SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste**
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

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 147, 148, 149, 150, 153, 154, 155, 156, 157, 158

were read on this motion to/for VACATE STAY.

By decision and order dated December 6, 2022, and published at 2022 NY Slip Op 34108(U) (the "December Decision"), the Court, among other things, granted defendants protective orders and stayed this action pending the Court of Appeals' determination of an appeal in *Gottwald v. Sebert*, another action considering recent amendments to the Anti-SLAPP Law (2020 N.Y. Laws Ch. 250). *December Decision*, at 2.[1] In this motion, plaintiff moves to vacate the stay and protective orders so that plaintiff can pursue discovery in relation to his claims against defendant Burke, an identified source in a news article alleging that "[b]iotech hedge fund titan Sam Isaly harassed, demeaned women for years," which plaintiff alleges was defamatory. (Amended Complaint, Ex. A, at 1). After the motion was filed, the Appellate Division, First Department affirmed the December Decision, and the Court of Appeals has interpreted the

[1] As noted in the December Decision, SLAPP is an acronym for Strategic Litigation Against Public Participation. *December Decision*, at 1. The December Decision itself concerns plaintiff's motion seeking leave to reargue the Court's July 11, 2022, decision and order initially dismissing this action, published at 2022 NY Slip Op 32203(U).

application of the Anti-SLAPP Law to apply to actions pending at the time of the statute's enactment in *Gottwald*. *Isaly v. Garde*, 2023 NY Slip Op 02847 (1st Dept. May 30, 2023); and *Gottwald v. Sebert*, 2023 NY Slip Op 03183 (Jun. 13, 2023). Specifically, the Court held that the continuation of a potential SLAPP claim after the November 2020 enactment of Chapter 250 (no matter how much earlier the action was commenced) was subject to the enhanced standards of the Anti-SLAPP Law. *Gottwald*, at *4-5. These appellate decisions render much of the instant motion moot. For this reason, as well as the reasons detailed below, the instant motion is denied.

Although plaintiff styles the instant motion as seeking to vacate a stay, the gravamen of plaintiff's motion is that discovery should be permitted in this action because the Court erred in not denying defendants' motions to dismiss this action. (Mem. of Law in Supp., at 2; and Mem. of Law in Reply, at 2).[2] In addition to disagreeing with the Court's decisions dismissing most of the claims in this action, plaintiff asserts that the Court did not provide him an opportunity to be heard in opposition to a stay prior to granting it, and that the Court did not properly consider: 1) the Court's authority and discretion to stay this action pending the Court of Appeals' determination of *Gottwald*; 2) plaintiff's age and health; 3) that evidence might be lost or destroyed during a stay; 4) that a stay is not necessary to avoid prejudice. Even putting aside the First Department's affirmance in this action and the Court of Appeals' decision in *Gottwald*, plaintiff's position is not only unavailing, but largely framed on inaccurate assertions of fact and law, which the Court addresses below.

[2] Indeed, as plaintiff has not provided any supporting affidavits in support of the instant motion (offering only memoranda of law in support and reply), plaintiff has not attempted to competently bring new facts to the Court's attention, and whether the instant motion is even properly before the Court pursuant to CPLR 2214(b) is questionable. *See, e.g., Mitkowski v. Marceda*, 2013 NY Slip Op 34061(U) (Sup. Ct., Rockland Co. 2013), *affd.*, 133 A.D.3d 574 (2d Dept. 2015).

Plaintiff Was Expressly Heard at the Court's Invitation on the Potential Issuance of a Stay

The Court has previously noted that it is "mindful of one's natural sense of frustration and helplessness at having a negative article written that plaintiff believes is inaccurate." *December Decision*, at *5. That said, "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (Dec. 1770), *as quoted by Hussein v. State of New York*, 19 N.Y.3d 899, 912 n. 4 (2012) (Read, J. dissenting). The Court "relies upon the informed arguments of litigants before the Court in rendering its decisions," as a core element of the American legal system, and "should not have to pour over an extensive record as an alternative to relying on counsel's representations."[3] *Gjonbalaj Mgmt. LLC v. Little*, 2022 NY Slip Op 34487(U), *3 (Civ. Ct., Bronx Co. 2022) (vacating judgment and dismissing action due to plaintiff's improper litigation tactics) (citations omitted). *See also, Greenlaw v. United States*, 554 U.S. 237, 243-244. "Here, the facts really do get in the way," of plaintiff's argument, and plaintiff's assertion that the Court stayed this action without giving him an opportunity to be heard in opposition is without any merit. *Intl. Genomics Consortium v. United States*, 104 Fed. Cl. 669, 674 (Ct. Fed. Cl. 2012).

On November 7, 2022, the Court, via a court attorney, contacted both sides "to inquire whether the parties have a position about the possibility of the Court issuing an order staying or

[3] This is not the only instance of questionable arguments advanced by plaintiff that have consumed judicial resources. Plaintiff also argues that defendants have not actually asserted the Anti-SLAPP Law in seeking dismissal, rather that they have only reserved their right to argue at a later time. (Mem. of Law in Supp., at 5). However, defendants asserted the Anti-SLAPP Law in both letters and memoranda in Motion Seq. Nos. 003 and 004, about which plaintiff sought reargument in Motion Seq. No. 005. (Deft. Garde's Feb. 23, 2021, Ltr., NYSCEF Doc. No. 87; Deft. Garde's May 17, 2021, Ltr., NYSCEF Doc. No. 89; Deft. Burke's Supplemental Mem. of Law, NYSCEF Doc. No. 91; Deft. Garde's Supplemental Mem. of Law, NYSCEF Doc. No. 92; Deft. Burke's Aff. in Reply, NYSCEF Doc. No. 105; and Deft. Garde's Mem. of Law in Reply, NYSCEF Doc. No. 107).

