

Memorandum in Support COMMITTEE ON MEDIA LAW

Media Law #1

January 3, 2013

A. 856

By: M. of A. Weinstein
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil rights law, in relation to actions involving public petition and participation.

LAW AND SECTIONS REFERRED TO: Amending Civil Rights Law §§ 70-a(1)(a) and 76-a(1)(a) and (b)

THE COMMITTEE ON MEDIA LAW SUPPORTS THIS LEGISLATION

This bill, as set forth in the sponsor's memorandum, greatly strengthens the protections provided by New York's current law regarding Strategic Lawsuits Against Public Participation ("SLAPP suits"). The amendments to the New York Civil Rights Law will discourage frivolous litigation that is calculated to silence New York citizens in their exercise of the rights of free speech and petition about matters of public concern.

The bill would amend Section 76-a of the Civil Rights Law to define an "action involving public petition and participation" to include a claim related to:

- i. Any communication in a place open to the public or a public forum in connection with an issue of public concern; or
- ii. Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

The bill would also amend Section 70-a of the Civil Rights Law to provide that costs and attorneys' fees "shall be recovered upon a demonstration . . . that [a SLAPP suit] was commenced or continued without a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."

So amended, New York's anti-SLAPP law would better accomplish its original, important purpose: to provide "the utmost protection for the free exercise of speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." L. 1992 ch. 767. A robust anti-SLAPP

law would also conserve judicial resources and reduce the litigation costs incurred by plaintiffs and defendants alike, by deterring baseless lawsuits or disposing of them at the earliest opportunity. Regrettably, the existing statute, as narrowly interpreted by the courts, has almost completely failed to realize those objectives.

Background

New York was one of the first states to recognize that frivolous lawsuits intended to silence commentary and criticism pose a grave threat to citizens who express their views on matters of public interest. As New York State Supreme Court Justice Nicholas Colabella said in a 1992 decision:

Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.¹

When the legislature enacted New York Civil Rights Law Sections 70-a and 76-a and CPLR 3211(g)-(h) in 1992, it underscored that the “rights of citizens to participate freely in the public process must be safeguarded with the utmost diligence” and that the “threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs.”² Although New York’s law was pioneering in its time, the experience of the intervening twenty years has demonstrated that it was too narrowly drafted and was outfitted with insufficient remedies.

In practice, New York’s anti-SLAPP law has almost entirely failed to protect the state’s citizens from frivolous lawsuits arising from their participation in public affairs. The current law has proven to be ineffective in two specific respects; the bill would remedy both shortcomings.

¹ *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. Westchester County 1992).

² L. 1992 ch. 767.

The Bill Would Rectify the Inadequate Scope of the Current Statute

The definition of a SLAPP suit under current Section 76-a is limited to an action initiated by “a public applicant or permittee” – a limitation that New York courts have all-too-rigidly construed.³ Indeed, the application of the statute is so exceedingly narrow that only about a dozen cases have been held to fit within the statutory definition of a SLAPP suit in the two decades since the law’s enactment.⁴ Meanwhile, many frivolous lawsuits are filed each year that maliciously target free speech and public participation, but do not specifically arise in the context of the public “permit” process. Frivolous and retaliatory lawsuits have targeted non-profit organizations, teachers, homeowners, small businesses, public officials, journalists, and community activists. Of course, even a meritless lawsuit can cost tens of thousands of dollars (or more) to defend. And SLAPP suit targets are often individuals or organizations with limited resources, without applicable insurance to cover their defense costs.

One need not look far for examples of litigation, seemingly directed at silencing public criticism, which New York’s anti-SLAPP law is powerless to deter because of its limited scope and ineffectual remedies. For example, a candidate for U.S. Congress sued a director of the Simon Wiesenthal Center, the local leader of his own party, his opponent in the election, and sixteen other defendants for allegedly describing as “racist” an essay that plaintiff had published in favor of “ethnic boundaries on marriage.” See *Russell v. Colety*, No. 024375/10 (Sup. Ct. Westchester County 2011), *aff’d sub nom.*, *Russell v. Davies*, 97 A.D.3d 649, 948 N.Y.S.2d 394 (2d Dep’t 2012). While the case was dismissed, this challenge to free speech did not involve a “permit,” and anti-SLAPP remedies were not available. In another case, a plaintiff who operated a sand mine sued a local reporter and his employer for libel based upon an article that (truthfully) reported the plaintiff’s past criminal conviction. The court dismissed the complaint, but held that the reporter and his newspaper could not invoke the anti-SLAPP law because it does not apply to the media. *Cholowsky v. Civiletti, et al.*, slip op. 51742(U) (Sup. Ct. Suffolk County 2007). And in *Ottinger v. Teikert, supra*, 901 N.Y.S.2d at 908, the court found that a libel case against a citizen blogger qualified as a SLAPP suit, dismissed the complaint as meritless, but declined to award fees, leaving the defendant with substantial,

³ For example, in *Long Island Association for AIDS Care v. Greene*, 702 N.Y.S.2d 914 (2d Dep’t 2000), the Second Department held that a woman’s statements to the press about alleged misuse of public funds was “not materially related to any efforts by her to report on, comment on, challenge, or oppose an application by the plaintiff for a permit, license, or other authorization from a public body,” and therefore the anti-SLAPP statute did not apply, even though the trial court had found the plaintiff’s lawsuit to be frivolous. In *Hariri v. Amper*, 51 A.D.2d 146, 854 N.Y.S.2d 126 (1st Dep’t 2008), the court held that, although the plaintiff had “made direct appeals to [the Town Supervisor] and other Town Board members, spoke out at Town Board meetings and work sessions, and actively debated the issue at civic meetings and in the media,” the plaintiff was not a “public applicant or permittee,” and thus his claim against an individual who opposed the proposed use of a local airport for commercial purposes was outside the scope of the anti-SLAPP statute. See also *Harfenes v. Sea Gate Association, Inc.*, 168 Misc. 2d 647, 647 N.Y.S.2d 329 (Sup Ct. N.Y. County) (finding anti-SLAPP law inapplicable because plaintiff was “unaware” that defendant was a permit applicant).

