

Midland Ave. Owners Corp. v Groman
2024 NY Slip Op 35344(U)
July 15, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56808/2019
Judge: David F. Everett
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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**

-----X
MIDLAND AVENUE OWNERS CORP.,

Plaintiff,

-against-

PAUL GROMAN and MARIA BATISTA,

Defendants.
-----X

EVERETT, J.

INDEX NO. 56808/2019

**DECISION/ORDER
Motion Seq. 9 and 10**

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 306-310, 312, 317-325, 327-336, 339, relative to the motion by defendant Paul Groman (Groman) for leave to amend his answer to include a counterclaim (CPLR 3025 [a]) asserting that “(a) this case, originally filed (*sic*) in 2019, is a continuing SLAPP suit under Civil Rights Law 76-a; and (b) this is a continuing SLAPP suit and Groman is entitled to assert a counterclaim pursuant to Civil Rights Law 70-a,” (motion # 9) and the motion by plaintiff “(i) pursuant to CPLR §2221 (e) to renew opposition to the motion by Defendant Maria Batista (“Batista”) for leave to amend her answer pursuant to CPLR § 3025 (b) to include a counterclaim based on Civil Rights Law §§ 70-a and 76-a (the “Counterclaim”), on the grounds that there has been a change in binding precedent issued from the Appellate Division, Second Department after the decision rendered on the motion, which would change the prior determination, (ii) pursuant to CPLR § 3211 (a) (7) to dismiss the Counterclaim on the grounds that the Counterclaim fails to state a claim,” the Court determines as follows:

Background

Preliminarily, it is noted that SLAPP is the acronym for “Strategic Lawsuits Against Public Participation.” The anti-SLAPP laws were first adopted in 1992 (Civil Rights Law § 70-a) and expanded in November 2020 (Civil Rights Law § 76-a).

In this action, plaintiff is suing former board member/resident Groman and co-op resident defendant Maria Batista (Batista) in relation to letters and emails sent anonymously to other residents in 2019. The claims (NYSCEF Doc No. 321) include defamation based on defendants’ posting of libelous and defamatory remarks about plaintiff, breach of contract based on Groman’s dissemination of confidential information in violation of the Code of Ethics, breach of fiduciary duty based on the disclosure of confidential material by Groman, a board member of plaintiff, and for a permanent injunction.

Motion # 9

In the affirmation in support of motion # 9 (NYSCEF Doc No. 307), Groman explains that Batista moved this Court for leave to amend her answer to include a counterclaim under Civil Rights Law 76-a and Civil Rights Law 70-a. (NYSCEF 233-237). The Court granted the motion. Plaintiff would not agree to stipulate to Groman amending his answer in the same way, necessitating this motion.

In opposition (NYSCEF Doc No. 327, 329), plaintiff argues that Groman’s “first counterclaim is precluded not only by law of the case [NYSCEF Doc No. 328], but by the very elements needed to establish a claim for malicious prosecution and with respect to the second proposed counterclaim, the SLAPP statute cannot be applied retroactively.” Plaintiff contends that because Groman was a member of the Board, not a public participant, and not acting in a public capacity, Groman’s claim differs from that of Batista’s claim, which should not have been allowed;

and that even if the amendment to SLAPP applied retroactively, Groman's motion to amend would be futile "because he was speaking in his capacity as a Board member for a residential housing cooperative (a corporate entity), therefore is not the intended member of the class of people that SLAPP is intended to protect. Defendant Groman did not speak as a member of the public in a public forum regarding public interest."

Plaintiff relies on *VIP Pet Grooming Studio, Inc. v Sproule* (224 AD3d 78 [2d Dept 2024]), noting the "case states 'the presumption of prospective application has not been overcome here'" and *Burton v Porcelain* (223 AD3d 775, 777-778 [2d Dept 2024]), noting the case states the amendment is not retroactive.

In *VIP Pet Grooming Studio, Inc. v Sproule* (224 AD3d at 89-90), the Second Department concluded:

Without retroactivity, the complaint must be viewed under the former iterations of Civil Rights Law §§ 70-a and 76-a, which, as noted, limit anti-SLAPP relief only to matters involving public petition and participation brought by public applicants and permittees (see *id.* former § 76-a [1] [a], [b]; *Hoi Trinh v Nguyen*, 211 AD3d at 1624). Only actions within the scope of the former anti-SLAPP statute, if continued after the effective date of the 2020 anti-SLAPP amendments, are subject to the remedial provisions of Civil Rights Law §§ 70-a and 76-a as amended. In sum, the broadened definition of public petition and participation under Civil Rights Law § 76-a does not apply retroactively to this action. The complaint, therefore, is governed by the prior statutory definition of public petition and participation, which was limited, at the time of this action's commencement, to matters involving only public applicants and permittees, and did not apply to a broader universe of defendants such as the Sproules (*see id.* former § 76-a [1] [a], [b]).

