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NEW YORK COURT APPLIES ANTI-SLAPP AMENDMENT RETROACTIVELY TO PREVIOUSLY FILED LAWSUIT

Hodgson Russ Media and First Amendment Alert
April 20, 2021

In *Sackler v. American Broadcasting Companies, Inc., et al.*, 2021 N.Y. Slip Op. 21055 (N.Y. County Mar. 9, 2021) (Perry, J.), the New York County Supreme Court became the first State Court in New York to apply the recently amended anti-SLAPP law retroactively. The Sackler lawsuit stemmed from defendants' mistaken use of the plaintiff's image in connection with a report on Purdue Pharma's involvement in the OxyContin epidemic—he was not the David Sackler who was a part owner of Purdue Pharma, but rather a health and welfare industry consultant. Plaintiff filed suit against the defendants for defamation per se, under theories of both libel and slander. Defendants moved to dismiss the complaint on various grounds. While the motion was under consideration, however, the Legislature amended the anti-SLAPP law (codified at New York Civil Rights Law ("CRL") §§ 70-a, 76-a). As acknowledged in the trial court's decision, the amendment to CRL § 76-a significantly broadened the definition of "an action involving public petition and participation," noting further that the amendment "imposed the requirement that a plaintiff 'establish by clear and convincing evidence that any communication which gives rise to the action' was made with actual malice."

In evaluating the issue of the amendment's retroactive application, the Supreme Court leaned heavily on the federal court's reasoning in *Palin v. The New York Times Co.*, --- F. Supp. 3d ---, 2020 WL 7711593 (S.D.N.Y. Dec. 29, 2020), in which Judge Rakoff similarly concluded that the law should be applied retroactively because it is a remedial statute. Citing and relying upon the session law, including the justification offered by State Senator Brad Hoylman, the sponsor of the anti-SLAPP amendment, the New York Supreme Court observed that retroactivity was in keeping with the amendment's purpose to reverse the "narrow" interpretation that had been afforded to the law by New York courts. Dismissing the complaint, the court found that plaintiff had not satisfied his evidentiary burden of showing actual malice by clear and convincing evidence. A mere "failure to investigate will not alone support a finding of actual malice." The court also rejected plaintiff's plea for additional discovery, noting that plaintiff's request was contrary to the mandate of CPLR § 3211(g), which required dismissal in the absence of plaintiff's satisfaction of his evidentiary showing, even at the pleadings stage.

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Takeaway. The Supreme Court's decision in *Sackler* is a wake-up call for defamation plaintiffs looking to pursue claims stemming from publications fitting within the significantly broadened definition of "public petition and participation." Coupled with the amendment to CRL § 70-a, which gives successful defendants the ability to bring a claim for costs and attorneys' fees, the changes to the anti-SLAPP law provide powerful tools for defamation defendants in New York.

For any question you have regarding whether this recent decision impacts any of your organization's activities, please contact Stephen Kelkenberg (716.848.1307), Ryan Cummings (716.848.1665), or any member of our Media and First Amendment practice.