holding the instant matter in abeyance pending the determination of *Gottwald v Sebert*...in the Court of Appeals." (Nov. 7, 2022, 3:55 p.m. Brian Krist Email to Counsel, at 1). Plaintiff's counsel responded thirty-nine minutes later with a 588-word written response stating that "[o]n behalf of our client Mr. Isaly, we strongly *oppose* the staying of the instant motion pending the Court of Appeals' decision in the *Gottwald* case." (Nov. 7, 2022, Email by Alan S. Lewis, at 1) (emphasis in original). Defendants responded later that evening, at which point the court attorney thanked counsel for their "prompt and fulsome responses" regarding a potential stay. (Nov. 7, 2022 Email by Jonathan M. Albano, at 1; and Nov. 7, 2022, 10:00 p.m. Brian Krist Email to Counsel, at 1). The following morning plaintiff's counsel sent a 467-word reply to defendants' supplemental submission. (Nov. 8, 2022, Email by Alan S. Lewis). Further, plaintiff's counsel sent a third written submission containing a 247-word sur-reply opposing a stay and attaching a copy of plaintiff's 37-page brief appealing the July Decision. (Dec. 5, 2022, Email by Alan S. Lewis).[4] All told, plaintiff submitted, and the Court considered, over 1,000 words of written argument (supplemented by a nearly 40-page brief attached to them) expressly opposing a stay.

The Court specifically referenced the parties' supplemental submissions addressing a possible stay, stating:

> 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.

[4] Plaintiff's brief, which Mr. Lewis certified as being 9,505 words in length, is available on NYSCEF.

December Decision, at *2.[5] Notwithstanding the Court having invited and heard plaintiff's arguments, which the Court specifically noted in the December Decision, plaintiff now argues that the stay "has not yet been the subject of argument." and was issued "without first affording Isaly any opportunity to oppose it." (Mem. of Law in Supp., at 1 and 4). In reply, plaintiff maintained that position despite Burke referencing plaintiff's supplemental opposition to the stay, stating that "[t]he complete stay and protective order as ordered was not sought by either Burke or Garde and, therefore, had not yet been the subject of argument until Isaly filed this motion." (Mem. of Law in Reply, at 6; and Aff. in Opp., at 4).

Counsel's argument that plaintiff had not been given the opportunity to be heard prior to the Court staying this action when the same counsel (1) was specifically invited to submit written opposition; (2) did so; and (3) then took it upon himself to offer two more written submissions and an attached brief in further opposition to a stay, is irreconcilable with his duty to the Court and the other participants in this action. *See, Gjonbalaj Mgmt., supra.* That the Court took supplemental letter briefing from the parties (especially considering the depth of plaintiff's letter briefing) rather than more formal briefing is irrelevant. *See, e.g., Kaufman v. Sirius XM Radio, Inc.*, 41 Misc. 3d 1204(A), *6 n. 7 (Sup. Ct., New York Co. 2013) (rejecting plaintiff's argument "that there is some significance in the fact that the parties, as directed by the District Court, submitted letter-briefs instead of full length memoranda of law," as "disingenuous," especially where "the letter-briefs were quite substantive"). Seeking and considering supplemental letter-briefing after a matter has been submitted as fully briefed is neither new nor novel in New York courts. *See, e.g., Granite State Ins. Co. v. Aim Constr. of NY, Inc.*, 68 Misc. 3d 427, 431 (Sup. Ct., New York Co.

[5] To be clear, appellate courts in New York have long recognized that the Court's express reference to the parties' written supplemental arguments satisfies the procedural recital requirements for an order. *See,* CPLR 2219(a); and, *e.g., Kirschner v. Abbot Bakeries*, 92 Misc. 402, 404 (App. Term, 1st Dept. 1915) (discussing requirement to specifically reference papers considered "by number or otherwise").

2020); and *Cortlandt Apts., LLC v. Simbali Design Architecture, PLLC*, 2020 NY Slip Op 30842(U), *2 (Sup. Ct., Cortlandt Co. 2020) (discussing letter briefing directed by courts). That the parties chose not to file their supplemental arguments to NYSCEF (as they were provided to the Court by email) does not affect their existence or substance and, to the extent the parties could have or should have subsequently electronically filed copies in NYSCEF, the parties have waived that by not timely raising the issue. *See, Kilgore v. City of New York*, 76 Misc. 3d 1228(A), *5 n. 9 (Civ. Ct., Bronx Co. 2022) (movant's failure to object to defective affidavits constituted waiver) (citations omitted). To illustrate the contrast more fully between plaintiff's arguments and the record, the Court reprints the parties email correspondence in full as an endnote/addendum.[i]

The Court's Authority and Discretion to Stay This Action

In seeking to vacate the stay, plaintiff argues that the Court lacked authority and discretion to stay this action pending the Court of Appeals' determination of *Gottwald*. (Mem. of Law in Supp., at 6). To the extent the First Department's affirmance of the December Decision does not render the matter academic, plaintiff is wrong. Contrary to plaintiff's objections, "this court has the authority to grant a stay even without a motion by the parties." *MPEG LA L.L.C. v Haier Am. Trading, LLC*, 2018 NY Slip Op 31414(U), *5 (Sup. Ct., New York Co. 2018), *citing, Halloran v. Halloran*, 161 A.D.2d 562, 564 (2d Dept. 1990) (holding that "[a] court, pursuant to CPLR 2201, may *sua sponte* grant a stay of proceedings in an action that is pending before it"). This power specifically extends to staying actions pending an appeal to the Court of Appeals in another action. *December Decision*, at 10-11.