Plaintiff's view is that the Court held that the anti-SLAPP amendments would not be retroactively applied, that the defendants were not protected under the prior version of the anti-SLAPP statute, and that they were not entitled to attorney fees and costs under the anti-SLAPP statute.

In *Burton v Porcelain* (223 AD3d at 777-778), the Court determined:

Contrary to the defendant's contention, the broadened definition of public petition and participation in the amended section 76-a does not apply retroactively to this action (see *VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d 78 [2d Dept 2024]). The complaint, therefore, is governed by the prior statutory definition of an action involving public petition and participation (see *VIP Pet Grooming Studio*, 224 AD3d 78).

In reply (NYSCEF Doc No. 335), Groman disagrees with plaintiff's interpretation of *VIP Pet Grooming Studio, Inc. v Sproule* (224 AD3d 78 [2d Dept 2024]) and that the 2020 amendments to the anti-SLAPP statute (Civil Rights Law § 76-a) do not apply retroactively. Groman argues that in *VIP Pet Grooming Studio, Inc. v Sproule*, there was no continuation of the action by the plaintiff after the effective date of the SLAPP statute; that in this action there has been a continuation of the action after the effective date of the amendments to the SLAPP statute; and therefore, the holding in *Gottwald v Sebert* (40 NY3d 240 [2023]), which would allow the SLAPP counterclaim, applies. Groman emphasizes that plaintiff did continue the defamation action after the effective date of the amended SLAPP statute and therefore Groman's motion to amend the answer to include the counterclaim should be granted just as this court granted Batista's motion to amend her answer to include counterclaim.

Motion # 10

In the affirmation in support of motion # 10 (NYSCEF Doc No. 319), plaintiff contends that after this Court granted Batista leave to amend, *VIP Pet Grooming Studio, Inc. v* and *Burton v Porcelain* were decided, which provide a basis to grant the motion to renew, and upon renewal to deny the motion by Batista to amend her answer to assert a counterclaim pursuant to Civil Rights Law §§ 76-a and 70-a, as "palpably insufficient and clearly devoid of merit"; or, in the alternative, that the counterclaim asserted in Batista's amended answer be dismissed for failure to state a claim as a matter of law.

Plaintiff argues that, evidenced by the pleadings in the underlying action for defamation, the action is not materially related to Batista's efforts to report on, comment on, challenge or oppose an application by plaintiff; and that her efforts were neither within the scope of the former anti-SLAPP statute, nor subject to the remedial provisions of the 2020 amendments.

In opposition (NYSCEF Doc No. 330), Batista argues that plaintiff's reading of the decisions cannot be followed, as such reading would render *Gottwald v Sebert* (40 NY3d 240, 248 [2023]), and the "continued" language in the 2020 amended statute meaningless; and that *VIP Pet Grooming Studio, Inc. v. Sproule* and *Burton v Porcelain* are both readily distinguishable as the plaintiffs in those cases did not continue those defamation actions post-enactment of the 2020 amendment to the Anti-SLAPP statute.

In Gottwald v Sebert (40 NY3d at 260), the Court concluded:

Application of the amendments to Gottwald's post-effective date continuation of the action does not "upset[] reliance interests" or "trigger[] fundamental concerns about fairness" (*Regina*, 35 NY3d at 365). Although the "[r]etroactive imposition of punitive damages" raises constitutional concerns, those concerns become relevant only if the statute "explicitly authorized punitive damages for preenactment conduct" (*Landgraf*, 511 US at 281). Similarly, the imposition of compensatory damages is problematic only if it penalizes conduct predating the statute (*id.* at 281-282). Our interpretation of the application of the fees and damages provisions does not implicate these concerns (*see id.* at 267 n 21 ["In some cases . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application"]). As applied here, Sebert may assert a counterclaim under Civil Rights Law § 70-a and, if successful, recover costs, attorney's fees, and damages based on Gottwald's continuation of this action following the amendment's effective date.

Thus, even though the Court ruled that the statute did not apply retroactively, the Court granted the defendant's motion to amend her answer to assert a counterclaim for attorneys' fees and costs pursuant to Civil Rights Law § 70-a, based on the plaintiff's continuation of the lawsuit after the amended statute was enacted.

