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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

SUPERIOR COURT
CIVIL ACTION NO:
09-01794-BSANDRA MURPHY & others¹vs.

MASSACHUSETTS TURNPIKE AUTHORITY

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR
REAL ESTATE ATTACHMENTI. INTRODUCTION

This case arises out of the Massachusetts Turnpike Authority's use of tolls collected on tolled portions of its Metropolitan Highway System ("MHS") to pay costs and expenses for the entire MHS including non-tolled portions. Plaintiffs allege that the use of the tolls for non-tolled roads constitutes an unconstitutional tax. Before the court is the plaintiffs' motion for real estate attachment. For the reasons set forth below, after a hearing and review of the summary judgment record, plaintiffs' motion is DENIED.

II. BACKGROUND

Prior to the enactment of G. L. c. 81A in 1997, the Massachusetts Turnpike Authority ("MTA") managed and funded tolled facilities including the Turnpike and the Sumner/Callahan Tunnels while the Commonwealth financed maintenance and capital needs for all non-tolled interstate and state highways. When the Central Artery² and Tunnel Project regarding interstate highway route 93 ("I-93"), commonly

¹ Douglas J. Barth, Robert Ackley, Joel A. Feingold as beneficiaries of the Massachusetts Turnpike Toll Equity Trust, and Jack Altshuler, as trustee of the Massachusetts Turnpike Toll Equity Trust.

² "Central artery" is defined as "all roadways and tunnels for vehicular traffic constructed by the highway department that constitute that portion of interstate highway route 93 beginning at a point immediately south of the Southampton street interchange, so-called, and continuing to and including the interchange of interstate highway

referred to as "the Big Dig," received federal approval in the early 1980s, its capital cost was estimated at about \$3 billion dollars, all of which was to be funded from the state and federal tax bases. By the mid-1990s, the estimated cost of the Big Dig rose to over \$10 billion dollars. In 1997, G. L. c. 81A was enacted, which placed the MTA in charge of overseeing the construction, maintenance and financing of the Big Dig.

General Laws c. 81A defines the MTA as a "body politic and corporate," authorized to "own, construct, maintain, repair, reconstruct, improve, rehabilitate, refinance, use, police, administer, control and operate" the Turnpike and MHS. G. L. c. 81A, § 1. The statute split the Turnpike into two parts: the western portion of interstate highway route 90 ("I-90") referred to in the statute as "the Turnpike;" and the eastern portion of I-90 which is part of what is now known as the MHS. The Turnpike is defined as the portion of I-90 extending from the town of West Stockbridge on the Commonwealth's border with New York to, but not including, the interchange of I-90 and state highway route 128 in the town of Weston. G. L. c. 81A, § 3. The Turnpike is a tolled highway. The MHS, an integrated system of roadways, bridges, tunnels and related structures and facilities, includes the eastern portion of I-90 between route 128 and Logan Airport, the Big Dig, which includes the central artery and central artery north area, the Zakim bridge and the Callahan, Sumner and Ted Williams tunnels. G. L. c. 81A, § 3. Not all of the roadways within the MHS are tolled.

In addition to the administration of the Turnpike and MHS, the MTA is also authorized "to charge and collect and from time to time fix and revise tolls for transit" on the Turnpike and the MHS. G. L. c. 81A, § 10. On the MHS, currently, tolls are collected on the Sumner, Callahan and Ted Williams tunnels and on the eastern portion of I-90. The revenues that are collected from the tolls on the MHS are used to maintain the entire MHS. The plaintiffs argue that because tolls collected on tolled roadways of the MHS are used to operate and maintain non-tolled roadways, the tolls are transformed from a fee to a tax, and as such are unconstitutional. Before the court is the plaintiffs' motion to attach real estate of the MTA in an amount not less than \$250 million.

route 93 and Massachusetts avenue in the South End section of the city of Boston and continuing to and including the interchange of interstate highway route 90 and interstate highway route 93 in the South Bay section of the city of Boston, so-called, and continuing to and including the interchange of state highway route 1 and interstate highway route 93 in the Charlestown section of the city of Boston including, but not limited to, the so-called Charles river crossing portion of interstate highway route 93 and such additional highway and bridge components as the general court may from time to time determine, but excluding the central artery north area" G. L. c. 81, § 3.