Plaintiff's reliance on *Croker v. New York Trust Co.*, 206 A.D. 11 (1st Dept. 1923) in arguing that a stay was not permitted here is misplaced. (Mem. of Law in Supp., at 6). While noting that the "power to suspend or stay proceedings should be sparingly exercised," the First

Department specifically cited those cases "when other remedies are inadequate and the equities invoked [are] apparent and strong," as cases where a stay is appropriate. *Croker*, at 13. Nearly 90 years after deciding *Croker*, the First Department affirmed that a potential stay of discovery – which is the core issue before the Court here – is directed to the Court's discretion. *See, Polsky v. 145 Hudson St. Assoc. L.P.*, 100 A.D.3d 426, 426 (1st Dept. 2012). *See also, Schneider v. Rockefeller*, 31 N.Y.2d 420, 435 (1972) (motion to vacate discovery stay addressed to trial court's discretion). For the reasons addressed below, this action is the very type of action contemplated so long ago by *Croker* as warranting a stay.

Plaintiff's characterization of the state of precedent throughout the State concerning the "retroactivity" of Chapter 250 prior to the Court of Appeals' recent decision in *Gottwald* was also inaccurate, as there was an apparent department split on the applicability of the statute to pending actions. While the Fourth Department adopted the First Department's now-modified holding in *Gottwald* (as plaintiff notes), the Third Department affirmed the Supreme Court, Clinton County finding that Chapter 250 was retroactive.[6] *Reus v. Etc Hous. Corp.*, 72 Misc. 3d 479, 485 n. 1 (Sup. Ct., Clinton Co. 2021), *affd.*, 203 A.D.3d 1281 (3d Dept.) *lv. to reargue or app. denied*, 2022 NY Slip Op 66672(U) (3d Dept. 2022) (noting that "[a]lthough the Civil Rights Law was amended in November of 2020, the amendments were effective retroactively," as "although this action was

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[6] As the Court previously noted, "the Court is, of course, bound by the holdings of the First Department," but that:

> "[a]s 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."

December Decision, at 11-12.

commenced prior to the November 2020 amendments, Plaintiffs have continued this action to date," and "[i]t has now been almost six months since the November 2020 amendments went into effect" in applying Chapter 250 to then-pending action); and *Trinh v. Nguyen*, 211 A.D.3d 1623, 1623 (4th Dept. 2022) (adopting *Gottwald*).[7] The Second Department had declined to rule on the issue, and trial courts within the Second Department had split on the issue. *See, Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998 (2d Dept. 2021) (declining to address retroactivity as unnecessary); and, *e.g., Balliet v. Kottamasu*, 76 Misc. 3d 906, 916 n. 22 (Civ. Ct., Kings Co. 2022) (quoting federal courts in noting that "[i]t is clear that [Civil Rights Law] § 76-a is a remedial statute that should be given retroactive effect" while discussing history of anti-SLAPP legislation in New York); and *Goldberg v. Urbach*, Index No. 100012/2020, 2022 WL 1285452, *1 (Sup. Ct., Richmond Co. 2022) (finding that Chapter 250 was not retroactive).

The Court also did not misapprehend its authority to stay this action or the conditions upon which the stay was issued. The automatic stay of discovery in this action was continued specifically so that the parties and the Court might benefit from the Court of Appeals' resolution of *Gottwald*, which (as anticipated) is of clear relevance to the defendants' pending motions.[8] Pausing for a dispositive ruling from the Court of Appeals on a relevant issue in another pending

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[7] Although the retroactivity of Chapter 250 was not expressly addressed in the Third Department's decision in *Reus* beyond a general "[w]e have examined plaintiffs' remaining contentions and find them to lack merit," the issue was briefed before the court, and thus part of the Third Department's holding. *Reus*, 203 A.D.3d at 1287; and Brief for Plaintiffs-Appellants, *Reus v. Etc Hous. Corp.*, 2021 WL 7185631, *8 and 30-31. Plaintiff's counsel was aware of *Reus* prior to filing the prior motion for leave to reargue (Motion Seq. No. 005) that resulted in the December Decision, and this motion, as well. *See*, Confirmation Notice, NYSCEF Doc, 24, *Gottwald v. Sebert*, Case No. 2021-03036, (1st Dept. Apr. 18, 2022). That plaintiff failed to mention that a department split potentially exists, especially as plaintiff wrote to inform the Court that the Fourth Department had adopted *Gottwald,* is disappointing, and the Court expects greater care from counsel when advancing arguments in the future. *See, Gjonbalaj Mgmt., supra.*, and *see also, People v. Turner*, 5 N.Y.3d 476, 481-483 (2005) (criticizing counsel for failing to cite relevant precedent).

