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NEW YORK'S HIGHEST COURT ADDRESSES RECENT ANTI-SLAPP AMENDMENTS AND MULTIPLE ASPECTS OF DEFAMATION LAW IN LAWSUIT AGAINST KESHA

To Our Clients and Friends:

The New York Court of Appeals, the highest court in New York, recently issued a decision regarding several elements of New York's defamation law, including what plaintiffs qualify as "public figures" for purposes of determining their burden of proof for defamation claims, the applicability of New York privileges against defamation liability, and the scope of certain of the 2020 amendments to New York's anti-SLAPP law. Those amendments to sections 70-a and 76-a of the New York Civil Rights Law strengthened the protections for defendants in so-called SLAPP suits ("strategic lawsuits against public participation") that seek to punish and chill the exercise of the rights of petition and free speech. Notably, this appears to be the first decision from New York's highest court regarding the amendments New York adopted to its anti-SLAPP law in 2020.

Background

In *Gottwald v. Sebert*,* the New York Court of Appeals considered a dispute between the singer/songwriter Kesha Rose Sebert, known as "Kesha," and the music producer Lukasz Gottwald, known as "Dr. Luke."[1] In 2014, Kesha, who had been under contract with Gottwald in connection her recording career, sued Gottwald in California alleging that Gottwald had sexually assaulted her and seeking to void her contractual arrangements with him.[2] The same day, Gottwald sued Kesha in New York, alleging that Kesha and her attorneys had defamed him.[3]

While Gottwald's defamation action was pending, New York amended its existing anti-SLAPP law in a number of ways.[4] New York's previous anti-SLAPP law, enacted in 2008, was limited to litigation arising from a public application or permit, "usually in a real estate development situation."[5] Among other things, as relevant here, the 2020 amendments "substantially expanded" the definition of "an action involving public petition and participation" to which the anti-SLAPP law would apply.[6] The anti-SLAPP law already required a plaintiff in any action to which the anti-SLAPP law applied to meet the "actual malice" standard, so expanding the scope of actions to which the anti-SLAPP law applies also expanded the actions in which plaintiffs were required to show actual malice.[7] Similarly, the anti-SLAPP law already allowed defendants to file a counterclaim to seek compensatory and punitive damages; expanding the scope of the anti-SLAPP law also expanded the set of actions in which defendants could seek that relief. And the 2020 amendments also created a mandatory fee-shifting provision, meaning that courts are required to award attorneys' fees to defendants who defeat actions to which the anti-SLAPP law applies.[8]

After New York amended its anti-SLAPP law, Kesha sought leave to assert a counterclaim under the amended anti-SLAPP law for attorneys' fees, damages for emotional distress, and punitive damages, as the amended law permits.[9]

After initial rulings at the trial court, the First Department intermediate appellate court issued two separate rulings on Kesha's defenses, ruling that Gottwald was not a public figure; that whether Kesha's statements were protected by New York privileges against defamation liability was a fact question that only the jury could resolve; and that the amended anti-SLAPP law did not apply to Gottwald's claims because he had filed his claims before the amendments to the anti-SLAPP law were adopted.[10]

Kesha appealed both those rulings to the New York Court of Appeals, New York's highest court. On June 13, 2023, the New York Court of Appeals reversed the appellate court in whole or in part on each issue.[11]

Public Figure Status

Under governing precedent from the United States Supreme Court, as a matter of federal constitutional law, a defamation plaintiff found to qualify as a "public figure" can only establish defamation liability if he proves by clear and convincing evidence that defamatory statements were made about him with "actual malice," meaning with knowledge that the statement was false or with reckless disregard as to whether the statement was false.[12] Public figures come in two varieties. A general or "all-purpose public figure" is so prominent as to qualify as a public figure for all purposes, regardless of what defamatory statements are made or what subject matter those statements address.[13] Alternatively, plaintiffs will qualify as a "limited-purpose public figure" even if they do not have such broad notoriety if they nonetheless have invited and achieved public attention with respect to the subject matter the defamatory statements address.[14]

