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Court Rules that New York's New Anti-SLAPP Law Applies Retroactively

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On June 30, 2021, pop star Kesha was reportedly handed a victory by a New York state court, which ruled that the state's new anti-SLAPP legislation applied retroactively to music producer Dr. Luke's lawsuit, in which he claims Kesha defamed him by allegedly falsely accusing him of rape.

The court's decision means that Dr. Luke will face an elevated burden of proof at trial, needing to prove by clear and convincing evidence that Kesha acted with "actual malice" when she made her allegations against him. Previously, a New York state trial court held that Dr. Luke was not a public figure and therefore only had to prove that Kesha either knew her statements were false or acted with reckless disregard for the truth. That court did not take into account the new anti-SLAPP law, which was passed on November 10th, 2020.

Below, we discuss New York's new Anti-SLAPP law, including its scope and trends based on recent decisions.

New York's Anti-SLAPP Law

SLAPP stands for "Strategic Lawsuit Against Public Participation" and refers to a lawsuit that is filed in retaliation against an individual who criticizes or opposes a corporation or individual. It is a tactic used to intimidate or silence critics with the consequences of litigation. Often, SLAPP lawsuits will claim that the critic defamed or otherwise hurt the corporation or individual bringing the lawsuit.

Anti-SLAPP laws are passed by legislatures to ensure that only valid claims are brought forth, by heightening the burden of proof, requiring a showing of "actual malice" to make a successful claim. Theoretically, corporations or individuals with legitimate claims will be able to meet this high standard, and those misusing the court system will not.

New York's previous anti-SLAPP law was limited, requiring a showing of actual malice only for claims brought in "an action involving public petition and participation." N.Y. Civil Rights Law § 76-a(2). This language meant that the standard was applied only to cases initiated by individuals and entities in controversies over a public application or permit, such as disputes arising from real estate developments.

The newly amended anti-SLAPP law significantly broadened the types of speech covered by the statute, protecting "any communication in a place open to the public or a public forum in connection with an issue of public interest." Moreover, the statute highlights that "public interest shall be construed broadly, and shall mean any subject other than a purely private matter."

The new anti-SLAPP law also makes clear that courts **shall** award attorney's fees and costs to a defendant that succeeds on a motion to dismiss a SLAPP suit. The legislature passed this portion of the amendment after finding that courts "almost never actually imposed" fee shifting when they previously had discretionary power to do so.

Noticeably, the new anti-SLAPP legislation does not contain language explicitly declaring that it would apply retroactively or not.

Notable Decisions Applying New Anti-SLAPP Law

The first case to retroactively apply the amended New York anti-SLAPP law was *Palin v. The N.Y. Times Co.*, where the court held that the law is a "remedial statute" designed to correct imperfections in the prior law. The *Palin* court also emphasized that the legislature passed the law with a sense of urgency, declaring the law "to take effect immediately."

After *Palin*, New York courts have expanded on when the new anti-SLAPP law is applicable and when it is not. One plaintiff argued that the newly amended anti-SLAPP law applied only to public figures, such as Sarah Palin, and should not apply to private individuals. In a recent decision, a court rejected this argument, noting that nothing in the language of the law supported applying it only to public figures. That same plaintiff also argued that anti-SLAPP "protects the little guy" and should not be construed to protect large companies, like television networks. The court rejected this argument as well, noting that the very purpose of the newly amended law was to expand protected speech.

The ability for the new anti-SLAPP law to protect large media companies was highlighted by Justice Charles D. Wood in an unpublished opinion, where he applied the anti-SLAPP law retroactively to the benefit of The New York Times. Although not the first time the newly amended anti-SLAPP law was applied to the benefit of the New York Times, Justice Wood emphasized that the legislature's revised language "turned the original purpose of the Anti-SLAPP law upside down." *Project Veritas v. N.Y. Times Co.* ("Not only does the amended Anti-SLAPP law grant protection to a Goliath against a David, but 16 years after the SLAPP law was enacted, a newspaper had never qualified for SLAPP protection for its written articles").

One New York court has identified a limit to the protections of the new anti-SLAPP law. Threatening and intimidating speech which violates the law and does not receive First Amendment protection is not covered by the anti-SLAPP statute. *Nat'l Coal. On Black Civic Participation v. Wohl*, No. 20 Civ. 8668 (VM), 2021 WL 480818 at *14 (S.D.N.Y. Jan. 12, 2021) (holding that speech which plausibly violated the VRA and KKK Act was not "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" and was not covered by anti-SLAPP.)

Takeaway

New York's anti-SLAPP law was amended less than a year ago, and it has already significantly impacted several high-profile legal matters. New York state courts are taking cues from the broad language used by the legislature and holding that the new statute expands protected speech even to media companies and others. Because of how recent the new law is, it will be interesting to see where courts draw the lines for what falls within the statute's protection.

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Special thanks to summer associate Evelyn Blanco in the Los Angeles office for her contributions to this post.

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