| **Isaly v Garde** |
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| 2022 NY Slip Op 34108(U) |
| December 6, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 160699/2018 |
| Judge: James E. d'Auguste |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **Hon. James E. d'Auguste, J.S.C.** **PART 55**

***Justice***

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SAMUEL D. ISALY,

Plaintiff,

- v -

DAMIAN GARDE, DELILAH BURKE,

Defendants.

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**INDEX NO.** 160699/2018

**MOTION DATE** 10/17/2022

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for REARGUMENT/RECONSIDERATION .

Plaintiff moves for an order granting him leave to reargue this Court's decision and order dated July 11, 2022 (NYSCEF Doc. Nos. 128 and 129, and referred hereinafter as the "July Decision"), which dismissed the amended complaint in this defamation action based, in part, upon the Southern District of New York's holdings (and the Second Circuit's affirmance of them) in companion federal litigation. Upon reargument, plaintiff contends that defendants' motions to dismiss and for protective orders (Motion Seq. Nos. 003 and 004) should be denied and he should be granted leave to serve and file an amended complaint.[1] Defendant Garde opposes in writing while reserving the right to argue that recent amendments to the 'Anti-SLAPP Law,' (2020 N.Y. Laws Ch. 250) are retroactive and applicable to the instant action, an issue pending before the Court of Appeals in another action.[2] *See, Gottwald v. Sebert*, 2022 NY Slip Op 68019(U) (1st Dept. Jun. 28, 2022), *granting lv. to app.* 203 A.D.3d 488 (1st Dept. Mar. 10, 2022).

As a threshold matter, there is little question that the instant action is "an action involving public petition and participation," as presently defined by the Anti-SLAPP Law, codified in

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[1] *See, Isaly v. Boston Globe Media Partners LLC*, Dkt. No. 18-cv-9620, 2020 U.S. Dist. LEXIS 174845 (S.D.N.Y. Sept 23, 2020), *reconsideration denied*, 2021 U.S. Dist. LEXIS 91558 (S.D.N.Y. May 13, 2021), *affd.*, 2022 U.S. App. LEXIS 1006 (2d Cir. Jan. 13, 2022) (dismissing complaint arising from same allegations).

[2] SLAPP is an acronym for Strategic Litigation Against Public Participation. *See, Gordon v. Marrone*, 151 Misc. 2d 164, 166 (Sup. Ct., Westchester Co. 1991).

relevant part as Civil Rights Law § 76-a(1)(a). July Decision, at 9. Pursuant to Chapter 250, §§ 1 and 3 (codified as Civil Rights Law § 70-a(1)(a) and CPLR 3211(g)), any such action "commenced *or continued*" after November 10, 2020 must have, at the pleadings stage, "a substantial basis in fact or law," or "a substantial argument for an extension, modification or reversal of existing law." (emphasis added). Absent such a showing, a complaint alleging a claim involving public petition and participation is subject to mandatory dismissal and fee-shifting. Civil Rights Law § 70-a(1)(a); and CPLR 3211(g). However, the applicability of the Anti-SLAPP Law is very much in question after the First Department held, during the pendency of defendants' motions, that "[c]ontrary to the decision of the motion court and in other nonbinding decisions," Chapter 250 did not apply to actions (such as the instant action) that were commenced prior to November 10, 2020. *Gottwald*, 203 A.D.3d at 488 (citation omitted). The First Department subsequently denied reargument in *Gottwald*, but granted leave to appeal to the Court of Appeals. *Gottwald*, 2022 NY Slip Op 68019(U), *supra*.

After reviewing the parties' papers, this Court sought the parties' positions regarding a possible stay of this action pending the Court of Appeals' determination of *Gottwald*, and both parties responded with written supplemental arguments to each other's supplemental arguments. Plaintiff opposes a stay, while defendants consent to a stay.[3] Upon the foregoing, the decision and order of the Court is as follows: Plaintiff's motion is granted in part and denied in part, to the extent of granting reargument, vacating the July Decision in part upon such rearugment, denying plaintiff's motion for leave to file a second amended complaint, and staying this action (including all discovery) pending a determination by the Court of Appeals in *Gottwald.*