[8] As the Court previously noted, plaintiff's arguments in this action are belied by his representations in seeking leave to appear as *amicus curiae* in *Gottwald*. *December Decision*, at 12 n. 11.

action is a widespread and laudable practice, as it promotes judicial efficiency to listen for and adhere to the holdings of the highest court in New York at the outset rather than potentially flooding the appellate courts with needless practice that could have been avoided with a more efficient initial pause. *See, e.g., Budget Mortg. Bankers, Ltd. v. Maza*, 5 Misc. 3d 1031(A), *3-4 (Sup. Ct., Nassau Co. 2004) (noting that "[t]he granting of a stay will avoid the possibility of irreconcilably inconsistent results," and can "certainly save scarce judicial resources"); and *Amelius v. Grand Imperial LLC*, 2016 NY Slip Op 32330(U), *4-5 (Sup. Ct., New York Co. 2016), *lv. to reargue denied*, 57 Misc. 3d 835 (Sup. Ct., New York Co. 2017) (discussing impact of Court of Appeals' decision in another action while motion for preliminary injunction was pending). The parties' interest in pausing potentially unnecessary and costly discovery pending the outcome of *Gottwald* (as discussed *infra.*) was also compelling, independent of the *status quo* established by CPLR 3214.

Again, plaintiff represented the importance of *Gottwald* to this action in seeking leave as *amicus* in *Gottwald*. *December Decision*, at 11 (quoting plaintiff's motion for leave to appear in *Gottwald*). For the reasons set forth in the December Decision and restated here, the Court's stay of this action was well within its authority and discretion.

Plaintiff's Age and Health Do Not Compel Expediting Discovery

In urging the Court to vacate the automatic stay imposed by CPLR 3214(b) and the related protective orders granted in this action, plaintiff asserts that his age and health overcome any other considerations in staying discovery in this action. (Mem. of Law in Supp., at 6-7; and Mem. of Law in Reply, at 3-4). The parties do not dispute plaintiff's age or that he has suffered from some level of paralysis for decades following a high school wrestling accident. (Amended Complaint,

Ex. A, at 4). However, Burke does dispute whether plaintiff's present medical condition necessitates immediate discovery. (Aff. in Opp., at 2).

At the outset, the Court of Appeals' decision in *Gottwald* that, assuming other criteria to sustain an anti-SLAPP counterclaim, "[plaintiff's] continuation of his suit beyond the effective date of the amendments entitles [defendant] to recover damages," changes the applicable rule. *Gottwald*, at *4. Pursuant to CPLR 3211(g)(3), "[a]ll discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section," which "shall remain in effect until notice of entry of the order ruling on the motion," unless "[t]he court, on noticed motion and upon a showing by the non-moving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition." For the reasons explained below, plaintiff's motion would fail even under the more permissive CPLR 3214(b) standard, and is not a close question pursuant to CPLR 3211(g)(3).

It also appears that plaintiff's argument is an attempt to drive litigation in a way that courts, legislatures, and academics have criticized in defamation litigation for over thirty years. *See, e.g., Serafine v. Blunt*, 466 S.W.3d 352, 365-366 (Tex. Ct. App., 3d Dist. 2015) (Pemberton, J. concurring) (collecting authorities and discussing characteristics of SLAPP cases); and Sponsoring Mem. of Sen. Hoylman-Sigal dated Jul. 22, 2020 in Supp. of 2019-S52A (stating that Chapter 250 was "intended to address [the] threat of personal damages and litigation costs . . . as a means of harassing, intimidating, or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs). Although plaintiff relies upon the trial preference available to litigants over age 70, pursuant to CPLR 3403(a)(4), plaintiff is not seeking a trial preference but continuation of discovery (Mem. of Law in Supp., at 2) (emphasis in original). While plaintiff asserts that "the phrase 'justice delayed is justice denied'

has considerable resonance here," (Mem. of Law in Supp., at 6; and *see also* Nov. 7, 2022, Email by Alan S. Lewis, at 1), a federal judge has recently concluded that "[p]laintiff is engaging in gamesmanship" relating to his litigation tactics involving a related defamation claim involving the same purportedly defamatory article. *Isaly v. Boston Globe Medial Partners, LLC*, Dkt. No. 22-cv-2254, 2023 U.S. Dist. LEXIS 4564, *17 (S.D.N.Y. Jan. 10, 2023).

Substantively, plaintiff's application fails, as well. While plaintiff has repeatedly stated that he seeks 'limited discovery,' plaintiff has not offered any proposed discovery demands with the instant motion, which are necessary for the Court in considering the scope of plaintiff's intended discovery. The Court raised this issue in the December Decision, noting 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," and "[p]laintiff'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." *December Decision*, at 7. Now, plaintiff offers neither proposed demands, nor any argument as to what the Court may have misapprehended about plaintiff's intentions mere months ago. What little information plaintiff does provide – stating plaintiff's desire "to obtain documents and responses to interrogatories and not be further delayed in identifying and deposing witnesses" – indicates that plaintiff seeks the full panoply of discovery rather than specific and narrowly tailored requests. (Mem. of Law in Supp., at 7). In the absence of any information or argument to the contrary, the Court is left to conclude that plaintiff's demands are as broad as the Court found them to be this past December.

