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New York First Department Clarifies the Applicability of New York's Anti-SLAPP Statute

Anti-Strategic Lawsuits Against Public Participation ("anti-SLAPP") laws are designed to discourage the use or threat of litigation to stifle free expression. In November 2020, New York State amended its anti-SLAPP statute to greatly expand its protections. Since this amendment, federal courts have wrestled with whether the law (or portions of it) apply in federal cases — sometimes struggling to determine which provisions are substantive (and therefore applicable in federal actions) and which are procedural (and therefore inapplicable).

On November 28, 2023, in *161 Ludlow Food* v. *L.E.S. Dwellers*, the Appellate Division of the Supreme Court of New York, First Department, offered some clarity, holding that New York's anti-SLAPP procedural rules under Civil Practice Law and Rules ("CPLR") Sections 3211 and 3212 operate independently of the provisions of New York's anti-SLAPP statute that permit parties to recover attorneys' fees and punitive damages. Therefore, the portions of the statute that permit the recovery of attorneys' fees and punitive damages are substantive provisions that apply in federal actions.

I. Background

A. The New York Anti-SLAPP Law

Strategic lawsuits against public participation ("SLAPPs") are actions brought for the purpose of threatening or silencing critical speech. SLAPP suits lack a valid basis in law or fact but are brought to curtail the speech of current or future critics through the threat of legal liability and expensive and/or time-consuming litigation. In recognition of the danger such suits pose to free speech, many states have adopted anti-SLAPP laws designed to curtail such meritless suits. New York, for example, passed its original anti-SLAPP law in 1992.[1]

New York's original anti-SLAPP law, however, protected only limited categories of speech. The law protected defendants in legal actions "involving public petition and participation," N.Y. Civ. Rights § 70-a, defining this term to include only cases brought by plaintiffs seeking public permits, zoning changes, or other entitlements from a government body.[2] Under this narrow definition, a substantial amount of speech about issues of public concern — including most speech by journalists — was not covered by the anti-SLAPP statutory scheme. As one court wrote, nearly 15 years after its enactment, the anti-SLAPP law had not been successfully used to protect speech by a journalist.[3]

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[1] 1992 Sess. Laws of N.Y. Ch. 767, §§ 2-5 (A. 4299) (McKinney's).

[2] N.Y. Civ. Rights § 76-a ("'Public applicant or permittee' shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.").

[3] *Cholowsky* v. *Civiletti*, 16 Misc. 3d 1138(A), 2007 WL 2684684, at *2 (N.Y. Sup. Ct. Sept. 5, 2007).

In 2020, New York amended its anti-SLAPP statutory scheme to broaden substantially its protections. Today, New York's anti-SLAPP scheme includes four statutes that work in concert to limit SLAPP suits:

1. **New York Civil Rights Law Section 76-a** defines who qualifies for SLAPP protection and defines the standard of proof for a plaintiff in a SLAPP action as actual malice.[4]
2. **New York Civil Rights Law Section 70-a** allows a prevailing SLAPP defendant to obtain costs attorneys' fees.[5]
3. **CPLR 3211(g)** requires that courts grant a special motion to dismiss a SLAPP suit unless a plaintiff demonstrates a substantial basis in law for its claim.[6]
4. **CPLR 3212(h)** requires courts to grant motions for summary judgment for the defendant unless a plaintiff demonstrates a substantial basis in fact and law.[7]

The 2020 amendment included three key changes to the anti-SLAPP scheme. First, New York expanded the scope of protection of the anti-SLAPP law — set forth in New York Civil Rights Law Section 76-a — to include all speech on a matter of public interest.[8] By expanding the definition of matters "involving public petition and participation" to include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "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," New York substantially broadened the scope of speech protected by the statute and the protections provided to such speech. New York's anti-SLAPP law now applies to all protected expression on matters of public interest, which includes all or nearly all news journalism.[9]

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[4] N.Y. Civ. Rights Law § 76-a (McKinney's) ("An 'action involving public petition and participation' is a claim based upon: (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. . . . In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.").

[5] N.Y. Civ. Rights Law § 70-a (McKinney's) ("[C]osts and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.").

[6] CPLR 3211(g) (McKinney's) ("A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.").

[7] CPLR 3212(h) (McKinney's) ("A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law.").

[8] 2020 Sess. Laws of N.Y. Ch. 250, § 2 (A. 5991-A) (McKinney's) (deleted language limiting claims to "public applicants or permittees, and is materially related to any efforts of the defendants to report on, comment on, rule on, challenge or oppose such application or permission" and revised the claim to one "based upon (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").