Batista relies on *Isaly v Garde* (___ Misc 3d ___, 2024 NY Slip Op 24056 [Sup Ct, NY County 2024]), where the Court stated:

In re-casting his applicability argument in the instant motion, plaintiff relies upon the Appellate Division, Second Department's recent holding in *VIP Pet Grooming Studio, Inc. v. Sproule*, 2024 N.Y. Slip Op. 00205, ___ A.D.3d ___, ___ N.Y.S.3d ___ (2d Dept. Jan. 17, 2024), which held that a plaintiff's complaint filed days before Chapter 250 took effect (and in which no subsequent action had been taken) was not subject to Chapter 250.4 *VIP Pet Grooming Studio*, at *4-5. *See also*, *Burton v. Porcelain*, 2024 N.Y. Slip Op. 00291, 223 A.D.3d 775, ___ N.Y.S.3d ___ (2d Dept. 2024) (citing *VIP Pet Grooming Studio* in finding that Chapter 250 did not apply in motion to dismiss pending at the time of its enactment). Although plaintiff argues that *VIP Pet Grooming Studio* controls, plaintiff is incorrect. This action is immediately distinguishable in the sheer scale of plaintiff's post-enactment litigation activity, and the Court of Appeals has stated that “[t]here is no retroactive effect when these provisions are applied, according to their terms, to the continuation of the action beyond the effective date of the amendments.” *Gottwald*, at 258, 197 N.Y.S.3d 694, 220 N.E.3d 621. This particularly includes plaintiff's August 2022 effort to again amend his complaint in Motion Seq. No. 005, long after Chapter 250 took effect.

The Court did find that Civil Rights Law § 70-a financial relief applies to actions continued after the effective date of the amended law. Batista contends that plaintiff has actively continued this action post-enactment of the 2020 amended Anti-SLAPP statute, and thus the *VIP Pet Grooming Studio, Inc. v. Sproule* and *Burton v. Porcelain* cases are inapposite; that Civil Rights Law § 70-a allows defendants to “maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action.”; and that otherwise, if Civil Rights Law § 70-a did not apply to a continued action, the “continued” language in Civil Rights Law § 70-a would serve no purpose.

In reply (NYSCEF Doc No. 334), plaintiff recognizes that Batista urges the Court to follow the decision in *Isaly v Garde*. However, the Court in that case stated that it “is bound to apply the law as it exists, and as interpreted by controlling ... precedents,” including *VIP Pet Grooming Studio, Inc. v. Sproule* and *Burton v. Porcelain* (see *Columbia Mem. Hosp. v Hinds*, 38 NY3d 253,

269 [2022]). Plaintiff argues that because the amendment is not retroactive, the initial inquiry is whether the case involves a “qualifying action” under the prior definition of “public petition and participation” (*Burton v Porcelain*, 223 AD3d at 777). Plaintiff contends that, contrary to the facts in *Isaly v Garde*, this action was stayed as of November 20, 2020; that plaintiff did not notice any motions other than a cross-motion to discontinue a portion of the complaint, which plaintiff views as the opposite of “continuation”; that plaintiff did not seek to amend its complaint or pursue an appeal; that the motions made after November 2020 were made by Batista; that plaintiff cannot be charged with “continuing” a case where the only action taken was to oppose motions brought by Batista, which related to the validity of Batista’s counterclaim and had nothing to do with continuation of the underlying claims of defamation; and that the action was not “continued” for purposes of the anti-SLAPP amendment and the damages implemented in the amendment; that the two Second Department cases hold that only “actions within the scope of the former anti-SLAPP statute, if continued after the effective date of the 2020 anti-SLAPP amendments, are subject to the remedial provisions of Civil Rights Law §§70-a and 76-a, as amended”; that since the claims in this action are not “within the scope of the former anti-SLAPP statute,” Batista does not have a viable cause of action alleging a violation of the anti-SLAPP law and the counterclaim in her amended answer should be dismissed.

The Anti-SLAPP Law

In *Karl Reeves, C.E.I.N.Y. Corp. v Associated Newspapers, Ltd.* (___ AD3d __; 210 NYS3d 25, 30-31, 36 [1st Dept 2024]; 2024 NY Slip Op 01898, *4-6, 10), a decision even more recent than *VIP Pet Grooming Studio, Inc. v Sproule* and *Burton v Porcelain*, the Court set forth the history of the anti-SLAPP law, as follows:

The anti-SLAPP law was first enacted in 1992. The Legislature expressly declared it to be “the policy of the state that the rights of citizens to participate freely in the

public process must be safeguarded with great diligence” (L 1992, ch 767, § 1). The Legislature emphasized that New York “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” (*id.*). These concerns underpin the amendments that later fortified the anti-SLAPP law in November 2020 (see Sponsor's Mem, L 2020, ch 250, Bill Jacket, at 5-6).

