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Law Curbs Retaliatory Suits, Encourages Input by Public

By **Anthony S. Guardino**

About 15 years ago, the New York State Legislature adopted Chapter 767 of the Laws of 1992, intending to deter a form of "retaliatory litigation" that had come to be known as a "SLAPP Suit," or a "Strategic Lawsuit Against Public Participation." In enacting this statute, the Legislature stated in its findings and purposes that it was the state's public policy "that the rights of citizens to participate freely in the public process must be safeguarded with great diligence." The Legislature added that New York law "must 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."1

As one court has stated, the SLAPP law was intended "to prevent well-heeled public permit holders" from using "the threat of personal damages and litigation costs…as a means of harassing, intimidating or…punishing individuals, unincorporated associations…and others who have involved themselves in public affairs" by opposing them.2 During the Senate debates, the bill's supporters cited examples where some businesses sought to silence opponents of projects or proposals through lawsuits for defamation, causing opponents to incur substantial costs in defending suits that were ultimately dismissed.3

The law facilitates the early dismissal of a SLAPP suit by tightening the legal substantive requirements imposed upon plaintiffs to prevail in such a suit and by lowering the procedural hurdles that the defendants must clear to obtain dismissal of the suit.

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As for the former, under Civil Rights Law §76-a, a plaintiff asserting a defamation claim in a SLAPP suit is considered a public figure and can recover damages only upon demonstrating clear and convincing evidence that the defendant knowingly defamed the plaintiff or acted with reckless disregard for the truth or falsity of the statements the defendant made. Thus, under the anti-SLAPP statute's substantive provisions, the opponents of permit holders or applicants enjoy the same "safeguards for freedom of speech and the press that are required by the First and Fourteenth Amendments [of the United States Constitution] in a libel action brought by a public official" against critics of his or her official conduct.4

A determination whether the anti-SLAPP statute pertains to a particular action requires a twofold inquiry. First, under Civil Rights Law §76-a(1)(b), the court must determine whether the plaintiff is "a public applicant or permittee," defined as any person who has applied to obtain a permit, zoning change, lease, license, or other permission from any government body. Next, under Civil Rights Law §76-a(1)(a), the court must decide whether the lawsuit is an "action involving public petition and participation," defined as "an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."

In terms of procedure, CPLR 3211(g) of the anti-SLAPP law governs motions to dismiss. It incorporates CPLR 3211(a)(7) by reference, under which "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that…the pleading fails to state a cause of action." Under that subdivision, the court in determining such a motion must presume the facts pleaded to be true and accord such pleading every favorable inference.5 However, CPLR 3211(g) amends prior law so that on a motion to dismiss a "SLAPP" action, the burden is upon the plaintiff to establish that its claim has the requisite "substantial basis." To avoid dismissal of its SLAPP suit complaint, a plaintiff must establish by clear and convincing evidence a substantial basis in fact and law for its claim. The Legislature viewed "substantial" as a more stringent standard than the "reasonable" standard that would otherwise apply.6

Narrow Construction

Courts have indicated that, because the anti-SLAPP law is in derogation of common law, it must be narrowly construed.7 Perhaps as a result, courts have rejected many claims seeking to have suits characterized as SLAPP suits and have found reasons to deny damages.8

For example, in *Hariri v. Amper*,9 the plaintiff entered into negotiations to purchase property within Enterprise Park at Calverton ("EPCAL") in Riverhead, New York. The plaintiff planned to use the property, formerly the Grumman Airfield, for the purpose of storing and using one or more business jet aircraft for personal and possible time share use. At that time, the Town of Riverhead was in the process of developing a new master plan for land use at the EPCAL site, which included the amendment or enactment of zoning regulations. The plaintiff undertook an active lobbying campaign to persuade town officials to enact a zoning code that would permit his desired use, which efforts were aggressively opposed by the Long Island Pine Barrens Society and its executive director. The plaintiff's proposed project never came to fruition, however, because the Riverhead Town Board adopted zoning codes for EPCAL that banned the storage of aircraft as a stand-alone use.

The plaintiff subsequently brought a defamation suit against the society and its

executive director, asserting that, in fighting the plaintiff's lobbying efforts, they had falsely accused him of improper relationships with public officials, shameless, un-American and improper lobbying, muzzling free speech, and causing a third party to make criminal death threats against the executive director. The defendants counterclaimed that the plaintiff's complaint was commenced by a "public applicant or permittee" in retaliation for the defendants' public advocacy and, therefore, was an improper SLAPP suit under the Civil Rights Law. The plaintiff moved for summary judgment dismissing the counterclaim, alleging that he was not a public applicant or permittee within the meaning of the anti-SLAPP law; that the alleged defamatory statements were not materially related to any effort on the part of the defendants to comment on or oppose any application or permit; and that the complaint had a good faith basis in law and fact. The defendants opposed the motion, asserting, among other things, that the plaintiff had "systematic[ally] and formal[ly] petition[ed] for increased aviation use at the EPCAL," and "applied to the Town Board of the Town of Riverhead…for new zoning to permit increased aviation uses." The defendants contended that as a result of the plaintiff's activities, he fell within the definition of "public applicant or permittee."