[9] *See, e.g.*, *VIP Pet Grooming Studio, Inc.* v. *Sproule*, 203 N.Y.S.3d 681, 686 (App. Div. 2024) ("The 2020 amendments to the Civil Rights Law expanded the pool of parties that may raise anti-SLAPP defenses, counterclaims, and cross-claims in their actions, now including journalists, consumer advocates, survivors of sexual abuse, and others.").

Second, New York revised the fee award provisions — set forth in Civil Rights Law Section 70-a — to make fee-shifting awards mandatory, not discretionary, when a plaintiff's case lacks a substantial basis in fact or law.[10]

Finally, New York revised CPLR 3211(g) to provide for an immediate stay of discovery while a special anti-SLAPP motion to dismiss is pending.[11]

Although these 2020 revisions have expanded the protections offered to speech under New York's anti-SLAPP statute, the protections have been limited by inconsistent application of the statutory scheme in federal court.

B. Federal Courts Have Applied New York's Anti-SLAPP Provisions Inconsistently

Under the *Erie* doctrine,[12] a federal court sitting in diversity jurisdiction will apply state substantive laws. But where there is a conflict between state and federal procedural law, the court will apply federal procedural law.[13] Categorization of state laws as "procedural" or "substantive" can thus have significant consequences for parties bringing state claims in federal court, and since New York passed its first anti-SLAPP statute in 1992, federal courts have debated the substantive versus procedural contours of the statute. And with New York's dramatic expansion of the anti-SLAPP statute's protections in 2020, the question of whether or not federal courts will apply the protections has only increased in importance.[14]

Federal courts in New York have generally found that CPLR 3211(g) and 3212(h) do not apply in federal court because they dictate procedure for anti-SLAPP cases that conflicts with the Federal Rules of Civil Procedure (i.e., special motions to dismiss or for summary judgment with different legal standards than those applied under the Federal Rules of Civil Procedure).[15] But most New York federal courts have applied Civil Rights Law Sections 70-a and 76-a in federal courts as substantive provisions. Rulings on this issue, however, have not been uniform.

For example, Judge Jed Rakoff applied Civil Rights Law Section 76-a in *Palin* v. *New York Times*, finding that he was bound to "apply § 76-a because it is a substantive, rather than procedural, provision."[16] Judge Eric Vitaliano agreed in *Coleman* v. *Grand*, finding that Section 76-a was "manifestly substantive" in "governing the merits of libel claims and increasing defendants' speech protections."[17] Also, in June 2023, the Second Circuit affirmed Judge Paul Engelmayer's application of Section 76-a's actual malice standard to dismiss a SLAPP action, implying that Section 76-a is generally applicable in federal court.[18] In a footnote, the court stated that it "assumed without deciding that the anti-SLAPP amendment" was applicable; thus, its discussion of Section 76-a in relation to anti-SLAPP was non-binding dicta.[19]

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[10] 2020 Sess. Laws of N.Y. Ch. 250, § 1 (A. 5991-A) (McKinney's) (replaced "may" with "shall" regarding recovery of costs and attorneys' fees).

[11] 2020 Sess. Laws of N.Y. Ch. 250, § 3 (A. 5991-A) (McKinney's) (adding subsection (3) providing for stays of discovery: "All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section").

[12] *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[13] Matthew L. Schafer & Tanvi Valsangikar, *The Application of the New York Anti-SLAPP Scheme in Federal Court*, 2 JOURNAL OF FREE SPEECH LAW 573, 583–92, available at https://www.journaloffreespeechlaw.org/schafer.pdf.

[14] *Id.* at 598-624.

[15] For example, in *Carroll* v. *Trump*, the court found that CPLR 3211(g) conflicted with Federal Rule of Civil Procedure 12 and therefore did not apply. 590 F. Supp. 3d 575, 584-85. The court found that while Rule 12 was deferential to plaintiffs, Rule 3211(g) required plaintiffs meet a heightened standard to avoid dismissal. *Id.* at 584. Additionally, while Rule 3211(g) suggests that plaintiffs make an evidentiary showing to avoid dismissal, Rule 12 does not. *Id.*

[16] *Palin* v. *New York Times Co.*, 510 F. Supp. 3d 21, 26 (S.D.N.Y.).

[17] *Coleman* v. *Grand*, 523 F. Supp. 3d 244, 258 (E.D.N.Y. 2021).

[18] *Kesner* v. *Dow Jones & Co.*, 2023 WL 4072929, at *2 (2d Cir. June 20, 2023).