Secondly, plaintiff has not established that his medical condition – which the Court does not minimize – threatens discovery such that the Court should vacate the automatic discovery stay

to the extent permissible. Plaintiff's reliance on *Polsky* is misplaced, as the evidence at issue in this motion is not being sought from an elderly or potentially international witness, but rather from a witness in New York in apparent good health. *See, Polsky*, at 426.[9] Moreover, plaintiff has not offered competent evidence that plaintiff is at imminent risk of death before discovery could be completed. *See, e.g., Schneider v. Flowers*, 137 Misc. 2d 512, 513 (Sup. Ct., Bronx Co. 1987); and *Sanfilippo v. Carrington's of Melville, Inc.*, 158 Misc. 2d 630, 631-632 (Sup. Ct., Suffolk Co. 1993) (discussing supporting affirmations by physicians detailing that movants were not likely to survive to trial without a calendar preference). Although plaintiff cites a 2012 article publishing the results of an Australian study ending in 2006 for the proposition that plaintiff's decades-ago injury has lowered his life expectancy, there is no specific evidence in the record concerning plaintiff's individual condition of the type found persuasive in *Schneider* or *Sanfilippo*. (Mem. of Law in Supp., at 6 n. 6). Indeed, plaintiff has expressly disclaimed even arguing that he is in failing health. (Mem. of Law in Reply, at 4). Rather, plaintiff's argument is that "he is mortal, *like the rest of us,*" but that supports applying the law in CPLR 3214 as the Court does for anyone else, as "[t]he basic principle of our jurisprudence is that every citizen regardless of his position, his property, his race or his creed, is entitled to equal and exact justice." *Saunders v. Champlain Bus Corp.*, 263 A.D. 683, 684 (3d Dept. 1942); Nov. 8, 2022, Email by Alan S. Lewis, at 1 (emphasis added); and Mem. of Law in Supp., at 6. Once again, "facts are stubborn things," and "[t]here is an utter failure of proof herein to justify" revisiting the stay in this action. *In re Estate*

[9] The cases cited by *Polsky* illustrate the contrast further. In *Matter of Menahem*, the potential witness was a 91-year-old notary public who had already provided facially conflicting affidavits regarding his notarization of a pre-nuptial agreement. 234 N.Y.L.J. 114, *1-2 (Sur. Ct., Kings Co. 2005). In *Erbach Fin. Corp. v. Royal Bank of Canada*, the question of staying discovery also concerned potentially extraordinary delays caused by "quite costly and cumbersome" cross-border discovery. 199 A.D.2d 87, 87-88 (1st Dept. 1993).

of Bromley, 128 Misc. 662, 665 (Sur. Ct., Washington Co. 1927) (denying petition to reopen decree of probate).

Plaintiff Has Not Established Any Specific Risk to Evidence

Plaintiff restates, in this motion, his previous arguments that he should be permitted to conduct discovery now because of concerns memories may fade or that documents may be destroyed, without any case-specific concerns. (Mem. of Law in Supp., at 7). The Court addressed this issue in detail in denying plaintiff's prior motion to vacate. *December Decision*, at 7-8. Plaintiff's strenuous objections to the contrary notwithstanding, plaintiff is wrong, and for the reasons the Court previously explained in the December Decision, *supra.*, plaintiff has, again, not met his burden of establishing good cause to vacate the discovery stay. *See, Alexandra H. Oxford Health Ins. Inc.*, Dkt. No. 11-23948-CIV, 2014 U.S. Dist. LEXIS 82248, *5-6 (S.D. Fla. Jun, 9, 2014) (denying repetitious motion).

To obtain an order for the purposes of preserving information from possible destruction, there must be some specific concern that particular evidence may be lost without the Court's intervention. *See, e.g., Ne Spraggins v. Current Cab Corp.*, 127 Misc. 2d 774, 774 (Sup. Ct., New York Co. 1985) (granting preliminary injunction to preserve taxicab from destruction through pre-action discovery order following sale for scrap). Once litigation has commenced, the parties (as the Court noted in the December Decision) are under an existing obligation to preserve evidence, the standard becomes more exacting, with one court explaining:

> However, once an action is commenced, and defendants are on notice that they should produce, and, at the very least, preserve possible evidentiary material, defendants have a legal duty to preserve the material that a plaintiff can enforce through the discovery sanctions of CPLR 3126 and/or common-law spoliation principles. Accordingly, plaintiff has other adequate legal remedies relating to the books, records and related materials…and thus has failed to demonstrate that he would be irreparably harmed if a preliminary injunction is not issued. Moreover,

> plaintiff has also failed to demonstrate that defendants have destroyed or are likely to destroy evidence relevant to this action.

Volodarsky v. Moonlight Ambulette Serv., Inc., 2011 NY Slip Op 34157(U), 7-8 (Sup. Ct., Kings Co. 2011) (collecting cases and denying order to preserve evidence) (citations omitted).

While the Court has heard plaintiff's objections here and in his previous motion, they remain, at bottom, objections to New York's civil discovery scheme, relief from which "lies not with the judiciary, but with the Legislature." *New York State Assn. of Tobacco & Candy Distributors v. City of New York*, 3 Misc. 3d 876, 883 (Sup. Ct., New York Co. 2002), *quoting New York Rapid Transit Corp. v. City of New York*, 275 N.Y. 258, 266 (1937) (court may not relieve parties from legislative policy decisions). As the Court previously stated, "[p]laintiff'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," that "[t]his Court must then presume that the Legislature was aware of" in enacting CPLR 3214. *December Decision*, at 8; *see also, VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 36 (1st Dept. 2012) (noting parties' obligation to institute litigation holds). Absent credible indications of a specific threat to evidence in this action, there is no reason to disturb the status quo established by the automatic stay.

The Stay and Protective Orders Were Necessary to Prevent Prejudice

Putting aside the enhanced restrictions imposed by CPLR 3211(g)(3) in this action, and pursuant to CPLR 3103, "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device," and that "[s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment,

disadvantage, or other prejudice to any person or the courts." As the Court already explained in the December Decision (at 7-8 and 10-12), an order pausing discovery pending *Gottwald* was appropriate, and plaintiff has not provided a basis to revisit that decision here. That would be true even if *Gottwald* remained submitted with the Court of Appeals. If anything, plaintiff's litigation of the instant motion only further supports protective relief.

