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Recent Developments in New York's Amended Anti-SLAPP Law

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The recent expansion of New York's law regarding so-called strategic lawsuits against public participation ("SLAPP") has created some uncertainty regarding what standards apply to currently pending matters arising under New York law involving public petition and participation. The New York legislature and courts are actively engaged in considering these questions, and a new proposed piece of legislation, if adopted, may clarify what standards apply in pending actions.

On July 22, 2020, the New York State Senate and Assembly passed legislation that expanded First Amendment protections under New York's anti-SLAPP law by providing new tools for defendants to challenge frivolous lawsuits. The bill was signed into law by former Governor Andrew M. Cuomo on November 10, 2020. The law amended and extended New York's existing statute (sections 70-a and 76-a of the New York Civil Rights Law) addressing so-called SLAPP suits:[1] suits that seek to punish and chill the exercise of the rights of petition and free speech by subjecting defendants to expensive and burdensome litigation.[2] New York's previous anti-SLAPP law, enacted in 2008, was limited to litigation arising from a public application or permit, often in a real estate development context.[3]

The amendments, which took effect immediately upon enactment, introduced the following key changes to New York law:

- Expanded the statute beyond actions "brought by a public applicant or permittee," to apply to any action based on a "communication in a . . . public forum in connection with an issue of public interest" or "*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*."[4]
- Confirmed that "public interest" should be construed broadly, including anything other than a "purely private matter."[5]
- Required courts to consider anti-SLAPP motions to dismiss based on the pleadings and "supporting and opposing affidavits stating the facts upon which the action or defense is based."[6]
- Provided for a stay of all proceedings—including discovery, hearings, and motions—pending determination of a motion to dismiss an action under the anti-SLAPP law, except that the court may order limited discovery where necessary to allow a plaintiff to respond to an anti-SLAPP motion.[7]
- Provided that the court must award attorneys' fees, and does not have discretion over whether to do so, when it grants such a motion.[8]

New York's existing anti-SLAPP law already provided that a plaintiff in an "action involving public petition and participation" was required, as a matter of state law separate and apart from federal constitutional law, to satisfy the "actual malice" standard first promulgated by the United States Supreme Court in the seminal First Amendment

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decision *New York Times v. Sullivan*.[9] By expanding the definition of an "action involving public petition and participation," the 2020 amendments require plaintiffs in a wider range of actions to satisfy that standard.[10]

When passed, commentators observed that courts would be asked to determine whether the revised statute was "retroactive" in effect, i.e., whether it would apply to actions already pending at the time it became effective, or if it would only have effect in subsequently filed actions. Under New York law, whether a statute is "retroactive" is "a matter of judgment made upon review of the legislative goal," based on "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be."[11]

The first courts to consider the issue uniformly held that the amended anti-SLAPP law did apply retroactively to actions pending as of the date the amendments were passed. For example, on December 29, 2020, United States District Judge Rakoff of the Southern District of New York held in *Palin v. New York Times Company* that the law was retroactive."[12] Judge Rakoff explained that "It is clear that the [amended law] is a remediate statute" that "should be given retroactive effect in order to effectuate its beneficial purpose" and that "[o]ther factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be."[13] In Judge Rakoff's view, "the legislative history demonstrates that the amendments to [the anti-SLAPP law] were intended to correct the narrow scope of New York's prior anti-SLAPP law" such that "the remedial purpose of the amendment should be effectuated through retroactive application."[14] In the *Palin* case, this determination meant that under the amended anti-SLAPP law, New York state law as well as federal constitutional law both separately required the plaintiff to meet the "actual malice" standard to establish her defamation claims. Over the following 14 months, almost 20 other state and federal courts—every court to consider the same question—came to the same conclusion.[15]

But on March 10, 2022, the First Department departed from that building consensus and held that the 2020 amendments to New York's anti-SLAPP law do *not* apply retroactively.[16] In *Gottwald v. Sebert*,* involving defamation claims brought by music producer Lukas Gottwald, known as Dr. Luke, against the pop star Kesha Rose Sebert, known as Kesha, the First Department held that the anti-SLAPP law does not apply to claims commenced before the November 2020 amendments were passed.[17] In that litigation, the New York trial and appellate courts had previously held that Dr. Luke did not qualify as a public figure and so was not required to meet the actual malice standard as a matter of federal constitutional law.[18] Kesha sought a ruling that the amended New York anti-SLAPP law applied retroactively to Dr. Luke's claims, which had been filed before the amendments to the anti-SLAPP law were enacted, and so required Dr. Luke to meet the actual malice standard under New York state law.[19] Kesha also sought to bring new anti-SLAPP counterclaims against Dr. Luke under the amended New York anti-SLAPP law which would have allowed her, if she prevailed, to recover attorneys' fees.[20] However, because the claims at issue were brought prior to November 2020, the First Department held that the "actual malice" standard did not apply and that Kesha could not bring anti-SLAPP counterclaims.[21]

The First Department explained that there was "insufficient evidence supporting the conclusion that the legislature intended" the recent amendments to the anti-SLAPP law "to apply retroactively to pending claims," like those asserted by Dr. Luke against Kesha.[22] The First Department held that to defeat the strong presumption against applying laws retroactively, there would need to be clear evidence that the law was intended to apply retroactively. It reasoned that, despite evidence that the amendments were intended to remediate the prior anti-SLAPP provision by broadening its scope,

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retroactive application of new statutes is so disfavored that it must be made explicit in the statutory text.[23]

