

New York's Expanded Anti-SLAPP Statute: Factors To Consider When Selecting a Forum

Although counsel may not always have a choice of forum, the amendments to New York's "anti-SLAPP" statute that took effect in November 2020 add to the factors that counsel may need to consider when they do have such a choice—and may make New York state court a more attractive forum for defendants (and a less attractive one for plaintiffs). This article explains why.

By Adrienne B. Koch (January 7, 2022)

Defamation claims arising under New York law are often litigated in federal court, either under that court's diversity jurisdiction (because the parties are citizens of different states) or because they are being litigated in tandem with claims that arise under federal law. Although counsel may not always have a choice of forum, the amendments to New York's "anti-SLAPP" statute that took effect in November 2020 (see 2020 Sess. Law News of N.Y. Ch. 250 (A. 5991-A)) add to the factors that counsel may need to consider when they do have such a choice—and may make New York state court a more attractive forum for defendants (and a less attractive one for plaintiffs). This article explains why.

Background: New York's Statute

"Anti-SLAPP" statutes are designed to shield defendants from lawsuits brought based on conduct that constitutes protected speech—so-called "strategic lawsuits against public participation." In November 2020, New York significantly expanded its anti-SLAPP statute. Whereas the law formerly applied only to claims relating directly to a defendant's efforts "to report on, comment on, rule on, challenge or oppose" certain kinds of applications to a "government body" (see *Int'l Shoppes v. At the Airport*, 131 A.D.3d 926, 928 (2d Dept. 2015)), it now applies to all claims that seek damages based on (a) "any communication in a public place open to the public or a public forum in connection with an issue of public interest"; or (b) "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (Civil Rights Law §76-a(1)(a)). While not every defamation claim will be covered by the expanded statute, the statute's application is broad: it defines "public interest" to mean "any subject other than a purely private matter." Civil Rights Law §76-a(1)(d).

A plaintiff asserting a claim that is covered by the statute must prove by clear and convincing evidence that the communication on which the claim is based "was made with knowledge of its falsity or with reckless disregard of whether it was false." *Id.* §76-a(2). If the defendant prevails, the plaintiff may be liable for attorney fees "upon a demonstration" that the action "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." *Id.* §70-a. The defendant may also recover other damages (including punitive damages) if the claim was "commenced or continued" for the purpose of "maliciously inhibiting" free speech. *Id.* Further, on a motion to dismiss such a claim (either on a pre-answer basis or on summary judgment), the plaintiff bears the burden of demonstrating that the claim "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law." See CPLR 3211(g); CPLR 3212(h).

In short, the statute makes any claim within its purview substantially more difficult for the plaintiff. It also puts the plaintiff at risk of liability for damages and attorney fees.

Application in Federal Court

What if a claim ostensibly covered by the New York statute is asserted in an action filed in—or removed to—federal court? The answer to that question is complicated. *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020), illustrates why.

In *La Liberte*, the Second Circuit held that California’s anti-SLAPP statute could not be applied in federal court. That statute provides that (a) in certain kinds of defamation cases a defendant may make a “special motion to strike”; (b) that motion must be granted unless the plaintiff shows “a probability” of success on the claim; and (c) “a prevailing defendant on this special motion shall be entitled to recover attorneys’ fees and costs.” See 966 F.3d at 85. Noting that its “sister circuits split on whether federal courts may entertain the various state iterations of the anti-SLAPP special motion,” the Second Circuit concluded that the procedures contemplated by the California statute could not be reconciled with Rules 12 and 56 of the Federal Rules of Civil Procedure. *Id.* at 86-87 (collecting cases). Since in federal court a valid Federal Rule of Civil Procedure controls over any conflicting state rule—and because Rules 12 and 56 are clearly valid—the California statute could not apply. *Id.* at 88.

In a footnote, the Second Circuit distinguished *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014), where it had previously “approved certain aspects of Nevada’s anti-SLAPP statute,” which “immunizes” communications that are “truthful” or “made without knowledge of ... falsity.” *La Liberte*, 966 F.3d at 86 n.3 (internal quotations omitted). Unlike the California statute (which only imposed “procedural elements”), the Nevada statute “effectively rais[ed] the substantive standard that applies to a defamation claim.” *Id.* (internal quotations omitted; emphasis in *La Liberte*). This distinction made all the difference: A federal court adjudicating a claim arising under Nevada law would be bound to apply the principles set forth in the Nevada statute because they did not purport to alter the procedures mandated by the Federal Rules. *Id.*

That footnote may provide the key to an analysis of whether and how New York’s statute, which was enacted after *La Liberte*, applies in federal court. Like the California statute, New York’s statute provides a procedural mechanism for early dismissal. See CPLR 3211(g); CPLR 3212(h). But like the Nevada statute, it also alters the substantive standard for defamation. See Civil Rights Law §76-a. In addition, it gives prevailing defendants a claim for attorney fees and other damages—but unlike the California statute, it provides that such a claim can be asserted regardless of whether the defendant obtains a dismissal through the special early dismissal procedure or in the ordinary course. See Civil Rights Law §70-a; cf. *La Liberte*, 966 F.3d at 88-89 (holding the attorney fee provision of California’s anti-SLAPP statute inapplicable in federal court because the statute “awards attorneys’ fees only to a prevailing defendant on a special motion to strike”) (citation and internal quotations omitted; emphasis in *La Liberte*).

Consistent with these distinctions, the federal district courts have so far held that the early dismissal mechanisms embodied in CPLR 3211(g) and 3212(h) do not apply in federal court (see *Nat’l Academy of Television Arts and Sciences v. Multimedia System Design*, 2021 WL 3271829, *12-13 (S.D.N.Y. July 30, 2021)), but the substantive standards embodied in Civil Rights Law §76-a do apply (see *Coleman v. Grand*, 523 F. Supp. 3d 244, 258 (E.D.N.Y. 2021)). As for the attorney fees and damage provisions embodied in Civil Rights Law §70-a, the situation is less clear: although at least

one federal court has found them applicable because the statute specifies that the early dismissal procedure is not the only way they can be invoked (see *Goldman v. Reddington*, 2021 WL 4099462, *5 (E.D.N.Y. Sept. 9, 2021)), at least one other has found the opposite (see *Nat'l Academy of Television Arts and Sciences*, *supra*, 2021 WL 3271829 at *12-13).

Conclusion

The Second Circuit will soon have an opportunity to weigh in on at least some of these matters: An appeal to that court in *Coleman*, *supra*, has been fully briefed and is awaiting oral argument. For now, however, it seems clear that (consistent with *La Liberte*) the New York statute's provisions regarding early dismissal under CPLR 3211(g) and CPLR 3212(h) will not apply in federal court. At the same time, *La Liberte* also suggests (as the lower courts have held) that other aspects of the statute—including its heightened standard of proof, and possibly also its provisions for attorney fees and damages—will apply in federal court. Nevertheless, where a party has a choice between proceeding in federal court or in New York state court, the likelihood that at least some aspects of the statute will not apply in federal court is an important consideration to take into account.

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