Courts and academics have recognized the particular risks of potential SLAPP actions for years, especially the potential for abusive use of pre-trial process to drive litigation expenses to stifle public participation, as "[a] lawsuit no doubt may be used as a powerful instrument of coercion or retaliation," as "the defendant will most likely have to retain counsel and incur substantial legal expenses to defend against it," and "the chilling effect upon a defendant's willingness to engage in constitutionally protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." George Pring, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 942 (1992) (citations and brackets omitted). *See also*, Jeremy Rosen, *Helping Americans to Speak Freely*, 18 Federalist Socy. Rev. 62, 63 (2017) (collecting authorities and noting that "[i]n short, these civil actions were meant to send a clear message: that there is a price for speaking out--that price being a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings") (quotations omitted). Illustrating the importance of protective orders, "[t]he costs immediately imposed on the defendants or targets can be substantial, including not only attorney's fees, court costs, and litigation expenses but also time and dollar resources diverted," from other purposes, as well as "lost wages, potential credit problems, insurance cancellations, and extreme psychological insecurity." Pring, at 942. As the Supreme Court, Westchester County noted years ago:

> SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. *The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success*...Needless to say, an ultimate disposition in favor of the target often amounts merely to a Pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. *Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.*

Gordon v. Marrone, 155 Misc. 2d 726, 736 (Sup. Ct., Westchester Co. 1992) (emphasis added). *See also*, Pring, at 933-934 (quoting *Gordon*).

Pausing while the merits of potential SLAPP cases can be examined (or, in this case, to establish which standard the Court should apply to this potential SLAPP case) prior to delving into discovery has been recognized as an effective means to protect the courts and litigants by "saving them significant time, expense, and emotional energy." Alyssa Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend. L. Rev. 441, 451 (2019) (citation omitted). In contrast to most expenses, which are not typically a basis for equitable relief, the prevention of undue discovery expenses is an express basis for a protective order. CPLR 3103(a). Also, the cost of litigation defense can be quite substantial, and not so easily carried through litigation for many Americans even with the possibility of post-hoc reimbursement or compensation. Leader, at 448-449 (estimating costs of defending defamation claims); and, *e.g., Eulitt v. City of San Diego*, Dkt. No. 18-cv-2721, 2020 U.S. Dist. LEXIS 163087, *9-10 (S.D. Cal. Jul. 29, 2021) (citing government report and noting that "roughly 4 in 10 Americans would struggle covering a $400 emergency expense and that 69% of Americans have less than $1000 in savings"). The legislative sponsoring memoranda reflect the same and similar concerns, noting that New York's anti-SLAPP laws have been "enacted by the Legislature

to provide the utmost protection for the free exercise or speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." Mem. of Sen. Hoylman-Sigal dated Jul. 22, 2020, *supra*. *See also*, Brief of Sen. Hoylman-Sigal as *Amicus Curiae* in *Gottwald v. Sebert*, Case No. 2021-03036 (1st Dept.) at 4 (noting legislative intent in enacting Chapter 250 to curtail instance of "cases burdening the courts and…defendants faced with expensive litigation for simply exercising their right of free speech").[10] The societal interest in preventing that harm, as determined by the Legislature in enacting CPLR 3103 and 3214 (and, as now applicable, 3211(g)(3)), is compelling.

In the end, plaintiff has not demonstrated an entitlement to the relief requested and the application is accordingly denied.

This constitutes the Decision and Order of the Court.

6/27/2023
DATE

James d'Auguste, J.S.C.

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

[10] Senator Hoylman-Sigal's brief is available on NYSCEF.

[i] The relevant email correspondence is as follows (emphasis in originals):

From: Brian Krist
Sent: Monday, November 7, 2022 3:55 PM
To: wmlaw; Theodore Y. McDonough; John Walsh; Alan S. Lewis; Kenneth I. Schacter; Elizabeth Buechner; Jonathan M. Albano
Subject: RE: 160699/2018 Samuel D. Isaly v. Damian Garde et al (Motion Seq. No. 005)
Importance: High

Good afternoon, Counselors:

In connection with plaintiff's motion for leave to reargue (Motion Seq. No. 005) pending before Justice d'Auguste in the above-captioned matter, I am writing to inquire whether the parties have a position about the possibility of the Court issuing an order staying or holding the instant matter in abeyance pending the determination of *Gottwald v Sebert*, APL-2021-00131 in the Court of Appeals. I note that the First Department's decision in *Gottwald*, currently pending in the Court of Appeals, was the subject of correspondence in this action (NYSCEF Doc. Nos .123-126) and I understand plaintiff has sought and been granted leave to appear as amicus curiae in that appeal after having appeared similarly in the First Department as well. *See, Gottwald v. Sebert*, 2020 NY Slip Op 71372(U) (1st Dept. 2020); and *Gottwald v. Sebert*, 37 N.Y.3d 1169 (Jan. 18, 2022). Please advise no later than the close of business on this Wednesday, November 9, 2022.

Brian Krist
Associate Court Attorney

From: Alan S. Lewis
Sent: Monday, November 7, 2022 4:34 PM
To: Brian Krist; wmlaw; Theodore Y. McDonough; John Walsh; Kenneth I. Schacter; Elizabeth Buechner; Jonathan M. Albano; Madelyn White; Christopher White
Subject: RE: 160699/2018 Samuel D. Isaly v. Damian Garde et al (Motion Seq. No. 005)

On behalf of our client Mr. Isaly, we strongly *oppose* the staying of the instant motion pending the Court of Appeals' decision in the *Gottwald* case.

