

Commercial division update: New York's Anti-SLAPP Law: A powerful weapon

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Several Commercial Division decisions adjudicating Anti-SLAPP law claims demonstrate the complexities that can be involved. Indeed, a recent decision dismissing claims brought by Donald Trump against The New York Times provides significant insight into the law's current application.

Strategic lawsuits against public participation, called SLAPP suits, have been characterized as suits having little legal merit but filed "to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *600W. 115th St. v. Van Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992).

New York's Anti-SLAPP law, found in Section 76-a of the New York Civil Rights Law applies to actions "involving public petition and participation" that involve "communication in a place open to the public or a public forum in connection with an issue of public interest" or "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." In practice, the Anti-SLAPP law protects against suits that are designed to silence journalists, activists and the like who have criticized the plaintiff on an issue of public interest, who then retaliates by bringing suit on questionable grounds.

An action found to be a SLAPP suit triggers two significant potential procedural benefits to the defendant. First, unlike a non-SLAPP suit where the general standard for dismissal is the high bar of failure to state a cause of action, the burden

is on the plaintiff bringing a SLAPP suit to avoid dismissal by demonstrating that the claims have a substantial basis in law or are supported by a substantial argument for an extension, modification or reversal of existing law. *Ascend Wellness Holdings v. Medmen NY*, 2023 WL 5332694 (N.Y. Co. Aug. 18, 2023) (quoting CPLR 3211(g)). Second, where dismissal of the SLAPP suit is granted, the defendant is entitled to recover costs and attorney's fees incurred in defending against it.

Several Commercial Division decisions adjudicating Anti-SLAPP law claims, discussed below, demonstrate the complexities that can be involved. Indeed, a recent decision dismissing claims brought by Donald Trump against The New York Times provides significant insight into the law's current application.

The amendments

The Anti-SLAPP law was originally enacted in 1992 in response to concerns "about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards." *Mora v. Koch*, 79

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Misc. 3d 434 (Dutchess Co.2023) At that time, it was narrowly directed at situations where the speech at issue involved public applications for permits, zoning changes and other governmental approvals.

The apparent focus was on real estate developers who, in an effort to quiet those who opposed their developments,brought baseless suits against their opponents, causing them to incur legal fees and annoyance for having spoken out against the developer's plans.

In November 2020, the law was substantially broadened. Because courts applying the prior version of the law had“interpreted the statute to require that ‘the persons properly alleged to be public applicants within the meaning of the Anti-SLAPP statute [are] persons whose proposed actions required government permission;’” it “was rarely if ever successfully invoked as a protection for the news media.” SLAPP Suits-Costs and Fees, Compensatory and Punitive Damages to Defendants, 1992 Sess. Law News of N.Y. Ch. 767 (A. 4299) (McKinney's).

The 2020 amendments broadened the definition of what constitutes an “action involving public petition and participation” covered by that law as any claim based on:

1. any communication in a place open to the public or a public forum in connection with an issue of public interest; or
2. any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

N.Y. Civ. Rights Law §76-a. The amendments also provided that the term “public interest” as used therein “shall be construed broadly, and shall mean any subject other than a purely private matter.” N.Y. Civ. Rights Law §76-a(1)(d).In effect, these amendments broadened the law's scope to cover a greater variety of public participation than speech regarding permitting, zoning and other governmental approval issues.

The amendments did not change the standard for dismissal of a SLAPP suit, that the plaintiff bringing the suit satisfy its burden or demonstrating that it has a substantial basis in law or that substantial arguments existed for modifying existing law.

The amendments did add two new procedural protections for those defending against an alleged SLAPP suit. First,the amendments stayed discovery on the claim while a motion to dismiss is pending. Second, they made the recovery of attorneys' fees and costs mandatory for a defendant who succeeded in dismissing a SLAPP suit,whereas under the earlier law such recovery was discretionary.

Substantial basis

In addressing motions to dismiss SLAPP suits, the courts engage in a two-step analysis. First, a court must determine whether the case falls within the statutory definition of a SLAPP suit, which as noted was broadened by the2020 amendments. Next, the court considers whether the plaintiff bringing the SLAPP suit has carried its burden of demonstrating a substantial basis in law for the claim or for modifying that law, the standard for surviving dismissal both before and after the 2020 amendments.

In *Waterways at Bay Pointe Homeowners Association v. Waterways Development Corporation*, 969 N.Y.S.2d 807(Suffolk Co. 2013), Justice Elizabeth Emerson of the Suffolk County Commercial Division performed this two-step analysis under the pre-amendment version of the law.

The plaintiff in that case was the homeowners association of a condominium project that sued its sponsor for breaching an agreement to pay certain amounts to the association and to construct tennis courts on the property. In response, the defendant sponsor asserted a counter-claim claiming that, while the association had contractually agreed that the defendant could complete the project in accordance with the approved plans and that it would “not interfere or otherwise impede and/or disrupt” those efforts, it breached that agreement in several respects, including by allowing its facilities to be used for meetings to organize opposition to that construction, by sending letters to homeowners encouraging them to oppose further construction and by retaining an attorney to oppose that construction before the zoning board.

