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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Significant Liability May Await Those Who File SLAPP Suits

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In recent years, numerous states have enacted laws to deter so-called "SLAPP" suits—i.e., strategic lawsuits against public participation. These anti-SLAPP laws provide procedural protections for individuals and entities that are sued as punishment for—and to deter them from—speaking out on public matters. The anti-SLAPP laws provide various protections to the defendants named in SLAPP suits, including in some cases (1) expedited consideration of a defendant's motion to dismiss a SLAPP suit, and (2) a framework for evaluating a defendant's motion to dismiss that shifts the burden to the plaintiff to demonstrate a likelihood of success on the merits of its underlying claim in order to avoid dismissal. Moreover, when a SLAPP suit is dismissed, the anti-SLAPP laws typically afford the defendant the right to recover its costs and attorney fees, and sometimes compensatory and punitive damages.

Although New York has enacted an anti-SLAPP law, its protections are weak as compared to the anti-SLAPP laws in other states. For example, the New York law applies only when a lawsuit is "materially related" to the defendant's public statements about the plaintiff's application to a "government body" for "a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act." N.Y. Civil Rights Law §76-a. Accordingly, while the New York anti-SLAPP law protects a defendant who speaks out against a plaintiff's application for a government benefit, it does not protect a defendant who is sued for speaking out about a matter of public concern unrelated to such an application. Moreover, even if an underlying lawsuit qualifies as a SLAPP suit, the defendant can only recover its costs and fees if the suit "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"—a standard that is rarely met. N.Y. Civil Rights Law §70-a.

The New York State Senate and Assembly, however, are currently considering amendments to the New York anti-SLAPP statute that, if enacted, would (1) significantly broaden the statute's coverage to include speech related to any "issue of public concern" (not just speech addressing an application for a government benefit) and (2) automatically entitle a defendant who files a successful anti-SLAPP motion to dismiss to its costs and fees. In these ways, the proposed amendments would bring the New York anti-SLAPP statute in line with some of the nation's more expansive anti-SLAPP statutes.

Southern District Judge J. Paul Oetken recently addressed—and rejected—several challenges to one of those expansive anti-SLAPP statutes, the Nevada statute.

In *National Jewish Democratic Council v. Adelson*, 2019 WL 4805719 (S.D.N.Y. Sept. 30, 2019), Southern District Judge J. Paul Oetken recently addressed—and rejected—several challenges to one of those expansive anti-SLAPP statutes, the Nevada statute. That statute goes even further than the proposed amendments to

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the New York statute by entitling a successful anti-SLAPP defendant not only to its costs and fees, but also to compensatory damages and, if the defendant can show that the plaintiff acted with "oppression, fraud, or malice" in bringing the SLAPP suit, to punitive damages. Nev. Rev. Stat §§41.670(1), 42.005(1). Judge Oetken upheld this damages scheme, thus paving the way for a potentially substantial recovery by the defendant in the case and demonstrating the significant deterrent effect that a strong anti-SLAPP statute can have.

'National Jewish Democratic Council'. This case arose out of a defamation suit filed by Sheldon G. Adelson, a prominent businessperson who owns and operates casinos around the world, against the National Jewish Democratic Council (the Council), its chair, and its CEO (collectively, the defendants). During the 2012 presidential election cycle, the Council published a statement on its website that encouraged Mitt Romney to stop accepting money from Adelson. The statement included the allegation that Adelson had personally approved of prostitution in his Macau casinos.

In response, Adelson filed his underlying defamation suit in the Southern District of New York, asserting state law claims under Nevada law. The defendants moved to dismiss under Nevada's anti-SLAPP statute. Judge Oetken (to whom the underlying case also was assigned) granted the motion to dismiss, awarding the defendants costs and fees.

Thereafter, the defendants brought this separate action against Adelson under the Nevada anti-SLAPP law, seeking compensatory and punitive damages for the prior defamation suit, as well as their attorney fees for bringing this separate action. In response, Adelson moved to dismiss, arguing, among other things, that (1) the imposition of damages against him under Nevada's anti-SLAPP law would violate the Supremacy Clause of the U.S. Constitution, (2) the application of the anti-SLAPP statute's damages provision would be inconsistent with New York choice-of-law rules, and (3) his underlying defamation action itself was protected conduct under the anti-SLAPP statute, thus rendering the defendants' separate damages suit a prohibited SLAPP. For their part, the defendants moved for summary judgment on the issue of Adelson's liability for damages and fees under the anti-SLAPP statute.

Judge Oetken denied Adelson's motion to dismiss and granted the defendants' motion for summary judgment on the issue of liability for compensatory damages and fees. He found that summary judgment was premature on the issue of liability for punitive damages, but allowed the defendants to move forward with the claim.

Awarding Compensatory and Punitive Damages Does Not Violate the Supremacy Clause. Judge Oetken found Adelson's first argument—that applying the Nevada anti-SLAPP statute's damages provision against him would violate the Supremacy Clause—to be "fundamentally flawed." 2019 WL 4805719, at *3. Adelson argued that subjecting him to damages under the Nevada statute's damages provision would violate the Supremacy Clause, because it would "punish[]" him for bringing his underlying defamation action in federal court. Id.