Several factors go into that decision, as I will endeavor to explain.

First, Mr. Isaly made the motion to reargue in an attempt to *foreclose* the need for the perfection of his pending appeal to the Appellate Division. The Court's decision on the motion to reargue could result in Mr. Isaly withdrawing his appeal, or potentially modifying his appeal brief to reflect any amended decision the Court may issue on that motion. Mr. Isaly intends to perfect the appeal soon and to seek as prompt of a hearing in the Appellate Division as is available. Mr. Isaly brought his lawsuit in 2018, filed the amended complaint that is the subject of the pending motion and notice of appeal early in 2019, and does not want to see additional periods of time elapse, measured potentially in several extra months or even years, before the issues he has raised are adjudicated. Underscoring this concern, he is 77 years old, and respectfully deserves a reasonably prompt determination of his motion. The maxim "justice delayed is justice denied" has particular resonance under these circumstances.

Second, regardless of the outcome of the anti-SLAPP retroactivity issue presented in the *Gottwald* appeal, the issues that have already been briefed in the motion to reargue and motion to replead (most or all of which would be briefed in the Appellate Division) will still require judicial determination. To be sure, depending on the outcome of the *Gottwald* appeal, the parties may or may not be submitting supplemental briefs about the impact of that decision on this case in this Court, but that speculative possibility should not prevent the resolution of the issues that nevertheless have to be resolved in any event and which date back to the motion to dismiss already made a few years ago.

Third, reargument motions do not stay state appeal deadlines. As a result, the determination of the outcome of Mr. Isaly's motion can only have a beneficial impact on the parties' devotion of resources to the appeal, IF the motion to reargue is decided promptly and not stayed.

Fourth, in federal court, the Globe, Garde's employer, represented by the same lawyers, has made a motion to dismiss the complaint Mr. Isaly filed pursuant to CPLR Section 205. The parties' arguments are not dissimilar from the ones made here. The determination of the pending motions in this Court may be of interest to the federal court, an additional reason why it does not make sense to stay the pending motions. Nobody has asked the federal court to stay those motions, nor has the federal court made any suggestion on its own about doing so.

We respectfully request oral argument on the pending motions, on a date as soon as is available. While the Court conducted oral argument in 2019, that occurred before the conclusion of Mr. Isaly's first federal case and therefore did not encompass the res judicata and collateral estoppel issues that have **never** been orally argued. We submit that these are important issues, and are at least as meritorious of oral argument as the core CPLR 3211(a)(7) issue on which the Court heard oral argument in 2019.

We have added Christopher White of the McSpedon firm to this email chain, having been informed by that firm that he is now the lawyer responsible for representing Ms. Burke. I have also added my colleague, Madelyn White.

Respectfully,

Alan S. Lewis
Partner
Carter Ledyard & Milburn LLP

From: Jonathan M. Albano
Sent: Monday, November 7, 2022 4:34 PM
To: Brian Krist;
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Alan S. Lewis; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; John Walsh
Subject: RE: 160699/2018 Samuel D. Isaly v. Damian Garde et al (Motion Seq. No. 005)

Dear Mr. Krist:

All defendants fully support the Court issuing an order staying or holding the pending motion for reargument in abeyance pending a decision by the Court of Appeals on the issue of retroactivity of the anti-SLAPP law in *Gottwald v Sebert*, APL-2021-00131 and APL-2022-00082, where the issues already have been fully briefed. Doing so will serve the interests of judicial efficiency and avoid unnecessary legal expenses and delay. Plaintiff's newly-minted concern about delay is not well-founded since it was the plaintiff who filed the motion to reargue and chose not to perfect his appeal promptly (and it is still not perfected). If the Appellate Division's decision in *Gottwald*—an outlier on the issue of the statute's retroactivity—is reversed, the Court will be required to consider the additional grounds for dismissal provided by the anti-SLAPP law, and it would be far more efficient for the Court to address those issues together with plaintiff's motion to reargue.

Thank you for your consideration,

Jonathan M. Albano
Morgan, Lewis &Bockius LLP

From: Brian Krist
Sent: Monday, November 7, 2022 10:00 PM
To: Jonathan M. Albano
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Alan S. Lewis; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; John Walsh

Thank you, Counselors, for your prompt and fulsome responses.

Brian Krist
Associate Court Attorney

From: Alan S. Lewis
Sent: Tuesday, November 8, 2022 7:38 AM
To: Brian Krist; Jonathan M. Albano
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; John Walsh

Mr. Krist,

Before seeing your email of last night, we had drafted the following reply to the email sent earlier by Defendants, which we would still ask the Court to consider:

With little awareness of the contradiction at the heart of their expressed position, Defendants contend that *delaying* the adjudication of the reargument motion will "*avoid* unnecessary legal expenses and *delay*" (emphasis added). To the contrary, *delay* will not somehow *prevent delay*. Nor will delay prevent expenses as the parties' expenses to draft the reargument motion have already been incurred. A resolution of that

motion can only *reduce* expenses - to brief appellate issues that may be rendered moot by the Court's decision on the reargument motion.

Mr. Isaly is 77 years old and brought this lawsuit four years ago. He is mortal, like the rest of us, and respectfully deserves the timely adjudication of the issues he has raised without the passage of additional months and years.