[19] *Id.* at *2 n.2.

But in *Waite* v. *Gonzalez*, Judge Pamela Chen expressed doubt that any portion of New York's anti-SLAPP statute applies in federal court.[20] Judge Chen wrote that "[t]he Court is dubious as to whether New York's anti-SLAPP law applies in federal court," noting "[t]he Second Circuit has yet to squarely address this issue."[21] She cited the Second Circuit's decision in *La Liberte* v. *Reid*, finding that California's anti-SLAPP law, in its entirety, was superseded in federal court by Federal Rules of Civil Procedure 12(b)(6) and 56, which conflict with the anti-SLAPP laws' heightened pleading standards.[22] Similarly, in *National Academy of Television Arts and Sciences Inc.* v. *Multimedia System Design, Inc.*, Judge Valerie Caproni held in 2021 that Section 70-a of New York's anti-SLAPP regime did not apply, because the "substantial basis" standard conflicted with Federal Rules of Civil Procedure 12 and 56, since the "substantial basis" standard was a heightened burden on plaintiffs at the pleading stage.[23]

Some federal courts have used the heightened procedural standards of the amended anti-SLAPP laws to block the entire anti-SLAPP regime from applying in federal court. As these cases demonstrate, New York federal courts have reached inconsistent conclusions about which provisions of New York's anti-SLAPP statute are procedural and which are substantive. *161 Ludlow Food* v. *L.E.S. Dwellers* resolves any confusion.

C. The 161 Ludlow v. L.E.S. Dwellers Dispute

In 2018, plaintiff 161 Ludlow Food, a bar/restaurant, sued L.E.S. Dwellers, an organization that opposed plaintiff's liquor license, and its leader Diem Boyd.[24] Plaintiff sued in New York Supreme Court for defamation *per se*, alleging that defendants allegedly made knowingly false and malicious statements when they falsely complained to the Community Board that plaintiff did not have proper operating permits.[25] Defendants argued that the lawsuit was a SLAPP suit intended to punish their protected speech[26] and asserted counterclaims under Civil Rights Law Sections 70-(a) and 76-(a) for legal fees and punitive damages. Defendants argued that such fees and damages were appropriate because the suit was brought solely to harass defendants.[27] Defendants also moved to dismiss under CPLR 3211(g).

Evaluating the sufficiency of the pleadings, the court found that, although plaintiff's allegations stated a valid cause of action, plaintiff failed to meet the anti-SLAPP burden set forth in CPLR 3211(g).[28] Plaintiff failed to demonstrate a "substantial basis in law" for its claim because its liquor license was ultimately renewed and plaintiff

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[20] *Waite* v. *Gonzalez*, 2023 WL 2742296, at *12 (E.D.N.Y. Mar. 31, 2023). The case was ultimately dismissed on grounds unrelated to anti-SLAPP. *Id.* at *13.

[21] *Id.* at *12.

[22] *Id.* (citing *La Liberte* v. *Reid*, 966 F.3d 79, 85-89 (2d Cir. 2020)).

[23] *National Academy of Television Arts and Sciences Inc.* v. *Multimedia System Design, Inc.*, 551 F. Supp. 3d 408, 430-32 (S.D.N.Y. 2021). Notably, Judge Caproni reached a different conclusion two years later in *Max* v. *Lissner*, 2023 WL 2346365, at *8 (S.D.N.Y. 2023). In *Lissner*, Judge Caproni held that Section 76-a governs the standard of proof in a SLAPP action such that defendants, when they prevail on an anti-SLAPP claim, can obtain costs and attorneys' fees under Section 70-a. This is colloquially known as a SLAPP-back.

[24] *161 Ludlow Food, LLC* v. *L.E.S. Dwellers, Inc.*, 60 Misc. 3d 1221(A), 107 N.Y.S.3d 618, 2018 WL 3910990 (N.Y. Sup. Ct. 2018), *aff'd*, 176 A.D.3d 434, 110 N.Y.S.3d 23 (N.Y. App. Div. 1st Dep't 2019).

[25] *Id.* Plaintiff also asserted certain libel claims that the trial court dismissed as time-barred. *Id.* at *3.

[26] *161 Ludlow Food, LLC* v. *L.E.S. Dwellers, Inc.*, 60 Misc. 3d 1221(A), 107 N.Y.S.3d 618, 2018 WL 3910990, *3 (N.Y. Sup. Ct. 2018).