"Central artery north area" is defined as "roadways and tunnels for vehicular traffic constructed by the highway department consisting of a portion of state highway route 1 beginning at, but not including, the southern boundary of the Tobin memorial bridge and continuing to the interchange of interstate highway route 93 and state highway route 1" *Id.*

III. DISCUSSION

Attachments are granted to provide prejudgment security to prevent a defendant faced with the likelihood of an adverse judgment from attempting to conceal, alienate or dissipate assets so as to provide paying that judgment. A party is entitled to an attachment where there is a "reasonable likelihood that [it] will recover judgment, including interest and costs, in an amount equal or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment." Mass. R. Civ. P. 4.1(c).

Assuming for the sake of this motion, without finding such, that the plaintiffs can satisfy the element of likelihood of success on the merits, the plaintiffs' motion fails because of their inability to demonstrate that the defendant will be unable to satisfy a judgment. The defendant, a governmental authority, in addition to its assets in excess of \$7 billion dollars, owns various bridges, roadways and vehicles, and also has the power to borrow and raise funds. See G. L. c. 81A, §§ 4, 10. Unless the moving party comes forth with evidence that the defendant lacks sufficient assets to satisfy a judgment against it on the claims, the court will not presume such is the case. See Mass. R. Civ. P. 4.1(c) & (h); *Aetna Cas. and Sur. Co. v. Rodco Autobody*, 138 F.R.D. 328, 331-332, 340-341 (D.Mass. 1991) (applying Massachusetts law). The plaintiffs have not submitted any evidence to suggest that the MTA lacks sufficient funds or will attempt to conceal, alienate or dissipate assets so as to avoid paying a future judgment.

The plaintiffs argue the need for prejudgment security because there is currently legislation under consideration that would reorganize the MTA into another newly created public instrumentality. This argument is without merit. The plaintiffs have not made any showing that the successor authority would not assume MTA's responsibilities or would be unable to satisfy any judgment that might be issued in this action. The language of both the House and Senate bill explicitly state that the reorganization plan under consideration would transfer MTA's assets and liabilities to a new entity.¹

Furthermore, the plaintiffs cannot reasonably establish the amount of any judgment they might obtain. Under Rule 4.1, an attachment must be for a specified amount. Here, the plaintiffs have asked for an attachment of an amount not less than \$250 million. This case has not been certified as a class action,

¹ The House bill states that "the Massachusetts Transportation and Infrastructure Authority . . . shall be the successor to the financial obligations of the Massachusetts Turnpike Authority . . ." House, No. 4047 (March 25, 2009) § 125, lines 3174-3179. The Senate bill states, "The Massachusetts Turnpike Authority shall transfer the metropolitan highway system . . . and all related assets, liabilities, expenses and obligations to the division of roads and bridges in the Massachusetts Surface Transportation Authority not later than July 1, 2010." Senate, No. 2024 (April 6, 2009) § 57(e), lines 5809-5813.

nor was any evidence presented as to certification, and therefore, the plaintiffs can only assert damages allegedly suffered by the five named individual plaintiffs.⁴ Rule 4.1 requires that all attachment motions "shall be supported by affidavit," and the affidavit "shall set forth specific facts" sufficient to demonstrate a likelihood of success and damages equal to or exceeding the amount of the proposed attachment. Mass. R. Civ. P. 4.1(c) & (h). The plaintiffs have failed to submit any evidence which supports a finding of reasonable likelihood that the damages of the five named plaintiffs equal or exceed \$250 million. See, e.g. *Hamilton v. Arnold*, 135 F.Supp.2d 99, 104-105 (D.Mass. 2001) (denying motion for attachment under Mass. R. Civ. P. 4.1 where plaintiff failed to supply an affidavit setting forth sufficient facts).

IV. ORDER

For the foregoing reasons, it is **ORDERED** that plaintiffs' motion for real estate attachment is **DENIED**.

DATED: June 11, 2009

By the Court



H. B. Smith, Jr.
Justice of the Superior Court

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⁴ The plaintiffs present no evidence as to the requirements of certification under Mass. R. Civ. P. 23.

Ent-1:6/11/09