***1. Plaintiff's Motion for Leave to Reargue***

A motion for leave to reargue is, pursuant to CPLR 2221(d), designed "to point out controlling principles of law or fact that the court may have overlooked," and which would change the outcome of the Court's prior decision. *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller*, 2016 NY Slip Op 30422(U), *2 (Sup. Ct., New York Co. 2016) (quotation and citation omitted). Beyond granting reargument pursuant to CPLR 2221, this Court is also "fully

[3] Plaintiff also requested oral argument on the instant motion, which the Court declined as unnecessary given the extensive briefing in this and the underlying motions. *See, e.g., Mingla v. City of New York,* 2014 NY Slip Op 30162(U), *16 (Sup. Ct., New York Co. 2014) ("There is no right to oral argument."); and *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller*, Index No. 452358/2015, slip op., at *1 (Sup. Ct., New York Co. Mar. 4, 2016) (noting that "[a]rgument on the motion is no substitute for the papers submitted").

empowered to vacate or modify its own order," as "the court always retains the inherent power to set aside, correct or modify its own orders." *Sayre v. Hoey*, 113 A.D.3d 482, 482 (1st Dept. 2014); and *H.T. v. A.E.*, 57 Misc. 3d 1023, 1026 (Sup. Ct., Richmond Co. 2017), *quoting Halloran v. Halloran*, 161 A.D.2d 562, 564 (2d Dept. 1990) (quotation marks omitted). Thus, given that the various elements of the parties' motions and cross-motions determined in the July Decision are inextricably linked, this Court will exercise its inherent power to revisit the whole of the July Decision beyond the narrow portions that plaintiff seeks leave to reargue. That plaintiff has noticed an appeal of the July Decision does not impact this Court's power to revisit its own decision. *See, People v. Simmons*, 86 Misc. 2d 737, 739-740 (Sup. Ct., New York Co.), *affd. for reasons stated below*, 54 A.D.2d 624 (1st Dept. 1976) (Supreme Court authorized to resettle order during pendency of appeal to promote judicial economy and efficiency); and *People v. Green*, 131 Misc. 2d 641, 642-643 (Sup. Ct., Kings Co. 1986) (same, citing *Simmons, supra.*).

Defendants each moved separately to dismiss the amended complaint (Garde moving under Motion Seq. No. 003, and Burke under Motion Seq. No. 004), and for protective orders. In each motion, plaintiff cross-moved, pursuant to CPLR 3214(b), to lift the automatic stay of discovery imposed by defendants' motions to dismiss. Plaintiff's motion principally concerns the Court's application of res judicata and collateral estoppel effect of the federal courts' holdings in *Isaly v. Boston Globe Media Partners, supra.* Specifically, plaintiff alleges that the Court, in relying upon the federal courts' holdings, incorrectly applied the plausibility standard required in the federal courts to the amended complaint. (Mem. of Law in Supp., at 13-16). *See, e.g., Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 306 (2d Cir. 2021), *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (discussing federal plausibility standard in pleading). Plaintiff also alleges that this Court overlooked alleged non-opinion statements by Burke. (Mem. of Law in Supp., at 22-23). Garde opposes, and this Court considers Garde's opposition in considering the reargument of both Garde and Burke's motions to dismiss "as a matter of discretion in the interest of judicial economy." *See, Amelius v. Grand Imperial LLC*, 57 Misc. 3d 835, 843 (Sup. Ct., New York Co. 2017) (considering the City of New York's motion papers and determining the merits of affirmative defenses raised against City and its co-defendants). For ease of reference, this Court addresses defendants' motions to dismiss individually, and the parties' motions and cross-motions regarding discovery collectively, in turn.

**2. *Defendant Garde's Motion to Dismiss***

Upon further consideration, the Court adheres to its prior decision in dismissing the amended complaint as against Garde pursuant to CPLR 3211(a)(7), vacates its prior decision denying dismissal pursuant to CPLR 3211(g), and stays Garde's application for fee-shifting. Plaintiff's argument that this Court misapprehended the preclusive effect of the federal courts' holdings in dismissing this action against Garde is without merit since this Court already considered plaintiff's amended complaint in the absence of preclusive effect. As this Court noted in the July Decision (at page 7):

> "Even without the res judicat[a] and collateral estoppel effect of the related federal action, this Court, independent of the federal courts, similarly dismiss[es] the action as against Garde as plaintiff has not alleged facts from which a fact finder could properly infer that defendant Garde was grossly irresponsible in his reporting."

