance in the community, it is essentially a matter of public concern. See Global Waste, 762 A.2d at 1208-14 (finding residents' statements to a newspaper regarding pollution and environmental contamination from the plaintiff's recycling plant were protected under the Anti-SLAPP statute as the statements related to an issue of concern within the community). Similarly, in Hometown Props., the Court held a North Kingstown resident who participated in and submitted statements at a Department of Environmental Management meeting regarding alleged ground-water contamination caused by plaintiff's landfill operation was protected under the Anti-SLAPP statute. 680 A.2d at 58-59, 64. The Court further found that potential environmental contamination from the plaintiff's landfill clearly raises issues of public concern. Id. at 64.

Here, the Court finds that the matters surrounding the Plaintiffs' suit involve matters of public concern. See Connick, 461 U.S. at 146-48. Stone processing, crushing, and blasting represent an inherently dangerous activity to the community that should be carried out with extreme caution. See Selwyn v. Ward, 879 A.2d 882, 889 (R.I. 2005) (listing factors to consider when determining if an activity is ultrahazardous or abnormally dangerous). Before commencing suit, the Plaintiffs notified the Town of Westerly, RIDEM, and other federal agencies regarding the quarrying operations taking place on the Defendant's property. (Second Am. Compl. ¶¶ 63, 65). Actions at the quarry have resulted in safety violations and fines from regulatory bodies

such as the Federal Mine Safety and Health Administration, Environmental Protection Agency (EPA) for violations of the Clean Air Act, and the Town of Westerly.[4] Further, the RIDEM, in August of 2013, issued a Notice of Violation finding fugitive dust was extending beyond the Defendant's property line, with the potential to affect the public health, safety, welfare or the environment. (Pls.' Ex. C to Mem. in Supp. of Summ. J.)

The Defendant urges this Court not to consider the above issues when reviewing the Plaintiffs' current case since the Plaintiffs pursued legal claims under nuisance, trespass and strict liability tort theories. However, when reviewing the entire record, it is apparent to the Court that the quarrying operations which led to the Plaintiffs' complaints involve issues important to the community at large. Connick, 461 U.S. at 145. The Plaintiffs' cause of action stems directly from the quarrying activities on the Defendant's property, activities which have been cited on different occasions for being in violation of state and federal regulations. (Second Am. Compl. ¶ 23). Although the Plaintiffs are seeking redress for damages under private right of action theories, it is the blasting activities and other operations that pose a threat and therefore involve issues of importance to the community. Compare Hometown Properties 680 A.2d at 64 (holding defendant's statements about potential environmental contamination related to matters of public concern), with Hoffman v. Davenport-Metcalf, 851 A.2d 1083, 1088 (R.I. 2004) (holding that the private causes of action for eviction and criminal complaints are not causes of action involving matters of public concern). Therefore, when reviewing all the evidence with respect to the Plaintiffs' claims and complaints against the Defendant, this Court finds the subject issues to be those of public concern and clearly the type which the Legislature intended

[4] The three Notices of Violations issued by the Town of Westerly were subsequently withdrawn through dismissal stipulations entered into by the Defendant and the Town of Westerly in WB-2013-0136 before the case was heard by the Court. That case is currently on appeal to the Supreme Court.

to protect when enacting the Anti-SLAPP statute. See Connick, 461 U.S. at 147-48 (statements made reflect a matter of public concern based on the content, form, and context).

**D**

**Defendant's Affirmative Defenses**

In its Motion for Summary Judgment, the Plaintiffs also sought to strike several of the Defendant's affirmative defenses on the grounds that they too violated the Anti-SLAPP statute. However, the language of the statute clearly states "[a] party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions . . . shall be conditionally immune from civil claims, counterclaims, or cross-claims." Sec. 9-33-2(a). The statute does not explicitly state a party is protected from certain affirmative defenses under this section. Rhode Island case law has not addressed this issue to date, but other states Anti-SLAPP statutes do not provide immunity from affirmative defenses. See In re Gilman, CV 11-9327 DOC, 2012 WL 1162223 (C.D. Cal. Apr. 4, 2012) (finding the California Anti-SLAPP statute does not protect a party from affirmative defenses). Further, the Plaintiffs have not provided any case law in support of its position that the Anti-SLAPP statute should be applied to strike certain affirmative defenses of the Defendant. Therefore, the Court will not apply the Anti-SLAPP statute to strike Defendant's affirmative defenses eleven through seventeen.

**IV**

**Conclusion**

Finally, since the Plaintiffs' complaint falls within the purview of § 9-33-2, this Court grants the Motion for Summary Judgment, and dismisses the Defendant's counterclaim. This Court denies the Motion for Summary Judgment as it relates to Defendant's affirmative defenses eleven through seventeen. Further, pursuant to § 9-33-2(d), this Court shall award costs and

reasonable attorney's fees to the prevailing Plaintiffs. See Alves, 857 A.2d at 757 ("an award of costs and reasonable attorneys' fees [is] mandatory"). The Plaintiffs shall file an affidavit in support of attorney fees by the appropriate motion. Further, the Plaintiffs shall prepare the appropriate judgment for entry.