In the *Gottwald* case, the First Department intermediate appellate court held that Gottwald was not a general-purpose public figure because he was not a "celebrity" or a "household word."[15] And the court held he was not a limited-purpose public figure with respect to Kesha's allegedly defamatory statements about him because those statements accused him of sexual assault and Gottwald had done nothing to achieve public prominence with respect to the "specific public dispute . . . [of] sexual assault and the abuse of artists in the entertainment industry."[16] Therefore, the court found, Gottwald's acknowledged fame as a music producer and the notoriety he had achieved for his relationships with the artists he represented was irrelevant.[17]

A dissent at the First Department intermediate appellate court authored by Justice Saliann Scarpulla argued that the majority had misapplied the standard to determine when a plaintiff qualifies as a public figure.[18] The dissent argued that Gottwald probably qualified even as a general-purpose public figure because, though not a "household name" everywhere, he was "a household name to those that matter."[19] But even if not, the dissent argued that Gottwald was at minimum a limited-purpose public figure "in connection with the dynamics of his relationship to the artists with whom he works and upon which he has built his well-known professional reputation."[20] The dissent argued that the panel's application of the public-figure analysis was too narrow: "That Dr. Luke has not spoken publicly about

Kesha's allegations of sexual assault is not surprising, is not relevant, and does not preclude a finding that he is a limited purpose public figure. The definition of limited purpose public figure is not so cramped as to only include individuals and entities that purposefully speak about the specific, narrow topic (in this case a protégé's sexual assault) upon which the defamation claim is based."[21]

The New York Court of Appeals reversed, "agree[ing] with the dissent below" that Gottwald met the standard to qualify as a limited-purpose public figure, because he had "purposefully sought media attention for himself, his businesses, and for the artists he represented, including Sebert, to advance those business interests."[22] Therefore, Gottwald will be required to prove that Kesha made statements about him with "actual malice" to establish her liability.[23]

Privileges Against Defamation Liability

Kesha also argued that certain statements identified in Gottwald's complaint were protected by certain of New York privileges against defamation liability: New York's absolute common-law privilege for statements made in connection with judicial proceedings; its qualified common-law privilege for statements made in anticipation of litigation; and its statutory privilege codified at Civil Rights Law Section 74 for "fair and true reports" of judicial proceedings.[24]

Absolute Common-Law Privilege For Statements Made In Connection With Judicial Proceedings

New York courts have held that statements made in connection with judicial proceedings are absolutely privileged against defamation liability if they are pertinent to that proceeding.[25] Since 1986,[26] lower New York courts, beginning with the First Department intermediate appellate court, have identified an exception to that doctrine termed the "sham" exception, holding that the absolute privilege "will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant."[27] The First Department intermediate appellate court reaffirmed this exception as recently as 2015, when it expressly rejected a trial court's conclusion that the First Department's "sham" exception had "waned" in value.[28]

In *Gottwald*, the First Department intermediate appellate court held that whether the "sham" exception applied was a fact question that turned on whether Kesha sued Gottwald in good faith or as a sham.[29] Therefore, Kesha could not obtain summary judgment on the basis of that privilege; only the jury could decide whether Kesha could benefit from the absolute privilege for statements made in connection with judicial proceedings.[30]

The New York Court of Appeals reversed, holding that it was "error" to apply a "sham exception" to New York's common-law absolute privilege for statements made in connection with judicial proceedings.[31] It was "inconsistent" with the Court of Appeals' prior decisions regarding the absolute privilege for a court to examine the motive of the speaker.[32] Instead, if a statement was made in connection with a judicial proceeding and was pertinent to that proceeding, the absolute privilege applies.[33] The New York Court of Appeals therefore held that the absolute privilege applied to statements Kesha and her attorneys made in connection with her litigation against Gottwald.[34]