⁴ A Westlaw search turned up approximately 50 cases that discussed the anti-SLAPP law, but the overwhelming majority of them did so only in the course of holding that plaintiffs’ actions did not fit within the narrow statutory definition of SLAPP suits.

unreimbursed defense costs. Because the current anti-SLAPP law is too narrowly drafted and does not mandate an award of attorneys' fees for bad faith claims, a meritless lawsuit initiated only to silence and intimidate an outspoken defendant too often achieves those goals.

By amending the definition of an "action involving public petition and participation" the bill would better fulfill the public policies that the Legislature identified when it enacted New York's current anti-SLAPP law twenty years ago. The bill's expanded definition of "public petition and participation" would also bring New York's law in line with the robust anti-SLAPP statutes now in force in at least twelve jurisdictions, including, most recently, statutes adopted in Illinois, Texas, and Washington State.⁵

The Bill Would Greatly Improve Upon the Inadequate Remedies in the Current Statute

Section 70-a of the current statute authorizes a court to award, *in its discretion*, costs and attorneys' fees to defendants victimized by frivolous lawsuits calculated to deter free speech or the right of public petition. In authorizing an award of costs and fees, the Legislature intended to counter the "threat of personal damages and litigation costs . . . as a means of harassing, intimidating, or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs." L. 1192 ch. 767. Regrettably, in practice, the discretionary nature of the fee award has rendered the law toothless. Even in those rare instances when an action is found to fit with the current narrow statutory definition of a SLAPP suit, attorneys' fees are almost never awarded.⁶ Indeed, a Westlaw search turned up only four reported cases since New York's anti-SLAPP statute was enacted in which the courts awarded attorneys' fees to SLAPP-suit victims.

The bill's amendment to Section 70-a addresses this deficiency by directing that a court "shall" impose an award of costs and fees, if the court finds that the case has been initiated or pursued in bad faith.⁷ This mandatory fee-shifting provision would give SLAPP suit victims an effective deterrent to the financial intimidation wielded by

⁵ Other jurisdictions with anti-SLAPP statutes that broadly protect the rights of free speech and public petition include California, the District of Columbia, Indiana, Louisiana, Maine, Maryland, Oregon, Rhode Island, and Vermont.

⁶ See, e.g., *Ottinger v. Tiekert*, 901 N.Y.S.2d 908 (Sup. Ct. Westchester County 2009) (declining to award attorneys' fees although action found to be a SLAPP suit); see also *Miness v. Alter*, 262 A.D.2d 374 (2d Dep't 1999) (declining to award fees); *West Branch Conservative Ass'n. Inc. v. Planning Bd. Of Town of Clarkstown*, 222 A.D.2d 513 (2d Dep't 1995) (same); *Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F.Supp.2d 339 (S.D.N.Y. 2004) (same).

⁷ In providing for a mandatory award of attorneys' fees, the bill is not plowing new ground. CPLR § 8303-a mandates an award of costs and attorneys' fees "in an action to recover damages for personal injury . . . commenced or continued by a plaintiff . . . that is found, at any time during the proceedings or upon judgment, to be frivolous by the court." The bill merely extends to defendants, who are targeted with frivolous lawsuits for exercising their rights of free speech and petition, the protections that are already accorded to defendants in frivolous personal injury cases.

SLAPP-suit plaintiffs pursuing frivolous claims – a deterrent that is currently available to citizens in 21 other states and one territory.⁸

The Bill Would Leave Intact the Effective Procedures in the Current Law

The bill leaves unchanged several features in the existing New York anti-SLAPP statute (or other provisions of New York law) that provide important protections to citizens targeted by SLAPP suits. For example, CPLR 3211(g) states that a court considering a motion to dismiss a SLAPP suit must grant a preference in hearing. And CPLR 3214(b) ordinarily stays discovery until the anti-SLAPP motion can be heard. The proposed amendments would not change these and other procedural provisions of the New York law that help to minimize the burdens of a SLAPP suit until a judge can consider the merits (or, too often, the lack of merit) of plaintiffs' claims.

Finally, to be clear, the bill would not discourage good faith litigation that has “a substantial basis in fact and law” or can “be supported by a substantial argument for the extension, modification or reversal of existing law.” The amendments to Sections 76-a and 70-a are carefully tailored to deter (and dispose of, at the earliest opportunity) only a limited category of frivolous litigation that a court has specifically found to have been initiated or pursued in bad faith.

The bill would, in short, significantly strengthen the protections for free speech and citizen participation in New York.

Based on the foregoing, the New York State Bar Association Committee on Media Law **SUPPORTS** this legislation.

Chair of the Committee: Lynn Oberlander, Esq.

⁸ Of the 27 states – and one territory – with anti-SLAPP statutes, only six, including New York, do not mandate an award of fees and costs to a SLAPP-suit defendant upon a finding of bad faith by the plaintiff (“Mandatory Fee Awards”). The 22 jurisdictions with statutes that currently provide for Mandatory Fee Awards are Arizona, Arkansas, California, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, and Washington.