In rejecting this argument, Judge Oetken observed that (1) Adelson made the strategic decision to file his underlying state-law defamation action in federal court, invoking the court's diversity jurisdiction, (2) under Nevada's substantive law, if a defendant obtains dismissal under the state's anti-SLAPP statute, the defendant automatically is entitled to compensatory and punitive damages, and (3) under the *Erie* doctrine, a federal court sitting in diversity must apply the relevant state's substantive law. Accordingly, he found that *Erie* commanded him to apply the Nevada statute's damages provision against Adelson, and that this result—commanded by *Erie*—could not possibly violate the Supremacy Clause.

Awarding Damages and Fees Does Not Violate New York Choice-of-Law Rules. Judge Oetken then turned to Adelson's argument that the application of the anti-SLAPP statute's damages and fee-shifting provisions would be inconsistent with New York choice-of-law rules. He quickly disposed of this argument, at least as it related to the issue of compensatory damages and fee-shifting. Judge Oetken observed that "it is clear that the measure of compensatory damages is determined by the same law under which the cause of action arises," here, Nevada law. Id. at *6 (citation omitted). He found it similarly clear that Nevada law also applies to the defendants' claim for attorney fees because "[m]uch like the [defendants'] claim for compensatory damages, a proceeding for an award of attorneys' fees … is a tail dangling from [the underlying] suit." Id. at *5 (citation omitted). Accordingly, he held that "neither the compensatory damages provision nor the fee-shifting provision occasion[ed] a separate choice-of-law analysis." Id.

With respect to the issue of punitive damages, however, Judge Oetken

found that a choice-of-law analysis was necessary. In conducting the analysis, he noted that, under New York choice-of-law rules, he was required to apply "the law of the jurisdiction with the strongest interest in the resolution of the particular issue presented." Id. at *6 (citation omitted).

Here, because the conduct that "would serve as [the] predicate for punitive damages" was "the filing of a SLAPP" under Nevada law, Judge Oetken concluded that "Nevada ha[d] a strong interest in ensuring the application of its punitive damages provision." Id. (citation omitted). He also found that Adelson's status as "a domiciliary of Nevada" "point[ed] in favor of applying Nevada law." Id. By contrast, he found New York's interest in the action to be "minimal," including because "New York lacks a particularized interest … in protecting defendants from liability [in actions arising] under Nevada defamation law." Id. (citations and alterations omitted). Therefore, subjecting Adelson to punitive damages under the Nevada anti-SLAPP statute also would not violate New York choice-of-law rules.

The Defendants' Separate Suit for Damages and Fees Was Not Itself a Prohibited SLAPP. Judge Oetken characterized Adelson's final argument—that his underlying defamation suit itself was protected under the anti-SLAPP statute (even though it was dismissed as a SLAPP), and therefore he was entitled to the dismissal of the defendants' damages suit because it qualified as a prohibited SLAPP—as "puckish[]." Id. at *10. In rejecting this argument, he noted that it was premised on a questionable legal assumption, i.e., that an anti-SLAPP damages action could itself qualify as a SLAPP if the previously-dismissed SLAPP lawsuit's allegations "were truthful or [made] without knowledge of their falsehood." Id. at *10-*11. Judge Oetken assumed without deciding that an "anti-SLAPP damages action[] … c[ould] qualify as [a] SLAPP[]," but found that Adelson's argument nevertheless failed because he "ha[d] not provided any evidence whatsoever—written or oral, by witnesses or affidavits [as required by the anti-SLAPP statute]—that the allegations in his initial lawsuit were truthful or brought without knowledge of their falsehood." Id. at *11.

The Defendants Were Entitled to Compensatory Damages and Attorney Fees. Turning to the defendants' motion for summary judgment on the issues of damages and fees, Judge Oetken noted that "courts in this circuit … grant[] preanswer motions for summary judgment … only in the rarest of cases." Id. at *11 (citations and alterations omitted). He found, however, that "[t]his [was] one of those cases, at least on the issue of Adelson's liability for compensatory damages and attorney's fees." Id. at *12. He reasoned that "[u]nder Nevada's anti-SLAPP statute, the sole precondition to a defendant's entitlement to compensatory damages and attorney's fees is the … grant of [an anti-SLAPP] motion to dismiss," and it was undisputed that the defendants here had satisfied that precondition. Id.

As demonstrated by the Nevada statute, a strong anti-SLAPP statute can be a powerful weapon for those subjected to SLAPP suits, as well as a powerful deterrent against such suits.

With respect to punitive damages, however, Judge Oetken found summary judgment to be premature. To make out a claim for punitive damages under Nevada law, he observed that the defendants "must show that Adelson acted with oppression, fraud, or malice," and he held that "[t]he resolution of this question of fact must await, at minimum, a responsive pleading from Adelson." Id.

Conclusion

As demonstrated by the Nevada statute, a strong anti-SLAPP statute can be a powerful weapon for those subjected to SLAPP suits, as well as a powerful deterrent against such suits. Although the proposed amendments to the New York anti-SLAPP statute do not go as far as the Nevada statute—they do not provide a mechanism for a successful defendant to seek compensatory or punitive damages—they would allow a successful defendant to recover automatically its costs and fees, which itself would represent a significant strengthening of the existing New York statute.