Qualified Common-Law Privilege For Statements Made In Anticipation Of Litigation

New York courts have also recognized a qualified privilege for statements made in good-faith anticipation of litigation.[35] However, unlike the absolute privilege for statements made in connection with a judicial proceeding, New York's qualified privilege can be "lost . . . where a defendant proves that the statements were not pertinent to a good faith anticipated litigation."[36] And because Gottwald had argued there is a factual dispute as to whether Kesha actually had a good-faith anticipation of litigation at the time she made some challenged statements, the Court of Appeals agreed with the lower courts that the jury would have to determine whether the qualified privilege applied only after determining whether Kesha actually had a good-faith anticipation of litigation at the time that she and her agents made the relevant statements.[37]

Civil Rights Law Section 74 Fair Report Privilege

Finally, New York has adopted a statutory privilege immunizing statements that publish a "fair and true report of any judicial proceeding" where the statement is "substantially accurate."[38] The New York Court of Appeals has previously held that, unlike the common-law absolute privilege for statements made in connection with judicial proceedings, the statutory "fair report" privilege does include an exception for statements made by a plaintiff who "maliciously institute[s] a judicial proceeding" in order to make defamatory statements in connection with that proceeding.[39] In *Gottwald*, the New York Court of Appeals agreed with the lower courts that whether the fair report privilege applied was a question for the jury after determining whether Kesha's claims against Gottwald "were brought . . . in good faith or maliciously to defame Gottwald."[40]

Applicability Of Amended Anti-SLAPP Law

Finally, the New York Court of Appeals considered whether the amendments to the anti-SLAPP law applied "retroactively" and applied to Gottwald's claims even though he filed them before the New York anti-SLAPP law was amended.[41] If the amendments applied "retroactively," they would apply to Gottwald's claims in their entirety throughout the entire course of the litigation, including over the six years the matter was litigated before the amendments were adopted in 2020.

Kesha primarily argued that two separate elements of the 2020 amendments to New York's anti-SLAPP law should apply retroactively in *Gottwald*. First, Kesha argued that Gottwald should be required to meet the "actual malice" standard, regardless of whether he qualified as a public figure.[42] Second, Kesha argued that she should be entitled to file a counterclaim under the amended anti-SLAPP law that would entitle her to recover attorneys' fees, damages for emotional distress, and punitive damages if she ultimately prevailed in the litigation.[43]

Until the *Gottwald* case was decided by the First Department intermediate appellate court, a significant number of state and federal courts had held that the 2020 amendments to the anti-SLAPP law did apply retroactively to any matter pending at the time they were adopted.[44] The First Department intermediate appellate court in *Gottwald* was the first court to hold otherwise, holding instead that the amendments did not apply retroactively and applied only to claims filed after the amendments were adopted.[45] The First Department intermediate appellate court reached that decision as to both the

question of whether Gottwald was required under the amended anti-SLAPP law to meet the "actual malice" standard and as to the question of whether Kesha could file a counterclaim under that law for attorneys' fees and damages—answering both questions in the negative.[46]

Because the New York Court of Appeals had already held that Gottwald did qualify as a public figure and therefore was required to meet the "actual malice" standard, it did not consider the question of whether the 2020 amendments to the anti-SLAPP law also independently required him to do so.[47]

The New York Court of Appeals held that the provisions of New York's amended anti-SLAPP law authorizing a defendant to counterclaim for attorneys' fees and damages did not apply retroactively.[48] The Court held that the legislature did not expressly provide that the amendments should apply retroactively.[49] In particular, the Court held that because the amendments that allowed a defendant to bring a counterclaim for attorneys' fees and damages constituted a "statute imposing damages," they should not "presumptively apply in pending cases."[50]

