To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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PROJECT VERITAS,

Plaintiff,

-against-

THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5,

Defendants.

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DECISION & ORDER

Index No. 63921/2020
Seq. No. 7

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order staying all discovery in this action, pursuant to CPLR §§ 2201 and 5519(c), pending resolution of defendants' appeal of a Decision and Order, dated March 18, 2021, denying defendants' motion to dismiss pursuant to New York's anti-SLAPP statute,[1] CPLR 3211(g), and CPLR 3211(a)(1) and (a)(7); an interim order staying all discovery in this action, pursuant to CPLR §§ 2201 and 5519(c), pending resolution of defendants' Order to Show Cause[2]; and for such other and further relief as may be just, proper and equitable.

Order to Show Cause - Affirmation in Support - Memorandum of Law - Exhibits 1-2
Affirmation in Opposition - Memorandum of Law - Exhibits 1-4
Affirmation in Reply - Memorandum of Law - Exhibit 1
NYSCEF File

Upon the foregoing papers this motion is determined as follows:

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[1] New York's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute is codified at NY Civ. R. § 70-a. The legislative history of the statute defines its purpose as providing "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." The legislature noted that the statute was enacted to protect against threat of personal damages and litigation costs which can be and have been used as a means of harassing, intimidating or punishing individuals and others who have involved themselves in public affairs.

[2] The Order to Show Cause signed on May 25, 2021 provided for an interim stay of discovery until such time as the motion is decided (NYSCEF Doc. #144).

This is an action for defamation against the New York Times and two of its reporters, Maggie Astor and Tiffany Hsu, for their reporting on a video published by Project Veritas on September 27, 2020 attacking mail-in voting in Minnesota and purporting to prove that United States Representative Ilhan Omar ("Rep. Omar") and/or her campaign were connected to or involved in an illegal voter-fraud scheme. On September 29, 2020, the Times published a story by Ms. Astor referring to plaintiff's journalism as a "coordinated disinformation campaign." The story labeled the video report "deceptive," made claims of voter fraud "through unidentified sources and with no verifiable evidence," and accused plaintiff of "[m]aking claims without evidence of ballot harvesting." Despite plaintiff's demands that the alleged false accusations be retracted by the Times, the Times then published online stories by Ms. Hsu in October, 2020 which similarly claimed that plaintiff's video report was an example of "false voter fraud stories," called it "deceptive," and stated that the report made accusations of unlawful voting practices "without named sources or verifiable evidence." Thereafter, on November 2, 2020, plaintiff filed its Complaint asserting five claims for defamation against defendants. On December 18, 2020, defendants moved to dismiss the complaint pursuant to CPLR §§ 3211(a)(1), (a)(7), and the newly amended anti-SLAPP provisions of § 3211(g), which took effect on November 10, 2020. On March 18, 2021, the Court (Wood, J., NYSCEF Doc. #131) issued a Decision and Order denying defendants' motion. Defendants filed a notice of appeal on April 8, 2021 and have committed to expeditiously perfect the appeal. Issue was joined on April 12, 2021 by defendants' service of their answer together with defenses and a demand for a jury trial.

Defendants now seek a stay of discovery pending the hearing and determination of their appeal of the Court's denial of defendants' motion to dismiss the action. In sum, defendants argue that (i) a stay is necessary to avoid prejudice to defendants and ensure meaningful appellate review; (ii) staying discovery during the pendency of the appeal will not prejudice plaintiff; (iii) denial of a stay would result in the waste of judicial resources and needlessly burden all parties; and (iv) the appeal has merit and raises novel legal questions of first impression.

Defendants first submit that this Court's denial of a stay will prejudice defendants by effectively making it impossible for them to receive the full relief they seek on appeal under New York's anti-SLAPP law — namely, dismissal without the substantial cost and burden of discovery. Defendants argue that the avoidance of such costs is one of the central purposes of New York's newly-amended anti-SLAPP law, which was passed to both better facilitate the early dismissal of SLAPP suits and to avoid costly discovery expenses. Defendants submit that if discovery were to proceed pending appeal, then a significant part of the relief sought will be unattainable.