Defendants offer no substantive response to the following important point: If the decision on the motions is held back until *after* the conclusion of the *Gottwald* appeals, Mr. Isaly's appeal could be decided before the motion to reargue is decided, making all of the briefing of the reargument motion for naught and eliminating this Court's ability to correct its own errors. Furthermore, this is a *very unusual* reargument motion in that Garde, the prevailing party on the motion to dismiss, subsequently conceded in response that the standard for assessing res judicata is, as Mr. Isaly had argued, a state law standard – which is different from the Federal Rule 41 standard that the dismissal quotes and applies. It makes sense for this Court to rectify that error, before the Appellate Division does so, which this Court can only do if it adjudicates the motion to reargue now.

Likewise, Garde fails to dispute the key point that the issues raised in the reargument motion will have to be adjudicated, *regardless* of the outcome of the appeals in *Gottwald*. Garde has also not addressed Mr. Isaly's request for oral argument, which he instead ignores.

Finally, while *Gottwald* presents some of the same kinds of issues, it is also distinct. The issue in that case relating to the plaintiff's fault burden is whether, as a result of either public figure doctrine or the amended anti-SLAPP law, Gottwald should be required to prove actual malice *at trial*, whereas here, even if the Court of Appeals reverses the Appellate Division in *Gottwald*, which we doubt, the question would be whether the sufficiency of a complaint, filed years before the law's amendment, should be measured by standards that did not exist when it was filed – a question which the Court may never even have to answer and as to which *Gottwald* will not supply an answer.

Respectfully,

Alan S. Lewis
Partner
Carter Ledyard & Milburn LLP

From: Brian Krist
Sent: Tuesday, November 8, 2022 11:40 AM
To: Alan S. Lewis; Jonathan M. Albano
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; John Walsh

Good morning, Counselors

In asking for responses from both sides by tomorrow evening, I had not initially been seeking reply positions. Given that plaintiff has sent a reply though, defendants may reply, if they wish, no later than close of business tomorrow. Following that however, there will be nothing further unless directed.

All the best,

Brian Krist
Associate Court Attorney

From: Jonathan M. Albano
Sent: Wednesday, November 9, 2022 4:54 PM
To: Brian Krist; Alan S. Lewis
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; John Walsh

Dear Mr. Krist:

Thank you for the opportunity to respond to plaintiff's reply argument.

The Defendants believe that the Plaintiff is unnecessarily complicating and prolonging these proceedings. After choosing to delay his appeal by filing a motion for reargument, the Plaintiff now argue that he is entitled to prohibit the Court from effectively addressing all issues relevant to his motion. If the Court of Appeals reverses *Gottwald. v Sebert*—as is likely, *see Palin v. New York Times Co.*, No. 17-CV-4853 (JSR), 2022 WL 1744008, at *3 (S.D.N.Y. May 31, 2022) ("[A]s defendants point out, *Gottwald* appears to be an outlier. *See* Opp. 29 n. 9 ('[T]he overwhelming majority of courts to consider this question have agreed with this Court's reasoning and ruled that the 2020 amendments apply to pending actions.' (collecting cases)")—we can expect the Plaintiff to argue on appeal that the anti-SLAPP issue should be first addressed by the trial court rather than as an alternative ground on which to affirm the Court's judgment. We also can expect, based on past practice, that if the Court holds oral argument on the motion to reargue, we will see requests from the Plaintiff to file post-argument briefing even more lengthy than what he has filed on this straightforward issue. None of these tactics leads to efficiencies for the judicial system or the parties. Accordingly, defendants fully support the Court issuing an order staying or holding the pending motion for reargument in abeyance pending a decision by the Court of Appeals on the issue of retroactivity of the anti-SLAPP law.

Thank you.

Very truly yours,

Jonathan M. Albano
Morgan, Lewis &Bockius LLP

From: Alan S. Lewis
Sent: Monday, December 5, 2022 5:19 PM
To: Brian Krist
Cc: Madelyn White; Christopher White; Bruce Steinowitz; Theodore Y. McDonough; Kenneth I. Schacter; Elizabeth Buechner; Jonathan M. Albano; John Walsh

Attachment: NYSCEF#44 APPELLANTS BRIEF.pdf

Mr. Krist,

On behalf of Mr. Isaly, I write to update the Court in two respects:

1) Mr. Isaly has perfected his appeal, and a copy of his appeal brief is attached. The filing of the brief does not, in our view, diminish the value of this Court's adjudication of the pending motions, and instead, makes a reasonably prompt adjudication of the pending motions more important than ever: should this Court adjudicate the motions, depending on its specific ruling(s), that could moot the appeal or streamline the appeal by eliminating some of the issues that the Appellate Division would otherwise have to decide, potentially avoiding the expenditure of resources of the parties and the Appellate Division. But if the Court does not adjudicate the pending motions, it will forever lose its opportunity to correct on its own what we, on behalf of Mr. Isaly, regard as fundamental errors in the Court's dismissal decision. We also observe that one of our pending motions is for permission to replead, in the form of the proposed amended complaint attached to the motion.
2) To our knowledge, no argument date has yet been set by the Court of Appeals in *Gottwald v. Sebert*. That case involves two related appeals, one involving the plaintiff's public or private figure status, and the other involving the dispute over whether the revised anti-SLAPP Act is retroactive. Respectfully, it appears that no resolution of that appeal is imminent, and when it will be resolved remains unknown.

Respectfully,

Alan S. Lewis
Partner
Carter Ledyard & Milburn LLP