Instead, the Court held that because the amendments to the anti-SLAPP law provided that defendants could recover attorneys' fees and damages for an action "commenced *or continued*" improperly, the amendments could apply to Gottwald's claims, but only with respect to events that occurred after the amendments were adopted.[51] This did not constitute "retroactive" application, the Court held, because "these provisions are applied, according to their terms, to the continuation of the action beyond the effective date of the amendments."[52] In other words, the Court held that Kesha may bring a counterclaim under New York's amended anti-SLAPP law to recover attorneys' fees and damages, but only for attorneys' fees and damages that arose after the amendments were enacted, and not before: "Because Gottwald's liability [under the amended anti-SLAPP law] attached, if at all, when he chose to continue the defamation suit after the effective date of the statute, any potential calculation of attorneys' fees or other damages begins at the statute's effective date."[53]

Dissent

Judge Jenny Rivera of the New York Court of Appeals dissented in part.[54]

Judge Rivera argued in dissent that the majority had erred regarding the scope of New York's qualified privilege for statements made in anticipation of litigation.[55] Judge Rivera would have held that on the undisputed record, the statements in question were clearly made in anticipation of litigation because they were made while pre-suit settlement negotiations were ongoing, shortly before Kesha filed suit in California against Gottwald, and were made either in connection with settlement negotiations or as part of sharing information with the press under pre-suit embargo.[56] Judge Rivera argued that requiring a jury to decide whether Kesha had a good-faith anticipation of litigation on that record "severely limits settlement efforts" by allowing potential defamation liability to attach.[57]

Judge Rivera also argued in dissent that the majority had erred regarding the scope of New York's statutory "fair report" privilege.[58] Judge Rivera would have held that the statements of Kesha and her attorneys about litigation with Gottwald qualified as a "fair report" without examining her motives in bringing the litigation.[59] Judge Rivera argued that the *Gottwald* majority had "extend[ed]" the "sham"

exception to the New York statutory "fair report" privilege in a way that "risk[ed] eroding the privilege altogether."[60]

Finally, Judge Rivera argued in dissent that the majority had erred regarding the retroactivity of the 2020 amendments to the New York anti-SLAPP law.[61] Judge Rivera would have held that those amendments were retroactive and applied to Gottwald's suit in its entirety, dating to the day it was commenced.[62] In particular, Judge Rivera argued that the majority was wrong to treat the amendments that allowed defendants to assert a counterclaim for attorneys' fees and damages as a new law that "introduced damages liability" for the first time.[63] Judge Rivera argued that the 2020 amendments instead articulated a specific version of a remedy that always existed—the availability of sanctions, including attorneys' fees and damages, for filing a frivolous lawsuit—and so should not be treated as a statute imposing liability on past conduct that had not been a basis for liability at the time that conduct occurred.[64] Judge Rivera disagreed with the majority's interpretation of the statutory phrase "commenced or continued," which she would have found was a reason to hold the amendments applied retroactively, rather than applying only as of the date the amendments were adopted. In Judge Rivera's view, "[t]he majority's prospective-only construction of the 'commenced or continued' language . . . is an overly narrow construction of that phrase. The fact that any action continued at the time of the effective date of the amendments falls within the scope of the statute means just that; it does not necessarily or by implication mean that monetary relief is measured from the effective date. Despite the majority's effort to complicate straightforward language, the meaning and effect of the word 'commenced' in the phrase 'commenced or continued' tracks to the person who commenced the prohibited legal action."[65]

Conclusion

This decision from the highest court of New York provides additional precedent regarding the categories of plaintiffs who will qualify as public figures under New York law, the availability of New York common-law and statutory privileges against defamation liability, the retroactivity of New York's amended anti-SLAPP law, and the analysis New York courts should apply to evaluate whether newly enacted laws should have retroactive effect. The New York Court of Appeals expressly left open the question of whether other provisions of New York's amended anti-SLAPP statute will have retroactive effect as to cases pending at the time those amendments were adopted.