The anti-SLAPP law contains three primary components. Its scope is initially set forth in Civil Rights Law § 76-a, which delineates the types of public petition and participation that are protected by the law. Civil Rights Law § 70-a affords remedies to protected persons, in the form of attorneys' fees and compensatory and punitive damages. CPLR 3211(g) and CPLR 3212(h) establish a new standard designed to ensure that baseless SLAPP suits do not advance beyond the pleadings.¹ These two CPLR subsections flip the burden of proof ordinarily applied in CPLR 3211(a)(7) motions to dismiss or CPLR 3212 motions for summary judgment: once the movant establishes that the plaintiff's action is a SLAPP suit, the motion to dismiss “shall” be granted unless the plaintiff demonstrates that the cause of action has a substantial basis.

As originally enacted, the anti-SLAPP law was found applicable only to a narrow class of cases (*see* Mark C. Dillon, McKinney's Cons Laws of NY, CPLR 3212, Practice Commentary C3212:54 [2021]) brought by “public applicant[s] or permittee[s] (former CLR § 76-a[1]; *see Hariri v Amper*, 51 AD3d 146, 151 [1st Dept 2008]). Moreover, the law's original attorneys' fees provision was discretionary (*see* former Civil Rights Law § 70-a[1][a]), so that few parties who succeeded in defeating SLAPP suits recovered attorneys' fees (*see e.g. Matter of West Branch Conservation Assn. v Planning Bd. of Town of Clarkstown*, 222 AD2d 513, 515 [2d Dept 1995]).

On November 10, 2020, the Legislature strengthened the remedies available to victims of SLAPP suits (*see* L 2020, ch 250). The 2020 amendments expanded the scope of anti-SLAPP protection to encompass claims based on “(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” (Civil Rights Law § 76-a[1][a][1]-[2]). The amendments further directed that “public interest” shall be “construed broadly” to mean “any subject other than a purely private matter” (Civil Rights Law § 76-a[1][d]).

The 2020 iteration of the anti-SLAPP law codified a protected person's right to recover attorneys' fees by making an award of attorneys' fees mandatory, not discretionary, upon a showing that the SLAPP action “was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law” (Civil Rights Law § 70-a[1][a]). An adjudication under CPLR 3211(g) or 3212(h) that is favorable to a defendant is sufficient to support such a showing (*see id.*).

Finally, the amendments overhauled the expedited dismissal procedure set forth in CPLR 3211(g). In addition to CPLR 3211(g)(1) (which existed prior to the 2020 amendments), the amendments added three entirely new subsections (*see* CPLR

3211[g][2]-[4]). These provisions created a new evidentiary framework, which is, in effect, an accelerated summary judgment procedure under CPLR 3211(a)(7). Simply put, the 2020 amendments expanded the scope of anti-SLAPP protections to encompass all public communications on any nonprivate matter (see Civil Rights Law § 76-a[1]). The amendments simplified a defendant's burden. On a CPLR 3211(a)(7) motion to dismiss, the defendant bears the burden of showing that the action or claim is a SLAPP suit. Once the defendant satisfies this initial burden, the burden shifts to the plaintiff to demonstrate that its claim has a substantial basis (CPLR 3211[g][1]). If the plaintiff fails to meet that burden, then the covered action or claim is dismissed, with a concomitant mandatory award of attorneys' fees to the prevailing defendant (see Civil Rights Law § 70-a[1][a])....

Under the CPLR 3211(a)(7) standard, the question is whether a cognizable cause of action is manifested, presuming the complaint's factual allegations to be true, and according the pleading the benefit of every possible favorable inference (see *Doe v Bloomberg, L.P.*, 36 NY3d 450, 454 [2021]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]). By contrast, a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence (see *Castle Village*, 58 AD3d [178] at 183 [1st Dept 2008]).

The Court's framing of a SLAPP suit aids this Court in its analysis of the arguments presented by the parties. The Court in *Gottwald v Sebert* (40 NY3d at 260) determined that the 2020 amendments, which expanded the scope of anti-SLAPP protections, are not retroactive. This is consistent with the determinations in *VIP Pet Grooming Studio, Inc. v Sproule* and *Burton v Porcelain*. However, the Court in *Gottwald v Sebert* concluded: "[Defendant] may assert a counterclaim under Civil Rights Law § 70-a and, if successful, recover costs, attorney's fees, and damages based on [plaintiff's] continuation of this action following the amendment's effective date." (*id.* at 260.)