Defendants argue that while New York courts have yet to pass on this precise issue, courts in states with similar anti-SLAPP statutes have repeatedly held that discovery should be stayed pending the outcome of an appeal of the denial of an anti-SLAPP motion to dismiss. All have pointed to the fact that allowing discovery to proceed during the pendency of such an appeal would undermine the very relief sought — namely, the ability to avoid the burdens of discovery and litigation. In support of this assertion, defendants cite to *Fabre v Walton*, 436 Mass. 517, 521

[Mass. 2002] ["The protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the petitioner is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process."]; *Varian Med. Sys., Inc. v Delfino*, 35 Cal. 4th 180, 193 [Cal. 2005] [finding that an appeal from denial of anti-SLAPP motion automatically stays all further trial proceedings because such proceedings "affect the effectiveness of the appeal" since "the very purpose of the appeal is to avoid the need for that proceeding"]; and *Gaudette v Davis*, 2015 WL 9998075, at *1 [Me. Super. Nov. 19, 2015) (holding "that the discovery and scheduling order in this matter shall remain stayed until resolution of the [anti-SLAPP] appeal in the Law Court"].

Defendants next argue that staying discovery during the pendency of the appeal will not prejudice plaintiff. Defendants submit that the stay is only sought for a short time and will maintain the status quo. If plaintiff prevails in the appeal, the stay will "merely adjourn rather than foreclose" the relief and discovery plaintiff seeks. Defendants argue that a delay in prosecuting claims alone is not sufficient to demonstrate prejudice resulting from a grant of a stay, and that here, plaintiff will suffer no prejudice if a stay is entered. For example, defendants assert there is no evidence at risk of spoliation, no witnesses who are likely to be unavailable after appellate review, no claim that plaintiff is incurring ongoing damages, and, should the Second Department affirm the Order, discovery will proceed unaffected by the stay. Defendants further argue that plaintiff is free to move to vacate the stay if resolution of the appeal is delayed. Finally, defendants assert that plaintiff stands to benefit from any clarification provided by the Second Department regarding the scope of the claims and the appropriate standard of proof under the anti-SLAPP law.

Defendants submit that the Court should grant the stay of discovery in order to avoid the potential waste of judicial resources. They argue that there is no reason for the Court, or the parties, to expend time and resources in connection with discovery while the appeal is pending. If the appeal is successful, defendants argue that this Court and the parties will be spared the burden of expensive and time-consuming discovery. Moreover, any discovery pursuant to dismissed claims will deprive defendants of the protections to which the Second Department may find defendants are entitled, resulting in a waste of time and resources.

Finally, defendants argue they are entitled to a stay of discovery pending appeal because the appeal has merit and raises "novel and important" legal questions of first impression that will benefit from appellate review. Specifically, defendants argue that the November 2020 amendments to New York's anti-SLAPP law dramatically expanded the protections afforded to organizations in expressing their First Amendment rights. Here, defendants state that their appeal seeks, *inter alia*, to clarify the standards for dismissal under New York's newly amended anti-SLAPP law. They argue that the court should interpret the "substantial basis in law" and "clear and convincing evidence" standards that have yet to be analyzed by the Second Department.

Defendants believe that the Court erred in denying their motion to dismiss by (1)

misapplying CPLR § 3211(g)[3] and holding that "the clear and convincing standard" for establishing actual malice — actual knowledge that the challenged statements were false or awareness of their probably falsity — is not relevant when applying the anti-SLAPP statute, which, had the Court properly applied the standard, would have been dispositive for defendants' defense, given the lack of evidence submitted by plaintiff; (2) construing the "substantial basis in law" standard imposed by the anti-SLAPP statute as being "below the standard for summary judgment" without imposing any heightened burden upon plaintiff in response to defendants' motion under § 3211(g); and (3) misstating the law of defamation with respect to non-actionable statements of opinion by requiring defendants to expressly state that an item is opinion for it to be found to be one.