Even where the federal courts' decisions are not preclusive, they are persuasive. *See, Jones v. Supt., Va. State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) (noting "that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us" what has previously been done); and *Prince Hall Grand Lodge v. Supreme Council of United States*, 32 Misc. 2d 390, 399 (Sup. Ct., Kings Co. 1962) (even where decisions of other courts may not be entitled to res judicata effect, they may nevertheless be "persuasive, informative and most helpful to an understanding of what here has been litigated"). In particular, the Second Circuit's decision affirming dismissal was unequivocal in finding that plaintiff did not state a claim alleging gross irresponsibility, stating that "none of the allegations in the [complaint] and nothing in the transcript of the pre-publication interview suggest that what Garde witnessed that day was inconsistent with his sources' stories or even suggested that they might be untrue." *Isaly v. Boston Globe Media Partners*, 2022 U.S. App. LEXIS, at *3. If anything, plaintiff's choice to oppose Garde's motion to dismiss with evidence made the federal courts decisions more persuasive, as it waived plaintiff's ability (in contrast to the federal litigation) to stand upon the four corners of his pleading. *See, id.*, at *3 n. 1 (finding that district court correctly considered documentary evidence relied upon by plaintiff in bringing suit in motion to dismiss). As the Westchester County Supreme Court recently explained:

> "Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one. On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary

> showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint."
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> *Armentano v. Armentano*, 70 Misc. 3d 1215(A), *12 (Sup. Ct., Westchester Co. 2021) (citations omitted).

In choosing to introduce an interview transcript at the pleading stage, plaintiff opened the door beyond the four corners of the complaint and invited the Court to be persuaded by the Second Circuit's consideration of that same evidence. The Court is persuaded that plaintiff has not stated the necessary non-conclusory facts to successfully plead that Garde was grossly irresponsible in his reporting. *See, Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 (1999) (quotation and citation omitted).

This Court is mindful of one's natural sense of frustration and helplessness at having a negative article written that plaintiff believes is inaccurate and nothing in this decision should be read to minimize that. However, this Court is equally mindful that personalized impositions are required to give way to the societal benefit of a free press unfettered by the threat of defamation liability. *See,* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val. U.L. Rev. 1235, 1237-1238 (2007) (collecting authorities and noting that "[a] free press has long been recognized as one of the bedrocks of citizen participation in government through its role in keeping people informed about issues of public concern and providing a forum for debate about public issues," and that broad protections are necessary "[i]n a society in which the media plays a crucial role in informing citizens about current issues and encouraging them to participate in government"). The Governor noted as much in approving the first iteration of the Anti-SLAPP Law thirty years ago, acknowledging the risks of abuse of free speech, but stating that:

> "[I]t is the measure of our commitment to free debate in this State that we value speech and public participation knowing that the power may be misused, aware that the advocacy of some may be injurious or false, refusing to judge in individual cases whether debate itself would be good or bad. We protect public participation regardless of the content of the views expressed."
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> Governor's Signing Mem., 1992 N.Y. Laws Ch. 767, at 2 (Aug. 3, 1992).

While that interest in a free and robust press can be overcome under truly exceptional circumstances, they are not present in this action. The Court of Appeals has noted and affirmed "the expansive language of our State constitutional guarantee," of a free press and "the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events," which calls "for particular vigilance by the courts of this State in safeguarding the free press against undue interference." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (discussing defamation standard under state law). Accordingly, this Court adheres to its prior decision and dismisses the amended complaint as against Garde, vacates its prior decision denying fee-shifting, and stays that portion of Garde's motion seeking fee-shifting.

***3. <u>Defendant Burke's Motion to Dismiss</u>***

Upon further consideration, this Court adheres to its prior decision in dismissing the amended complaint against Burke pursuant to CPLR 3211(a)(7) in part, vacates it in part, vacates its prior decision denying dismissal pursuant to CPLR 3211(g), and stays the remaining portions of Burke's motion. As discussed in the July Decision, expressions of opinion are not a basis for a claim regardless of the pleading standard, and the vast majority of plaintiff's claims against Burke are grounded in non-actionable expressions of opinion as noted in the said decision at page 8. This Court will not re-state them here.

In seeking reargument however, plaintiff notes that the article attributes a handful of alleged statements by Burke that concern acts capable of being proven false rather than the expression of opinion or hyperbole. (Mem. of Law in Supp., at 22-23). Specifically, allegations that plaintiff exposed Burke to pornographic images on his computer screen and inappropriate commentary by e-mail, upon further consideration, constitute alleged acts which could be proven false. (Amended Compl., at ¶¶ 12(f) and (h)). Thus, the only issue previously determined by this Court was whether plaintiff's allegations against Burke concerned statements of opinion. Having reconsidered a portion of that decision, the questions of whether plaintiff otherwise validly pleaded a cause of action against Burke and whether those allegations are subject to fee-shifting are dependent upon the applicability of the Anti-SLAPP Law. Accordingly, and as discussed later in this decision, the Court vacates its prior decision dismissing the amended complaint as against Burke in part and will make a final determination of that motion following the Court of Appeals' determination in *Gottwald*.

### 4. ***Defendants' Motions for Protective Orders and Plaintiff's Cross-Motions to Lift the Discovery Stay***

Since this Court dismissed the amended complaint in the July Decision, defendants' motions and plaintiff's cross-motions to lift the automatic discovery stay were denied. July Decision, at 10. In light of the Court's decision granting reargument however, the parties' motions and cross-motions are no longer moot as they were when the Court issued the July Decision. Thus, on reargument, defendants' motions for protective orders are granted, and plaintiff's cross-motion is denied, pending the Court of Appeals' determination of *Gottwald.*

CPLR 3214 "provides for a stay of disclosure during the pendency of a motion addressed to the pleadings or for summary judgment or for partial summary judgment," by operation of law, subject to a motion to vacate that stay. *Rappaport v. Blank*, 72 A.D.2d 717, 717 (1st Dept. 1979). As a threshold matter, this Court notes that plaintiff's request to conduct "specific and narrowly tailored document requests and interrogatories," is flatly belied by the very broad initial discovery demands plaintiff served before defendants moved to dismiss this action. (Mem. of Law in Supp. of Cross-Motion, at 25; and NYSCEF Doc. No. 43). Plaintiff's papers also confirm that he would, if permitted, conduct discovery, as had been contemplated in federal court against Garde's publisher prior to discovery being stayed. (Mem. of Law in Supp. of Cross-Motion, at 25; and NYSCEF Doc. No. 80, at 7-10). Given that similarity, the Southern District's bench decision staying discovery in plaintiff's litigation against Garde's publisher is particularly relevant to the question of lifting the automatic stay in this action especially as plaintiff bears the burden of overcoming the automatic stay in this action. This is in contrast to federal court, where plaintiff was presumed to be able to commence discovery and yet was still stayed. (NYSCEF Doc. No. 80, at 28).[4] Again, even if the Southern District's decision staying discovery is not preclusive, it can be, and is, persuasive. *See, Jones*; and *Prince Hall Grand Lodge, supra*.

As discussed elsewhere in this decision, portions of defendants' applications to dismiss this action remain live until the Court of Appeals determines *Gottwald*. On that basis, the status of the case – with pending portions of a motion to dismiss – should be to keep the automatic stay imposed

[4] In ruling from the bench, the Southern District of New York cited *Hong Leong Fin. Lts. (Sing.) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69 (S.D.N.Y. 2013).

by CPLR 3214 and the burden should be upon plaintiff to establish why the stay should be lifted.[5] Plaintiff has not established why the stay of discovery should be lifted and, as a consequence, the stay should remain.

Plaintiff's stated concerns regarding fading memories, the potential loss or destruction of evidence and/or the unavailability of witnesses, although real concerns, are generic concerns that arise in any situation where discovery could be stayed. (Mem. of Law in Opp. to Motion to Dismiss, at 25). This Court must then presume that the Legislature was aware of that generic risk in crafting CPLR 3214, and plaintiff's nonspecific and unadorned concerns are insufficient to establish the type of "legitimate need" for immediate discovery that would justify lifting the automatic stay. *Murillo v. NYC Partnership Hous. Dev. Fund Co., Inc.*, 2015 NY Slip Op 30617(U), *29-31 (Sup. Ct., New York Co. 2015) (collecting authorities and quashing subpoena).

This Court particularly notes the sensitivity of potential discovery in this action in light of common law reporter's privilege concerns – which the Southern District of New York also referenced in staying discovery in plaintiff's federal litigation – and the press shield law codified at Civil Rights Law § 79-h. (NYSCEF Doc. No. 80, at 27-28 (discussing impact of reporter's privilege upon plaintiff's intended discovery in federal action)). Coupled with the lack of case-specific concerns – which the Southern District of New York also noted in staying discovery in plaintiff's federal action, and which the Court again finds persuasive – the stay should remain. (NYSCEF Doc. 80 at 28).[6] The parties themselves have been under an obligation to retain potential evidence without any order of the Court since they anticipated litigation, and there is no indication in the record before the Court that any loss of evidence has occurred. *See, VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 36 (1st Dept. 2012) (noting parties' obligation to institute litigation holds). Accordingly, plaintiff's cross-motions to vacate the discovery stays are denied and defendant's motions for protective orders are granted pending the Court of Appeals' determination of *Gottwald* and any resulting motion practice in this action.

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[5] Although this Court is not determining the parties' discovery motions pursuant to CPLR 3211(g) at this time, the Court is mindful of the heightened burden to lift a discovery stay in a SLAPP action pursuant to CPLR 3211(g)(3) which may apply to this action depending upon the outcome of *Gottwald*.

[6] The court cited *Bethpage Water Dist. v. Northrop-Grumman Corp.*, Dkt. No. 13-cv-6362, 2014 U.S. Dist. LEXIS 168468, 2014 WL 6883529 (E.D.N.Y. Dec. 3, 2014) and *In re Term Commodities Cotton Futures Litig.*, 2013-1 Trade Cas. (CCH) P78,378 (S.D.N.Y. 2013).

### 5. *Plaintiff's Motion for Leave to Amend the Complaint is Denied*

The branch of plaintiff's motion seeking leave to serve and file a second amended complaint (a proposed copy of which is filed as NYSCEF Doc. No. 136), is denied. The Court notes (and plaintiff urges) that CPLR 3025 is permissive in considering leave to serve an amended pleading, including a second amended complaint. (Mem. of Law in Reply, at 23-25). However, permissiveness is not boundless, and "exceptions also arise in practice that demonstrate why court approval should not be taken for granted," in applications based upon permissive standards. *Kilgore v. City of New York*, 76 Misc. 3d 1228(A), *3 (Civ. Ct., Bronx Co. Nov. 2, 2022) (discussing the state's permissive policy toward excusing defaults and denying vacatur) (quotation and citation omitted). For the reasons set forth below, this Court denies plaintiff's motion for leave to serve and file a second amended complaint.

As defendant Garde notes in opposing leave, the proposed second amended complaint would be plaintiff's sixth pleading over the course of three actions concerning the same article. (Mem. of Law in Opp., at 3). Plaintiff does not plow any new ground in the proposed pleading, and plaintiff is obliged, like all litigants, "to conduct lawsuits in a disciplined and efficient manner in order…to assure [both sides] that their claims will be expeditiously and fairly resolved." *Beetz v. City of New York*, 73 A.D.2d 925, 926 (2d Dept. 1980). Plaintiff did not cross-move for leave to amend or reserve his right to amend the complaint again in the face of defendants' motions, and there are no allegations in the proposed second amended complaint that could not have been alleged earlier. Thus, plaintiff's proposed second amended complaint bears the hallmarks of a dilatory pleading and motion practice that the courts have discouraged for some time. *See, e.g., 501 Fifth Ave. Co., LLC v. Yoga Sutra, LLC*, 2013 NY Slip Op 31236(U), *7 (Sup. Ct., New York Co. 2007) (denying leave to amend complaint). On that basis, the Court can, and does, deny plaintiff leave to amend.

This Court's decision would not differ if addressed the merits of the proposed second amended complaint. The second amended complaint suffers from the same conclusory defects that were largely fatal to the amended complaint as discussed *supra*. Additionally, plaintiff's status as an investment advisor as alleged in the second amended complaint (at ¶¶ 1; 4; 13 n. 2; 75; 80; and 82), and plaintiff's specific allegation that the acts he was accused of would constitute "misconduct that would violate local, state, and federal law as well as the policies of the workplace at OrbiMed," raise additional difficulties for plaintiff. (at ¶ 14. See also, ¶ 80). Plaintiff is licensed

as an investment advisor representative, of which judicial notice can be taken.[7] *See, Intensive Fin. Serv. Inc. v Colson*, 75 Misc. 3d 1232(A), *1 (Civ. Ct., Bronx Co. Aug. 5, 2022) (taking judicial notice of publicly available licensure records); and *J.A.M. Assoc., LLC v. Gomez*, 75 Misc. 3d 1219(A), *2 n. 2 (Civ. Ct., Bronx Co. Jun. 21, 2022) (taking judicial notice of publicly available government records). That plaintiff is subject to continued oversight by licensing authorities, and the conduct at issue concerns plaintiff's licensed work, appears to implicate the Anti-SLAPP Law as it existed prior to Chapter 250, codified as then-Civil Rights Law § 76-a(1)(b).[8] *See, Edwards v. Martin*, 158 A.D.3d 1044, 1046-1047 (3d Dept. 2018) (reversing denial of anti-SLAPP motion to dismiss); and, *e.g., Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A) (Sup. Ct., New York Co. 2004) (discussing Anti-SLAPP Law). Accordingly, this Court will not grant plaintiff leave to amend the complaint yet again.

**6. *The Remaining Portions of this Action are Stayed Pending the Court of Appeals' Determination of Gottwald***

The remaining issues in this action are limited to plaintiff's non-opinion-based claims against Burke and whether such claims are subject to dismissal and fee-shifting pursuant to CPLR 3211(g). Under the circumstances presented, this Court finds that the proper course of action at this juncture is to stay the remaining portions of the instant action until the Court of Appeals has determined the pending appeal in *Gottwald* regarding the potential applicability of the Anti-SLAPP Law herein.

Pursuant to CPLR 2201, the Court may order "a stay of proceedings in a proper case, upon such terms as may be just." This power specifically includes the power to stay an action until a pending relevant legal issue is argued and determined by the Court of Appeals. *See, Reynders v. Conway*, 79 A.D.2d 863, 864 (4th Dept. 1980) (citing practice commentaries in denying writ prohibiting stay of trial court proceeding pending appeal in another action). Whether argument in the Court of Appeals is imminent is not dispositive where, among other things, the issue on appeal in another matter may have "a significant impact" on the action to be stayed. *See, Assenzio v. A.O.*

[7] U.S. Securities and Exchange Commn., Investment Advisor Public Disclosure Report: Samuel David Isaly, https://reports.adviserinfo.sec.gov/reports/individual/individual_255467.pdf.

[8] As the Anti-SLAPP Law provided only for discretionary, not mandatory, fee-shifting prior to the enactment of Chapter 250, and defendants have not asked for Anti-SLAPP relief concerning the proposed second amended complaint, the Court does not consider Anti-SLAPP remedies in this decision. *See, Cisneros v. Cook*, 2022 NY Slip Op 05784, *1 (1st Dept. Oct. 18, 2022).

*Smith Water Prod.*, 2015 NY Slip Op 31647(U), *4-5 (Sup. Ct., New York Co. 2015) (citing *Reynders* in granting stay).

There is no serious question that the determination of *Gottwald* may have a significant impact upon this action as contemplated in *Assenzio*. Plaintiff's own litigation confirms this. Of particular note, plaintiff has been granted leave to appear, at his request, as amicus curiae multiple times in *Gottwald*. *See, Gottwald*, 2020 NY Slip Op 71372(U) (1st Dept. 2020); 203 A.D.3d 488, *supra.*; and 37 N.Y.3d 1169 (Jan. 18, 2022). In seeking leave to appear as amicus before the First Department on the very issue of retroactivity of the Anti-SLAPP Law, plaintiff asserted that the First Department's "ruling in [*Gottwald*] on this issue will no doubt be cited as precedent in [this action], giving him an obvious interest in its proper resolution." (Aff. of Alan Lewis in Supp. of Leave to Appear as Amicus Curiae to the First Dept., dated Feb. 4, 2022, ¶ 8).[9] Moreover, as defendants note regarding a potential stay, the appeal in *Gottwald* is fully-briefed, which will minimize the scope of any delay. (Defendants' Supplemental, at 1).

The Court is, of course, bound by the holdings of the First Department. However, as the Southern District of New York noted, "*Gottwald* appears to be an outlier," and "[t]he overwhelming majority of courts to consider this question have…ruled that the 2020 amendments [to the Anti-SLAPP Law] apply to pending actions." *Palin v. New York Times Co.*, 112 Fed. R. Serv. 3d (Callaghan) 2264, *10 n. 3 (S.D.N.Y. May 31, 2022).[10] Following the First Department's decision in *Gottwald*, the state senator who sponsored Chapter 250 appeared as amicus curiae to urge that the Legislature had intended for Chapter 250 to be retroactive to the extent of applying to actions (like this action) continued after the effective date of the amendment, and introduced legislation to supersede the First Department's decision. *Gottwald*, 2022 NY Slip Op 68019(U), at *1-2; and Sponsor's Mem., 2022 Legis. Bill Hist. NY S.B. 9239 (May 15, 2022) (stating that

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[9] The Court takes judicial notice of plaintiff's filings before the First Department in *Gottwald*, which are publicly available through NYSCEF.

[10] *See also*, Gibson, Dunn & Crutcher LLP, *Client Update: Recent Developments in New York's Amended Anti-SLAPP Law* (Jun. 1, 2022), at 2, available at https://www.gibsondunn.com/wp-content/uploads/2022/06/recent-developments-in-new-yorks-amended-anti-slapp-law.pdf (last accessed Nov. 29, 2022) (noting that "[t]he first courts to consider the issue uniformly held that the amended anti-SLAPP law did apply retroactively to actions pending as of the date the amendments were passed," and "[o]ver the following 14 months, almost 20 other state and federal courts—every court to consider the same question—came to the same conclusion," until *Gottwald*); and Bo Pearl and Caitlin Devereaux, Client Alerts: New York Appellate Court Holds Revised Anti-SLAPP Statute Not Retroactive (Mar. 28, 2022), available at https://www.paulhastings.com/insights/client-alerts/new-york-appellate-court-holds-revised-anti-slapp-statute-not-retroactive (last accessed Nov. 29, 2022) (collecting cases and noting that "courts applied the revised New York statute to earlier claims in at least eight cases").

"[w]hile the legislative history and intent of the sponsor was clear that Chapter 250 applied to pending actions and proceedings, the appellate division in Gottwald v. Sebert held otherwise," and that "[t]his bill would remedy that inconsistent decision, which circumvented the legislative intent of Chapter 250"). No court outside the First Department's control has adopted *Gottwald.* As much as the Court is bound by the First Department's holding in *Gottwald* that the recent amendments to the Anti-SLAPP Law do not apply to actions commenced prior to the amendments, the Court is equally bound by the First Department's holding in the same case that the First Department ought not have the last word on that same issue – which the First Department explicitly found in granting leave to appeal pursuant to CPLR 5713 – which itself is central to the continued litigation of this action.[11]

In staying this action, this Court is mindful both of the Court's need to expend scarce judicial resources efficiently and of the declared policy of the state to particularly adjudicate actions involving public petition and participation in a manner that minimizes costs in time and resources for litigants. *See, Gary G. v. Elena A.G.*, 72 Misc. 3d 1201(A), *11 (Sup. Ct., Kings Co. 2021) (noting that "[i]t is not the role of the judicial process to provide the parties unfettered access to scarce judicial resources to the detriment of others who need judicial intervention"); 1992 N.Y. Laws Ch. 767, § 1 (legislative finding declaring that "the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence," that "[t]he laws of the state 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," and expressing concern about "the threat of personal damages and litigation costs" in related litigation); Sponsor Mem., 2019 Legis. Bill Hist. NY A.B. 5991 (Feb. 27, 2019) (noting legislative intent to minimize the "financial reality" of SLAPP).

Although some delay is unavoidable in any order staying proceedings, such delay can be minimized by granting the stayed proceeding calendar preference upon the conclusion of the stay, which the Court will do in considering this action after the Court of Appeals' determination of *Gottwald. See, e.g.,* CPLR 3211(g) (granting Anti-SLAPP motion practice calendar preference). Accordingly, a stay pending a decision by the Court of Appeals is appropriate in this proceeding, and this action is stayed.

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[11] Plaintiff's argument in his supplemental opposition in this action that the issue to be determined in *Gottwald* is inapposite from that here is inconsistent with his position in *Gottwald* and is unavailing.