The motion court strictly construed the statute and granted the plaintiff's motion on the ground that he was not an applicant or permittee within the meaning of the statute, and the defendants appealed.

The Appellate Division, First Department, affirmed. It agreed with the motion court that the plaintiff could not be deemed a public applicant or permittee based on the fact that he aggressively advocated a particular agenda directly to town board members and at public meetings, and took steps to commence litigation against the town. Moreover, the appellate court found, the defendants presented no evidence that the plaintiff had made any attempt to comply with, or initiate an application process under, the town's specific procedures governing applications for zoning variances. The First Department concluded that, in view of the "narrow construction" that had to be afforded to the statute, "merely advocating one's agenda at public meetings, or initiating legal action," did not bring an individual within the ambit of an applicant or permittee as defined in Civil Rights Law §76-a(1)(b).

Damages Awarded

It is important to emphasize that there have been a number of decisions awarding costs and attorney's fees, as well as damages—including punitive damages—under the anti-SLAPP law.

Recently, for example, in *311 West Broadway LLC v. Jacob Cram Cooperative Inc.*,10 New York County Supreme Court Justice Herman Cahn found that a complaint was a SLAPP suit, dismissed the action and awarded the defendant its attorney's fees and costs.

Similarly, in *Duane Reade Inc. v. Clark*,11 the court found that the plaintiff's complaint was a SLAPP suit, rejecting the plaintiff's argument that its suit was not a SLAPP action because it was not materially related to any effort by the defendant to report on, comment on or oppose the plaintiff's application for a permit to develop a store and erect a sign. The court determined that the statute applied to statements made by the defendant to the press even if they were not spoken directly to the government agency considering the plaintiff's application. It then ruled that the plaintiff brought its lawsuit, which the court found to be "materially related" to the defendant's efforts to comment on the plaintiff's permit, without any substantial basis in fact or law and that, accordingly, the defendant was entitled to recover costs and attorney's fees. Moreover, the court found that the plaintiff had not shown any substantial basis for the lawsuit and its complaint established no purpose "other than intimidation, harassment and punishment for its initiation." Therefore, the court awarded both compensatory and punitive damages from the plaintiff.

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It seems clear that the anti-SLAPP law makes potential plaintiffs think twice about bringing actions that arguably might fall within the scope of the statute. Although courts recognize the need to cautiously apply the law's provisions, the occasional decision awarding costs, attorney's fees and damages has had the practical impact the Legislature seems to have intended: allowing a debate over matters of public concern with little concern over the filing of unwarranted lawsuits intended to thwart those discussions.

1. Laws of 1992 (ch 767, §1); see also Long, "Slapping Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition," 60 Okla. L. Rev. 419, 420-421 (2007) ("(t)he primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate the petitioners into dropping their initial petitions due to the expense and fear of extended litigation. …[T]he primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition"); Johnson, "Regulating Lobbyists: Law, Ethics, and Public Policy," 16 Cornell J. L. & Pub. Pol'y 1, 7-8 (2006) ("Anti-SLAPP statutes make it easier for courts to dismiss defamation suits and other retaliatory claims filed against persons who speak out on public issues. America's commitment to the open debate of public issues logically extends beyond discussions among the citizenry to include communications between citizens and public officials or employees. The interests of democracy cannot be served by requiring those who petition the government to do so with trepidation or excessive caution. …The right to petition, along with the related rights of association, speech, and press, must be interpreted in a manner that invites vigorous, and sometimes controversial, discussion of public affairs") (footnotes omitted)).

2. *Adelphi Univ. v. Committee to Save Adelphi*, NYLJ, Feb. 6, 1997, at 33, col 2 (Sup. Ct. Nassau Co., 1997).

3. See Senate Debate Transcripts, L 1992, ch. 767, New York Legis. Serv.

4. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

5. See, e.g., *Commodari v. Long Island University*, 295 A.D.2d 302 (2d Dept. 2002) (affirming dismissal under CPLR 3211(a)(7) of claims for defamation and tortious interference).

6. See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73.

7. See, e.g., *Harfenes v. Sea Gate Assn.*, 167 Misc. 2d 647 (Sup. Ct. N.Y. Co. 1995).

8. See, e.g., *Guerrero v. Carva*, 10 A.D.3d 105 (1st Dept. 2004) (in absence of evidence that defendants were petitioning an agency regarding an application or permission of plaintiffs, plaintiffs' action did not affect defendants' rights of public petition and participation before public agencies and did not offend Civil Rights Law §§70-a and 76-a); *Bell v. Little*, 250 A.D.2d 485 (1st Dept. 1998) (alleged inscription of false and malicious statements on building exteriors and sidewalks did not implicate rights of public petition and participation).

9. 51 A.D.3d 146 (1st Dept. 2008).

10. No. 104408/07 (Sup. Ct. N.Y. Co., Dec. 29, 2008).

11. 2 Misc. 3d 1007A (Sup. Ct. N.Y. Co. 2004).