[27] *161 Ludlow Food, LLC* v. *L.E.S. Dweller, Inc.*, 2023 WL 8193455, at *1 (N.Y. App. Div. 1st Dep't Nov. 28, 2023).

[28] The trial court found that there was "no dispute that plaintiff's claims [fell] within the ambit of New York's anti-SLAPP law" because the allegedly defamatory statements were made at a community board hearing in opposition to the renewal of plaintiff's liquor license. *Id.* at *3.

otherwise failed to establish how defendants' allegedly false statements harmed its business reputation.[29] The court left defendants' anti-SLAPP counterclaims intact.[30]

In 2019, the First Department affirmed the dismissal of plaintiff's claims under CPLR 3211(g), because the case involved public participation and petition and the claims lacked a substantial basis in law and fact.[31]

Defendants continued to pursue their counterclaims seeking attorneys' fees and punitive damages, and they moved for summary judgment on the claim.[32] In 2022, the trial court applied CPLR 3212(h) — which requires that a motion for summary judgment be denied when a party does not show that their claim has a "substantial basis in fact and law" in anti-SLAPP actions.[33] Because plaintiff did not establish a substantial basis for its claims, the court granted defendants' summary judgment motion on punitive damages and attorneys' fees.[34]

II. The First Department's Decision

On appeal, the First Department reversed in part and affirmed in part. The court reversed the grant of summary judgment with respect to defendants' counterclaims for punitive damages and affirmed the portion of the trial court's order granting summary judgment as to defendants' counterclaim for attorneys' fees.[35] The First Department held that the lower court misapplied CPLR 3212(h) in the summary judgment motion, because defendants' counterclaims were not SLAPP claims; they were affirmative claims for punitive damages and attorneys' fees.[36] The First Department held that the lower court had incorrectly conflated anti-SLAPP damages provisions with other provisions, clarifying instead that "[t]he award of attorneys' fees and punitive damages in SLAPP actions are subject to their own statutory regime found in Civil Rights Law §§ 70-a and 76-a (anti-SLAPP statutes). The anti-SLAPP statutes contain their own requirements and evidentiary burdens that have nothing to do with CPLR 3212(h)."[37] The burden shifting requirements of CPLR 3212(h) apply to SLAPP claims brought by defamation plaintiffs, not anti-SLAPP recovery claims by defamation defendants.

Here, the First Department splits the amended anti-SLAPP provisions cleanly into substantive and procedural provisions. While the damages provisions, subject to Civil Rights Law Sections 70-a and 76-a are substantive, they are also separate from the procedural provisions in CPLR 3212(g) and (h).[38]

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[29] *Id.* at *4. The trial court also held, in the alternative, that "the incremental harm and libel-proof plaintiff doctrines [also] warrant[ed] dismissal of plaintiff's claims." *Id.* at *5.

[30] *Id.*

[31] *161 Ludlow Food, LLC* v. *L.E.S. Dwellers, Inc.*, 176 A.D.3d 434, 435 (N.Y. App. Div. 1st Dep't 2019).

[32] *161 Ludlow Food, LLC* v. *L.E.S. Dwellers, Inc.*, 2022 WL 4119918, at *1 (N.Y. Sup. Ct. Sept. 1, 2022).

[33] CPLR 3212(h) (McKinney) ("A motion for summary judgment, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.").

[34] *161 Ludlow Food, LLC* v. *L.E.S. Dwellers, Inc.*, 2022 WL 4119918, at *1 (N.Y. Sup. Ct. Sept. 1, 2022).

[35] *161 Ludlow Food, LLC* v. *L.E.S. Dweller, Inc.*, 2023 WL 8193455, at *1 (N.Y. App. Div. 1st Dep't Nov. 28, 2023).

[36] *Id.*

[37] *Id.*

[38] *Id.*

III. Implications

Although brief, the First Department's *161 Ludlow Food* decision may have a large impact on future anti-SLAPP rulings, particularly in federal court. The decision draws the line between the substantive and procedural provisions of the New York State anti-SLAPP scheme. Moving forward, federal courts will likely apply New York Civil Rights Law Sections 70-a and 76-a as substantive state law. This will increase the likelihood that New Yorkers' expressive activity will be protected by New York's anti-SLAPP statutory scheme. This will also reduce forum-shopping incentives; plaintiffs will no longer be able to try to avoid the anti-SLAPP scheme in its entirety by filing in federal court.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Miles Wiley (Partner) at 212.701.3395 or mwiley@cahill.com; or Christina Lee (Associate) at 212.701.3266 or clee@cahill.com; or email publicationscommittee@cahill.com.