In response to a motion to dismiss the counter-claim, the court first found that it fell within the definition of a SLAPP suit under the original law. The court found that the claim was brought by a public applicant, here an applicant for zoning

variances among other things, and was materially related to the plaintiff association's efforts to oppose such application.

However, the court went on to find that the sponsor had met its burden of demonstrating that its counter-claim had a substantial basis in law. The sponsor had met that burden by relying on the contract in which the association had agreed not to interfere with the ongoing development and demonstrating that the association's activities constituted breaches of that agreement.

Another pre-amendment suit, *149 Mercer Owner v. 151 Mercer Retail*, 72 N.Y.S.3d 517 (N.Y. Co. Dec. 5, 2017), dealt with a motion to dismiss alleged SLAPP suit counter-claims.

The plaintiff owner of 149 Mercer Street brought claims alleging that construction work performed at an adjacent property damaged plaintiff's building. The defendant countered by alleging that the plaintiff had made repeated unsubstantiated complaints to the New York City Department of Buildings. The defendant asserted counter claims including for tortious interference with prospective business advantage, nuisance and breach of contract. In moving to dismiss, the plaintiff argued the counter-claims were meritless and asserted solely to stifle the plaintiff's exercise of its right to public petition and participation, in violation of the SLAPP law.

Justice Robert Reed of the New York County Commercial Division denied the motion to dismiss. While the court found that the counter-claims "technically fall within the SLAPP Statute," the court questioned whether the counter-claim defendant was "the sort of defendant the SLAPP Statute is intended to protect." In that regard, the court stated that this was "not a dispute where a citizen activist or civic group, trying to exercise petition and participation rights, is purportedly being harassed by a financially superior opponent by means of baseless complaints and claims."

The court nevertheless denied the motion to dismiss the counter-claims finding they had a substantial basis at law, noting that the "'substantial basis in law' requirement is met where the claimant makes specific allegations to establish the elements of its cause of action and pleads facts sufficient to support its claim." Not only was each element of the counter-claims adequately pleaded, the defendant "also

provided a detailed narrative of what occurred" when alleging the "continuous interference and refusal to cooperate."

Notably, the court held that, under the prior version of the law at issue in that case, because the Anti-SLAPP law is in derogation of common law, the court was required to narrowly construe it. In contrast, the 2020 amendments provided that the term "'[p]ublic interest' shall be construed broadly" and "shall mean any subject other than a purely private matter."

The 'Trump' case

More recently, in the post-amendment case *Trump v. Trump*, 79 Misc. 3d 866 (N.Y. Co. May 3, 2023), Donald Trump sued his niece, Mary Trump, The New York Times, and individual New York Times journalists for their actions related to The New York Times' publication of the 2018 article entitled "Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father," which disclosed certain of Trump's tax information.

His claims centered on a settlement agreement between Trump and Mary in which Mary allegedly had agreed to keep certain information, including Trump's tax information, confidential. The complaint alleged that a New York Times reporter caused Mary "to take 20-year-old tax and financial documents held by her lawyer and disclose them in violation of a 2001 settlement agreement." Trump asserted claims against The New York Times and its journalists for tortious interference with contract, aiding and abetting tortious interference with contract, unjust enrichment and negligent supervision.

Reed determined that the amended Anti-SLAPP statute applied to Trump's claims against *The Times* and its journalists. Indeed, the court found that the amended law "was specifically designed to apply to lawsuits like this one" because of, among other reasons, the "plaintiff's history of litigation—that some observers have described as abusive and frivolous..." The court rejected Trump's assertion that the law applied only to defamation claims.

The court then addressed whether Trump had demonstrated a substantial basis in law or for the modification thereof, holding he had not. It found that The New York Times defendants'

conduct was protected by the free speech rights afforded to them under New York law, including under the New York State Constitution, which defeated the claims. As required by the Anti-SLAPP law, the court awarded the dismissed defendants their attorney's fees and their attorney's fees and costs, amounting to \$392,000.

In a later decision in that same case, the court addressed a motion to dismiss by Mary. *Trump v. Trump*, 80 Misc. 3d765 (N.Y. Co. June 9, 2023). In addition to alleging that Mary had violated her confidentiality obligations in connection with the publication of The New York Times article, Trump alleged that her publication of a book was also a breach.

Initially, the court struggled with whether those claims fell within the definition of a SLAPP lawsuit. Mary asserted that they did because the claims were brought because she had engaged in free speech. In contrast, Trump alleged his claims were not based on her speech but on the actual publication of an article and book in violation of her confidentiality agreement.

The court nevertheless denied the motion to dismiss finding that "at least at this pre-discovery stage," Trump's breach of contract claim had a substantial basis in law. The court stated that, at the early stage of the litigation, it was unable to conclude that plaintiff initiated the suit to target Mary's protected free speech rights.

Conclusion

The applicability of Anti-SLAPP laws can be complex, particularly in light of its significant expansion in 2020 and the limited case law guidance thereunder. As more SLAPP suits make their way through the Commercial Division, further clarity will evolve as to the types of claims that fall within the definition of a SLAPP suit, and the determination of what constitutes a significant basis in law.