

ADMONITION NO. 25-06

CLASSIFICATION:

Advancing Frivolous Claim or Defense [Mass. R. Prof. C. 3.1]

SUMMARY:

In early 2013, a property developer built six condominium units and sold all six units along with six parking spaces assigned to individual unit owners. Three additional parking spaces located on the property were unassigned. After the sale of the final unit, the developer transferred ownership of all common property, including the three unassigned parking spaces, to a condominium trust through a master deed. The developer mistakenly believed that it retained ownership of the three unassigned parking spaces. In mid-2013, after execution of the master deed, the property developer marketed one of the remaining parking spaces for sale believing it had retained ownership of the spaces. The developer entered a contract for the sale of one of the three remaining parking spaces with a prospective buyer. The parties agreed to a short deadline for the buyer to complete the purchase.

After executing the contract for sale, the buyer took steps to obtain a commercial loan to fund the purchase and hired counsel to represent him in the transaction. The buyer's counsel reviewed the master deed, determined that the developer had not retained ownership of the remaining parking spaces, and communicated this information to the lawyer who was then representing the developer. The developer's counsel agreed with the buyer's counsel's determination that the three unassigned parking spaces were transferred to the trust as common property by the master deed. The parties agreed to extend the buyer's deadline to complete the purchase to give the developer an opportunity to amend the master deed in order complete the sale. The developer did not amend the master deed to exclude the three parking spaces from the trust common property and was unable to sell the parking space to the buyer.

The buyer thereafter sued the developer for breach of contract in the Small Claims division of the Boston Municipal Court ("BMC"). The buyer sought money damages for the expenses incurred in his attempt to purchase the parking space. At that point, the developer retained the respondent to defend the developer in the buyer's breach of contract action. The developer, through separate counsel, also brought an action in the Land Court against the trust, seeking a declaratory judgment that the developer, not the trust, owned the parking space.

After the Land Court action was filed, the respondent filed an answer and counterclaim on behalf of the developer in the breach of contract action. Despite the acknowledgment by the developer's other lawyer that the developer could not complete the sale and the developer's refusal to extend the time for the buyer to perform while it worked to amend the master deed, the counterclaim filed by the respondent asserted that it was the buyer who had breached the contract and that the developer had been ready, willing, and able to sell the parking space. At that time, upon request of the respondent, the case was transferred to the civil division of the BMC.

By late 2014, the Land Court determined that the developer had not retained ownership of the parking spaces and had transferred them to the trust via the master deed. The developer did not appeal the decision. The respondent did not then withdraw the counterclaim against the buyer in the breach of contract action, which remained ongoing in the BMC.

A year after the Land Court determined that the developer did not own the parking space, the buyer amended his breach of contract complaint to add an employee of the developer as an individual defendant. The respondent filed an answer and counterclaim on behalf of the employee and again asserted that that buyer had breached the contract to purchase the parking space, and that the developer had been ready, willing, and able to complete the purchase.

The buyer subsequently filed a motion for summary judgment in the BMC. The buyer also sought dismissal of the counterclaim. The buyer's motion for summary judgment was denied. The respondent then agreed to dismiss the counterclaim. Thereafter the buyer sought sanctions in the BMC against the respondent for advancing a frivolous counterclaim.

The BMC civil division declined to issue sanctions against the respondent. The buyer appealed.

On appeal, the BMC appellate division found that the respondent advanced a counterclaim that was not based in fact or law. The court found that it was clear that the developer did not have clear title to the parking space and that it was not ready, willing, and able to sell. Following remand, the BMC ordered the respondent to pay the buyer the attorneys' fees that he incurred in defending against the frivolous counterclaim, which totaled \$7,200. The respondent promptly complied with the order.

The respondent's conduct in twice asserting a frivolous counterclaim violated Mass. R. Prof. C. 3.1.

The respondent was admitted to practice in Massachusetts in 1999 and has received no prior discipline. The respondent was fully cooperative during bar counsel's investigation. He received an admonition for this misconduct.