Kesha has moved for reargument of that decision or for leave to appeal to the New York Court of Appeals, New York's highest court.[24] Her motion is supported by a number of *amici*, including New York State Senator Brad Hoylman, who co-authored the 2020 amendments to New York's anti-SLAPP law.[25] Senator Hoylman asserted in his proposed *amicus* brief in support of Kesha's motion that the legislature *did* intend for the law to have retroactive effect, explaining that the drafting history of the amendments and his personal understanding of the amendments support applying them retroactively.[26] Dr. Luke responded by arguing, among other things, that Senator Hoylman's brief improperly seeks to "influence the judicial interpretation of a statute" post-enactment, which "threaten[s] to undermine fundamental separation of powers principles," and disputed his interpretation of the drafting history.[27]

Most recently, on May 12, 2022, Senator Hoylman introduced a new bill to further amend the New York anti-SLAPP law, seeking among other things to "clarify" that the amended statute applies retroactively by appending language unambiguously providing retroactive effect.[28] The bill also clarifies the "substantial basis" standard applicable to motions to dismiss actions under the anti-SLAPP statute.[29]

The new proposed amendments are at the beginning of the legislative process. It remains to be seen whether the new amendments will receive support in the legislature and be enacted into law by the Governor's signature, and if so, on what timeline. The current amended anti-SLAPP law was initially introduced on January 9, 2019, was passed on July 22, 2020, and was signed into effect on November 10, 2020.[30] A similar time frame for the new proposed amendments would see them take effect in the middle of 2024. And separately, it remains to be seen how the courts, including the First Department and perhaps the Court of Appeals in *Gottwald v. Sebert* and other pending actions, will construe the new proposed amendments in determining whether the existing anti-SLAPP law already applies retroactively. Further developments in this complicated and important area of New York law are sure to follow in the near future.

** Gibson, Dunn & Crutcher LLP represented Sony Music Entertainment in Gottwald v. Sebert, No. 653118/2014 (Sup. Ct. N.Y. Cty.).*

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[1] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a.

[2] *Understanding Anti-SLAPP Laws*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/resources/anti-slapp-laws/ (last visited May 17, 2022).

[3] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a.

[4] *Id.* (emphasis added).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* (emphasis added).

[9] *Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 28–29 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and N.Y. Civil Rights Law § 76-a(2)).

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[10] *Id.*

[11] *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 997–98 (N.Y. App. Div. 2d Dep't 2011).

[12] 510 F. Supp. 3d 21, at 27 (S.D.N.Y. 2020); *see also Novagold Resources, Inc. v. J Capital Research USA LLC*, 2022 WL 900604, *9 (E.D.N.Y. Mar. 28, 2022) (applying New York's anti-SLAPP amendment retroactively); *Coleman v. Grand*, 2021 WL 768167, at *8 (E.D.N.Y. Feb. 26, 2021) (same); *Sackler v. American Broadcasting Companies, Inc.*, 144 N.Y.S.3d 529, 532 (Sup. Ct. 2021) (same).

[13] *Id*. at 26–27 (quoting *Matter of Gleason*, 96 N.Y.2d 117, 122 (2001)) (internal quotation marks omitted)..

[14] *Id.* at 27 (citation omitted).

[15] Memorandum of Law in Support of Motion of Defendant-Respondent for Reargument or, in the Alternative, Leave to Appeal, *Gottwald v. Sebert*, No. 2021-03036, Dkt. 20 at 15 n.1 (N.Y. App. Div. 1st Dep't Apr. 11, 2022).

[16] *Gottwald v. Sebert*, 203 A.D.3d 488 (N.Y. App. Div. 1st Dep't 2022).

[17] *Id.* at 489.

[18] *See Gottwald v. Sebert*, 193 A.D.3d 573, 576–78 (N.Y. App. Div. 1st Dep't 2021). That decision has been appealed to the New York Court of Appeals, New York's highest court, which has not resolved the question of Dr. Luke's public figure status. *See Gottwald v. Sebert*, No. 2020-01908, Dkt. 69 (N.Y. App. Div. 1st Dep't Jul. 22, 2020).

[19] Defendant Kesha Rose Sebert's Memorandum of Law in Support of her Motion for a Ruling that Civil Rights Law Section 76-a Applies to Plaintiffs' Defamation Claims and for Leave to Assert a Counterclaim, *Gottwald v. Sebert*, No. 653118/2014, Dkt. 2303 at 1 (Sup. Ct. N.Y. Cnty. Apr. 6, 2021).

[20] *Id.*

[21] *Gottwald*, 203 A.D.3d at 489.

[22] *Id.* at 488.

[23] *Id.*

[24] Memorandum of Law in Support of Motion of Defendant-Respondent for Reargument or, in the Alternative, Leave to Appeal, *Gottwald v. Sebert*, No. 2021-03036, Dkt. 20 (N.Y. App. Div. 1st Dep't Apr. 11, 2022).

[25] *See* Notice of Motion for Leave of Senator Brad Hoylman to Participate as *Amicus Curiae*, *Gottwald et al. v. Sebert*, No. 2021-03036, Dkt. 25 (1st Dep't) (filed April 15, 2022).

[26] *Id.*, Proposed *Amicus* Brief at 4–5.

[27] Omnibus Opposition to Motions For Leave to File *Amicus Curiae* Briefs In Support of Respondent's Motion for Reargument or Leave to Appeal, No. 2021-03036, Dkt. 26 at 10–11 (1st Dep't) (filed April 22, 2022).

[28] 2022 N.Y. Senate Bill No. S9239 (May 12, 2022), https://www.nysenate.gov/legislation/bills/2021/s9239.

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[29] *Id.*

[30] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a.

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