** Gibson, Dunn & Crutcher LLP represents Sony Music Entertainment with respect to third-party discovery in the trial court in Gottwald v. Sebert, No. 653118/2014 (Sup. Ct. N.Y. Cty.); claims against Sony Music Entertainment in the trial court have been dismissed.*

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[1] *Gottwald v. Sebert* ("*Gottwald III*"), No. 32, 2023 WL 3959051 (N.Y. June 13, 2023).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.* at *2.

[5] 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.

[6] *Gottwald III*, 2023 WL 3959051 at *5.

[7] *Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 28–29 (S.D.N.Y. 2020)(citing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and N.Y. Civil Rights Law § 76-a(2)).

[8] *Gottwald III*, 2023 WL 3959051 at *5.

[9] *Gottwald III*, 2023 WL 3959051 at *2.

[10] *Gottwald v. Sebert* ("*Gottwald II*"), 165 N.Y.S.3d 38 (App. Div. 1st Dept. 2022); *Gottwald v. Sebert* ("*Gottwald I*"), 148 N.Y.S.3d 37 (App. Div. 1st Dept. 2021).

[11] *Gottwald III*, 2023 WL 3959051.

[12] *Huggins v. Moore*, 94 N.Y.2d 296, 301 (1999); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

[13] *Gottwald III*, 2023 WL 3959051, at *2, *14 n.8.

[14] *Gottwald III*, 2023 WL 3959051, at *2.

[15] *Gottwald I*, 148 N.Y.S.3d at 43.

[16] *Id.* at 43–45.

[17] *Id.* at 44–45.

[18] *Id.* at 47–51 (Scarpulla, J., dissenting).

[19] *Id.* at 48–49 (Scarpulla, J., dissenting).

[20] *Id.* at 49–51 (Scarpulla, J., dissenting).

[21] *Id.* at 50 (Scarpulla, J., dissenting).

[22] *Gottwald III*, 2023 WL 3959051, at *2–3.

[23] *Id.* at *3.

[24] *Id.* at *3–4.

[25] *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718 (2015).

[26] *Halperin v. Salvan*, 117 A.D.2d 544, 548 (1st Dept. 1986).

[27] *Gottwald I*, 148 N.Y.S. at 46.

[28] *Flomenhaft v. Finkelstein*, 127 A.D.3d 634, 638 (1st Dep't 2015).

[29] *Gottwald I*, 148 N.Y.S.3d at 46.

[30] *Id.*

[31] *Gottwald III*, 2023 WL 3959051, at *3.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at *4.

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing Civil Rights Law § 74, *Holy Spirit Assn. for Unification of World Christianity v. New York*, 49 N.Y.2d 63, 67 (1979)).

[39] *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969).

[40] *Gottwald III*, 2023 WL 3959051, at *4.

[41] *Id.* at *5–7.

[42] *Id.* at *5.

[43] *Id.* at *6.

[44] 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).

[45] *Gottwald II*, 165 N.Y.S.3d at 39–40.

[46] *Id.*

[47] *Gottwald III*, 2023 WL 3959051, at *5.

[48] *Id.* at *6–8.

[49] *Id.* at *6.

[50] *Id.* at *7.

[51] *Id.* at *6.

[52] *Id.*

[53] *Id.*

[54] *Gottwald III*, 2023 WL 3959051, at *8–17 (Rivera, J., dissenting).

[55] *Id.* at *14–15 (Rivera, J., dissenting).

[56] *Id.*

[57] *Id.* at *14 (Rivera, J., dissenting).

[58] *Id.* at *15–16 (Rivera, J., dissenting).

[59] *Id.*

[60] *Id.* at *16 (Rivera, J., dissenting).

[61] *Id.* at *9–13 (Rivera, J., dissenting).

[62] *Id.* at *10–11 (Rivera, J., dissenting).

[63] *Id.* at *10 n.4, *12–13 (Rivera, J., dissenting).

[64] *Id.*

[65] *Id.*

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