With respect to the Court's first alleged error, defendants state that the anti-SLAPP law requires plaintiff to carry the high burden of demonstrating that its claims have a substantial basis in law, yet the Court failed to correctly apply the "substantial basis" standard to the actual malice element of plaintiff's causes of action in two ways. First, it held that Project Veritas did not need to demonstrate actual malice by clear and convincing evidence except in connection with a motion for summary judgment. In reaching this conclusion, the Court relied on a decision

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[3] CPLR 3211(g), entitled "Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation" provides as follows:

1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent."

by the Second Department interpreting CPLR 3211(h), which also imposes a "substantial basis in law" standard. Defendants argue that this analysis ignores the fact that the anti-SLAPP law, unlike 3211(h), expressly requires, as a "necessary element" that the plaintiff establish actual malice "by clear and convincing evidence" (*citing* N.Y. Civ. Rights Law § 76-a(2); *see also Singh v Sukhram*, 56 A.D.3d 187, 194 [2d Dept 2008] ["In an action covered by Civil Rights Law § 76-a, the plaintiff bears the burden of establishing by clear and convincing evidence that defamatory false statements were made with knowledge of their falsity or with reckless disregard to whether the statements were true or false."]).

Second, defendants submit that even if the Court was correct to have effectively written the clear and convincing standard out of the anti-SLAPP statute, Project Veritas nevertheless failed to demonstrate "a sufficient basis in law" for the element of actual malice. Defendants argue that the Court mistakenly credited plaintiff's conclusory allegations as evidence of actual malice. Defendants submit that none of plaintiff's actual malice allegations demonstrate, in whole or in part, that defendants "entertained serious doubts as to the truth of [their] publication or acted with a high degree of awareness of . . . probable falsity" (*citing Kipper v NYP Holdings Co.*, 12 NY3d 348 [2009]).

Defendants argue that the Court also failed to assess the impact of the anti-SLAPP law on defendants' arguments that the challenged statements are substantially true or are, alternatively, non-actionable statements of opinion. The Court held that "[d]efendants have not met their burden to prove that the reporting by Veritas in the Video is deceptive" and opined that "whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." Defendants submit that the Court applied the wrong standard for a decision under the anti-SLAPP law, as CPLR 3211(g) shifts the burden for a motion to dismiss from Defendants to plaintiff to demonstrate that the cause of action has a substantial basis in fact and law.

In addition, defendants argue that the Court erred with respect to the law of opinion in defamation actions, finding that "if a writer interjects an opinion in a news article ... it stands to reason that the writer should have an obligation to alert the reader, including a court that may need to determine whether it is fact or opinion, that it is opinion" (NYSCEF Doc. #131, p. 5). The Order cites no case law for the proposition that notice is required or that a failure to include any such notice is deceptive. Finally, defendants argue that the challenged statements are substantially true.

Plaintiff opposes the motion. In sum, plaintiff argues that (i) the denial of a motion to dismiss is not grounds for a stay, even under the anti-SLAPP law; (ii) defendants' appeal has no merit; and (iii) plaintiff would be severely prejudiced by a stay.

Plaintiff first argues that defendants' request for a stay of discovery pending appeal of the

denial of their motion to dismiss is unprecedented and unsupported. Plaintiff states there is no New York precedent supporting the claim that a stay of discovery is appropriate after the denial of a motion to dismiss and that the plain language of anti-SLAPP law reveals that the legislature, in enacting the law, did not intend such a result. Plaintiff submits that the "stay" cases cited by defendants fall almost entirely into one of two distinguishable categories: (1) cases involving an automatic statutory stay pursuant to CPLR § 5519, which, they assert, has no applicability here; or (2) cases involving discretionary stays pursuant to CPLR § 2201 where a parallel proceeding was pending in another court between the same parties. Plaintiff states that none of the cited cases involve a stay pending appeal of a denied motion to dismiss and that defendants have offered no authority to support their argument that the mere appeal from the denial of a dispositive motion creates a basis for a stay.

Second, plaintiff submits that there is nothing in the text or history of the anti-SLAPP law to suggest that a stay of discovery is appropriate pending the appeal of the denial of a dispositive motion. Plaintiff states that the current text of CPLR § 3211(g)(3) makes clear that the qualified stay imposed upon the filing of an anti-SLAPP motion to dismiss is automatically lifted as soon as the trial court rules on the motion, and it says nothing about reimposition of a stay should the losing movant appeal. Plaintiff argues that the legislature knows how to provide for a statutory stay of an action pending appeal when it deems one appropriate—indeed, CPLR § 5519 enumerates a number of instances in which a statutory stay pending appeal is mandatory. In amending the anti-SLAPP law, however, plaintiff points out that the legislature made no such provision. Plaintiff argues that defendants' protestations that they believe their motion to dismiss should have been granted, and that they do not want to engage in discovery while appealing, are no different from the arguments that any litigant on the losing end of a motion to dismiss could advance.

Third, plaintiff argues that defendants' appeal has no merit. With respect to defendants' argument that plaintiff did not sufficiently meet the amended anti-SLAPP law's higher burden of demonstrating a "substantial basis" that the defendants published false statements about Veritas with actual malice, plaintiff argues that the Court squarely held to the contrary. To that end, plaintiff quotes that portion of the Decision and Order which holds that "there is a substantial basis in law and fact that defendants acted with actual malice, that is, with knowledge that the statements in the Articles were false or made with reckless disregard of whether they were false or not" (NYSCEF Doc. #132, p. 15).

Plaintiff next argues that defendants err in their argument that the Court failed to find that plaintiff had shown a "substantial basis" for its claims by "clear and convincing evidence." Instead, plaintiff states that the Decision and Order addressed the issue clearly by correctly noting that "CPLR 3211(g) does not impose a 'clear and convincing' standard," and that the "clear and convincing" standard set forth in Civil Rights Law § 76-a(2) is applicable to a plaintiff's claims at the summary judgment stage (*id.*, at pp. 14-15).

Plaintiff takes issue with defendants' argument on appeal that the alleged defamatory statements were non-actionable statements of opinion. Again, plaintiff argues that the Court correctly decided this issue in holding that the defendants' description of plaintiff's

journalism as "deceptive" and "without verifiable evidence" in a news story would signal to a reasonable reader that these were assertions of fact, not opinion. The Court further noted that the Times' own policies prohibit news reporters like Astor and Hsu from injecting their personal opinions into Times news stories (*id.*, at pp. 5-7). Plaintiff submits that the Court's analysis of the issue was fully consistent with controlling New York case law (*citing Gross v N.Y. Times Co.*, 82 NY2d 146, 156 [1993]).

Finally, plaintiff argues that it would be severely prejudiced by a stay. Plaintiff first argues that a complete stay of an action is inherently prejudicial to the plaintiff. Plaintiff submits that New York courts recognize that "justice delayed is justice denied," and that therefore, "[s]ome excellent reason would have to be demonstrated before a judge is asked to bring to a halt a litigant's quest for a day in court" (*citing Ferber v Fairfield Greenwich Grp.*, No. 600469/2009, 2010 WL 2927274, at *3 [NY Sup. Ct. NY Cty. July 22, 2010]). It is precisely because of the "significant prejudice" resulting from a lengthy stay that New York courts consider a full stay of litigation to be a "drastic" remedy that requires extraordinary justification (*citing Hala v Orange Reg'l Med. Ctr.*, 76 NYS3d 369, 375, 378 [NY Sup. Ct. Orange Cty. 2018]). Plaintiff argues that the cases cited by defendants are inapposite and do not support defendants' position.

Plaintiff submits that defendants entirely discount the prejudice to plaintiff by what would be a lengthy stay until the Appellate Division resolves their appeal, and defendants' reassurances that they will "minimize the impact" by perfecting their appeal by the end of June 2021, does little to minimize that prejudice. During the time it takes for the appeal to be resolved, plaintiff is concerned that the alleged false and defamatory stories that are the subject of this action will remain on the Times' website. Because this Court has no ability to expedite the resolution of the appeal in the Appellate Division, plaintiff submits that defendants' request for a stay should be directed to the Appellate Division pursuant to CPLR § 5519(c), not to this Court.

Finally, plaintiff submits that a lengthy delay in plaintiff's ability to hold defendants to account for their allegedly tortious actions will embolden the Times to continue to publish falsehoods about plaintiff. In support of this assertion, plaintiff claims that just recently two Times reporters appeared on cable news and made false claims regarding plaintiff, despite the fact that the claims were contradicted by the Times' own published reporting. Plaintiff's request for a correction was denied. Accordingly, plaintiff submits that having demonstrated that its claims have a substantial basis, plaintiff is entitled to a chance to prove its claims in court without extraordinary delay.

Legal Analysis/Discussion

This motion requires the Court to determine whether defendants are entitled to a stay of discovery pending the appeal of the denial of their motion to dismiss pursuant to New York's anti-SLAPP statute, CPLR 3211(g), and CPLR 3211(a)(1) and (a)(7).

New York's recently-amended anti-SLAPP law extends heightened protection to lawsuits based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of

the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition (N.Y. Civ. Rights Law § 76-a [1][a]).

The next provision of the anti-SLAPP Law falls under CPLR 3211(g), which provides that:

> A motion to dismiss based on [3211(a)(7)], in which the moving party has demonstrated that the action involves public petition and participation as defined in Civil Rights Law 76-a shall be granted, "unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion" (CPLR 3211[g]).

Civil Rights Law §70-a creates an affirmative cause of action to recover damages from plaintiff, including attorneys' fees, and other damages from plaintiff in specified circumstances, if it can be shown that the applicant brought the action "without a substantial basis in fact and law" (CRL §70-a).

The anti-SLAPP law facilitates early dismissal of SLAPP suits (*Duane Reade, Inc. v Clark*, 2 Misc. 3d 1007(A) (Table), 2004 WL 690194, at *4), which is consistent with New York courts' practice of dismissing defamation claims at the earliest possible stage of proceedings that can be resolved by the court as a matter of law (*see, e.g., Immuno AG v Moor-Jankowski*, 537 N.Y.S.2d 129, 137 [1st Dept 1989] ["To unnecessarily delay the disposition of a libel action is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights"] [citation omitted], vacated on other grounds, 497 U.S. 1021 [1990]). To that end, the anti-SLAPP law requires courts to consider affidavits and other evidence not typically permitted under a CPLR 3211 (a) motion to dismiss (CPLR 3211[g][2]).

CPLR § 5519(c) provides that "[t]he court from or to which an appeal is taken . . . may stay all proceedings to enforce the . . . order appealed from pending an appeal . . . ." Similarly, CPLR § 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Under both provisions, courts have "broad discretion to grant a stay" of discovery in actions pending the resolution of an appeal (*Morreale v Morreale*, 84 AD3d 1187, 1188 [2d Dept 2011]; *see also Case Capital Corp. v Morgan Invest., Inc.*, 154 AD2d 501, 501 [2d Dep't 1989] [finding there exists "broad discretion" to stay action "as justice required"]; *Zonghetti v Jeromack*, 150 AD2d 561, 563 [2d Dept 1989] ["It is well settled that a court has broad discretion to grant a stay in order to avoid . . . potential waste of judicial resources"]; *Asher v Abbott Labs.*, 307 AD2d 211 [1st Dept 2003] [finding that courts grant stays in the interests of "comity, orderly procedure, and judicial economy"]). ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" [*Landis v N. Am. Co.*, 299 U.S. 248, 254-55 [1936] ["How this can best be done calls for the exercise of judgment,

which must weigh competing interests and maintain an even balance"]). This power is limited only by the Court's "own sense of discretion, prudence, and justice" (*Joseph v Cheeseboro*, 42 Misc2d 917, 919 [NY Civ. Ct. 1964], rev'd on other grounds, 43 Misc2d 702 [1st Dep't 1964]; *Economy Premier Assur. Co. v Robohm*, 2016 WL 1558846, at *3 [Sup. Ct. NY Cty. Apr. 15, 2016] ["Pursuant to CPLR 2201, any court in New York can stay its own proceedings 'in a proper case, upon such terms as may be just.' . . . It is left to the court to determine what a 'proper' case is as a matter of discretion, which must be exercised with circumspection"] [citing David. D. Siegel, N.Y. Prac. § 255 at 452 [5th ed. 2011]). Given the broad discretion afforded courts in New York in this area, "[a]ny relevant factor may be considered." David D. Siegel, New York Practice § 535 [6th ed. 2018].

With the foregoing principles in mind, the Court now turns to defendants' motion and the arguments made by the parties for and against a stay pending the resolution of defendants' appeal of the denial of their motion to dismiss.

To the extent defendants argue that a stay of discovery should be granted because their appeal raises questions about the correct legal standards for applying recently-enacted amendments to the anti-SLAPP statute, this Court incorporates its determinations with respect to the issues raised by defendants as set forth in the Decision and Order dated March 18, 2021 denying defendants' motion to dismiss (NYSCEF Doc. #31, Wood, J.).

The Court next turns to the defendants' argument that meaningful appellate review would be impossible without a stay, because defendants will effectively be prevented from receiving the full relief they seek on appeal, i.e., dismissal without the substantial cost and burden of discovery.[4] It is well settled in the law that a stay is appropriate when, without a stay, the relief sought on appeal will be mooted (*see First City, TexasHouston, N.A. v Rafidain Bank*, 131 FSupp 2d 540, 543 [S.D.N.Y. 2001]; *Suffolk County Ethics Com'n v Neppell*, 2003 WL 26086904, at *1 [NY Sup. Ct. Suffolk Cty. Jan. 30, 2003] [granting "stay pending appeal pursuant to CPLR 5519(c)" because "[u]nless a stay is granted, the appeal will be rendered moot by virtue of the fact that defendant will be forced to file the financial disclosure statement prior to the appeal {of whether the financial statement disclosure statement is required} being determined"], aff'd, 307 AD2d 961 [2d Dept 2003]; *Center For National Security Studies v U.S. Dept. of Justice*, 217 F. Supp. 2d 58 [D.D.C. 2002] [finding stay appropriate where district court had "ordered the Government to produce a list of the identities of all individuals detained in connection with the investigation of the September 11, 2001 terrorist attacks, and a list of the identities of their attorneys" in part because "disclosure of the names of the detainees and their lawyers would effectively moot any appeal"], aff'd, 331 F3d 918 [D.C. Cir. 2003]; *Neff v Pennsylvania R. Co.*, 173 F2d 931, 933 [3d Cir. 1949] [finding that once privileged matter is produced after an objection has been overruled, the question of correctness of the ruling is moot on appeal]).

In considering this argument, the Court disagrees with defendants that the denial of a stay will render moot their appeal. While it is accurate that the anti-SLAPP statute at issue provides

[4] Plaintiff did not address this argument in its opposition to the motion.

for the early dismissal of defamation claims in part to avoid costly discovery expenses, this is not the central focus of the defendants' appeal. Instead, defendants seek the reversal of the Court's denial of their motion to dismiss and a finding by the Appellate Division that plaintiff has not demonstrated that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. If defendants are successful upon appeal, the case will be dismissed and the primary goal of appellate review will have been achieved, despite the parties' having engaged in the exchange of discovery prior to the issuance of a decision. Moreover, neither party will be significantly harmed by the Court permitting discovery to take place and the action to be readied for trial in the event that the Appellate Division dismisses the action. Indeed, allowing discovery to be completed while the appeal makes its way through the appellate process will ensure that justice will not be unnecessarily delayed.

The Court next turns to plaintiff's argument that the denial of an anti-SLAPP motion to dismiss is no different than the denial of a motion to dismiss in other areas of litigation, because under the anti-SLAPP law and CPLR § 5519, defendants are not entitled to an automatic stay pending appeal. The Court agrees. The history and text of the anti-SLAPP law demonstrates that the Legislature did not intend to deviate from the general rule that no stay is available pending appeal of a denied motion to dismiss. Although defendants describe the anti-SLAPP law as a "newly-enacted statute," the primary recent amendment to the law merely enlarged the class of defendants who may take advantage of the motion to dismiss and burden-shifting procedures. Despite the fact that New York defendants have been permitted to file anti-SLAPP motions to dismiss for decades, the defendants here failed to cite any cases in which an unsuccessful movant was granted a stay pending appeal of the denial of an anti-SLAPP motion to dismiss.

In addition to the foregoing, it cannot be overstated that the plain text of the statute negates any inference that the Legislature intended for a stay to remain in effect throughout the entirety of an appeal. The current text of CPLR 3211(g)(3) makes clear that the qualified stay imposed upon the filing of an anti-SLAPP motion to dismiss is automatically lifted as soon as the trial court rules on the motion, and it says nothing about reimposition of a stay should the losing movant appeal.[5] Of course, the Legislature knows how to provide for a statutory stay of an action pending appeal when it deems one appropriate. For example, CPLR § 5519 enumerates a number of instances in which a statutory stay pending appeal is mandatory. Nevertheless, in amending the anti-SLAPP law and providing for a qualified stay in the trial court while a motion to dismiss is pending, the Legislature expressly chose to lift that stay as soon as the motion to dismiss is adjudicated by the trial court. As aptly argued by plaintiff's counsel, this choice was deliberate.

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[5] CPLR § 5519(g)(3): All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

In amending the anti-SLAPP law, the Legislature had many existing statutes from other states to reference. A number of those statutes explicitly extend the stay under an anti-SLAPP motion to dismiss to any subsequent appeal of the dismissal ruling, including the statutes in Hawaii, Kansas, Minnesota and Connecticut (*see* Haw. Rev. Stat. Ann. § 634f-2(3) [2002]; Kan. Stat. Ann. § 60-5320(f) [2016]; Minn. Stat. Ann. § 554.02 Subdiv. 2(1) [1994]; Conn. Gen. Stat. Ann. § 52-196a(5)(d) [2019]). Given that the anti-SLAPP law does not provide for a stay pending appeal of a denied anti-SLAPP motion, and that New York courts have not imposed a stay in during the pendency of the anti-SLAPP law, defendants have failed to convince this Court that it should deviate from the general rule that a stay is not available pending appeal of a denial of a motion to dismiss.

Plaintiff will be substantially prejudiced by a stay. In deciding whether to stay a case, the court considers prejudice to the opposing party (*Chan v Zoullas*, 34 Misc3d 1210(A) [Sup Ct NY Cty 2012]). Here, a delay of up to three (3) years is likely if a stay is granted. As argued by plaintiff, New York courts recognize that "justice delayed is justice denied," and that therefore, "[s]ome excellent reason would have to be demonstrated before a judge is asked to bring to a halt a litigant's quest for a day in court" (*Ferber v Fairfield Greenwich Grp.*, No. 600469/2009, 2010 WL 2927274, at *3 [N.Y. Sup. Ct. N.Y. Cty. July 22, 2010]). Far from considering a stay to be merely some harmless pause, it is precisely because of the "significant prejudice" resulting from a lengthy stay that New York courts consider a full stay of litigation to be a "drastic" remedy that requires extraordinary justification (*see Hala v. Orange Reg'l Med. Ctr.*, 76 NYS3d 369, 375, 378 [N.Y. Sup. Ct. Orange Cty. 2018]). Here, having first failed to convince the Court that plaintiff's case should be dismissed, defendants also failed to demonstrate the extraordinary justification required for the imposition of the drastic remedy of a stay pending appeal.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the defendants' motion is denied without prejudice to defendants' seeking a stay from the Appellate Division; and it is further

ORDERED that counsel shall appear for a virtual conference via Microsoft Teams on Wednesday, September 8, 2021 at 2:30 P.M. before Court Attorney Referee Laurie Sullivan; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff with notice of entry within 10 days of entry.

Dated: White Plains, New York
August 12, 2021

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part