***Conclusion***

For the reasons set forth above, plaintiff's motion is granted in part and denied in part, to the extent of granting reargument, vacating the July Decision in part upon such rearugment and further consideration of the Court, denying plaintiff's motion for leave to file a second amended complaint, and staying this action (including all discovery) pending a determination by the Court of Appeals in *Gottwald v. Sebert,* APL-2021-00131 and APL-2022-00082.

Accordingly, it is:

ORDERED that the instant motion is granted in part and denied in part; and it is further

ORDERED that, upon reargument, this Court adheres to that portion of the July Decision dismissing this action as against Damian Garde pursuant to CPLR 3211(a)(7); and it is further

ORDERED that, upon reargument, this Court vacates that portion of the July Decision dismissing this action as against Delilah Burke alleging that plaintiff exposed Burke to pornographic images on his computer screen and inappropriate commentary by e-mail and staying that branch of Motion Seq. No. 004 pending the Court of Appeals' determination of the pending appeal in *Gottwald*, and otherwise adheres to that portion of the July Decision dismissing the remaining causes of action as against Burke pursuant to CPLR 3211(a)(7) ; and it is further

ORDERED that, upon further consideration, the Court vacates that portion of the July Decision denying defendants' motions under Motion Sequence Nos. 003 and 004 to dismiss pursuant to CPLR 3211(g) and staying those branches of defendants' motions seeking dismissal pursuant to CPLR 3211(g); and it is further

ORDERED that, upon further consideration, those portions of defendants' motions seeking protective orders pursuant to CPLR 3103 are granted without prejudice to plaintiff filing to vacate the protective orders following the Court of Appeals' determination of the pending appeal in *Gottwald*; and it is further

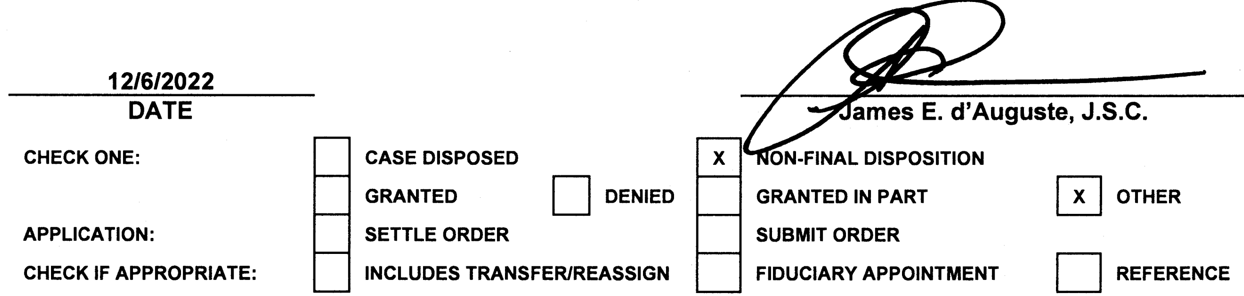
ORDERED that, upon further consideration, plaintiff's cross-motions to vacate the stay of discovery in this action pursuant to CPLR 3214(b) are denied without prejudice to plaintiff re-filing to lift the stay of discovery following the Court of Appeals' determination of the pending appeal in *Gottwald*; and it is further

ORDERED that the portion of plaintiff's motion seeking leave to serve and file a second amended complaint is denied; and it is further

ORDERED that this action is stayed pending the Court of Appeals' determination of the pending appeal in *Gottwald*; and it is further

ORDERED that plaintiff shall file a copy of the Court of Appeals' decision in *Gottwald* with this Court via NYSCEF within 10 days of receiving the Court of Appeals' decision.

This constitutes the decision and order of this Court.



**12/6/2022**
**DATE**

**James E. d'Auguste, J.S.C.**

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|---|---|---|---|---|---|---|
| **CHECK ONE:** | ☐ | **CASE DISPOSED** | | X | **NON-FINAL DISPOSITION** | |
| | ☐ | **GRANTED** | ☐ **DENIED** | ☐ | **GRANTED IN PART** | X **OTHER** |
| **APPLICATION:** | ☐ | **SETTLE ORDER** | | ☐ | **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | ☐ | **INCLUDES TRANSFER/REASSIGN** | | ☐ | **FIDUCIARY APPOINTMENT** | ☐ **REFERENCE** |