Despite the Court in *VIP Pet Grooming Studio, Inc. v Sproule*, finding that the 2020 amendments to the anti-SLAPP Law are not retroactive, it determined: "Only actions within the scope of the former anti-SLAPP statute, if continued after the effective date of the 2020 anti-SLAPP amendments, are subject to the remedial provisions of Civil Rights Law §§ 70-a and 76-a as amended." (*id.* at 89.)

Here, there is continuing post-enactment litigation activity, and the proposed counterclaim, as well as the counterclaim by Batista, seek to recover costs, attorney's fees, and damages. Therefore, at this early stage it would be consistent with this Court's findings to allow Groman to amend his answer, as was done in the prior decision related to Batista. Subsequently, plaintiff may challenge the substance of the counterclaims and their applicability to the circumstances in this action.

Amendment of Answer (CPLR 3025)

Leave to amend a pleading should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (CPLR 3025[b]; *Bloom v. Lugli*, 102 AD3d 715[2d Dept. 2013]). Moreover, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt (*Faiella v. Tysens Park Apartments, LLC*, 110 AD3d 1028 [2d Dept 2013]).

Motion to Renew (CPLR 2221 [e] [2] [3])

A motion for leave to renew is addressed to this Court's sound discretion (*see Fulcher v Empire State Grand Council Ancient & Accepted Scottish Rite Masons, Inc.*, 222 AD3d 721, 723 [2d Dept 2023]; *Jian Feng Zhang v Roman*, 186 AD3d 1625, 1626 [2d Dept 2020]). It must be based on new facts not offered on the prior motion that would change the prior determination and must contain reasonable justification for the failure to present these facts on the prior motion (*see* 2221 [e]; *Flanagan v Delaney*, 194 AD3d 694, 696 [2d Dept 2021]; *Jian Feng Zhang v Roman*, 186 AD3d at 1626). As stated in *Krobath v South Nassau Communities Hosp.* (178 AD3d 810, 811 [2d Dept 2019]): "A motion for leave to renew is not a second chance freely given to a party who has not exercised due diligence in making its first factual presentation (*see U.S. Bank N.A. v*

Ahmed, 174 AD3d 661, 665 [(2d Dept) 2019]; *Okumus v Living Room Steak House, Inc.*, 112 AD3d 799, 800 [(2d Dept) 2013]].” Even when purported new facts are stated, they may not change a prior determination (see *Gall v Colon-Sylvain*, 151 AD3d 701, 703 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Wilkins*, 97 AD3d 527, 529 [2d Dept 2012]). A new legal argument is not a basis for a motion to renew (see *Verizon N.Y., Inc. v Supervisors of Town of N. Hempstead*, 169 AD3d 740, 743 [2d Dept 2019]; *Matter of Kadish v Colombo*, 121 AD2d 722 [2d Dept 1986]).

Conclusion

In its prior Decision and Order on October 23, 2023, this Court stated:

Here this Court previously applied controlling law and held that the November 2020 amendments to New York Civil Rights Law Sections 70-A and 76-A did not apply retroactively to the claims set forth in this lawsuit. The Court of Appeals, however, has since held that the 2020 amendments are retroactively applied to any action which continues beyond the law's effective date with costs and attorneys' fees under the section calculated forward from the effective date. *Gottwald v. Sebert*, 2023 NY Slip Op 03183, June 13, 2023.

The Court's determination was consistent with subsequent rulings, which are not a basis to grant leave to renew or change the prior determination. Thus, Groman should be granted leave to amend his answer in the same way Batista amended her answer to assert a counterclaim under Civil Rights Law § 70-a.

The remaining contentions do not require a different result.

Accordingly, it is,

ORDERED that defendant Paul Groman's motion, for leave to amend his answer to include a counterclaim to assert a counterclaim pursuant to Civil Rights Law 70-a, is granted; and it is further

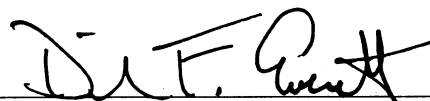
ORDERED that plaintiff's motion, for leave to renew or to dismiss the counterclaim, is denied; and it is further

ORDERED that Groman's proposed "Second Amended Verified Answer with Cross-Claim" shall be deemed served upon the filing of this Decision and Order on NYSCEF, and plaintiff and Batista will have 20 days to reply or otherwise respond.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
July 15, 2024

ENTER:

A handwritten signature in black ink, appearing to read "D. F. Everett", is written over a horizontal line.

HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF