To Be Argued By:
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New York Supreme Court
Appellate Division — First Department

315 WEST 103 ENTERPRISES LLC and
315 W 103 ST. DEVELOPMENT LLC,

Plaintiffs-Respondents,

–against–

RICHARD A. ROBBINS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

Richard A. Robbins appeals from the January 5, 2018 order of the Supreme Court of the State of New York, County of New York (Bluth, J.S.C.) (Final Order), R.9, whose Notice of Entry was given on January 10, 2018, R.251, and which was based on its previous order, entered on November 21, 2017 (First Order). R.8.

Since 1992, New York's anti-SLAPP law has provided extra protection for members of the public who contact public officials with their concerns about permit applications or the activities of companies using their government permits. Cases brought against such speech are treated as SLAPP suits: strategic lawsuits against public participation. Under this law, the defendant is entitled to move for early dismissal, and that motion must be given preference on the calendar. The plaintiff must show a "substantial" basis for its lawsuit, not just a reasonable basis, and when the plaintiff has pleaded a claim for defamation against the speech covered by the law, it must meet the *New York Times v. Sullivan* standard demanding a showing of "actual malice." Additionally (and regardless of whether the claim was for defamation), if the plaintiff fails to show that it had a substantial factual and legal basis for its claims, the anti-SLAPP law affords the defendant a claim for attorney fees. Indeed, the defendant also has a claim for damages if the defendant can show that the lawsuit was filed for the purpose of imposing a burden on the defendant's right of free speech.

In the First Order, R.8, the Supreme Court granted the request of plaintiffs-respondents 315 West 103 Enterprises LLC and 315 W 103 St. Development LLC, to discontinue a defamation complaint against Robbins, R.12-23, the resident of a building adjacent to a building where plaintiffs were having construction done; the complaint attacked as tortious certain calls to the New York Department of Buildings about damage to property and violations of Stop Work Orders. The court reached this conclusion notwithstanding the pendency of a motion by defendant that included claims for monetary relief based on New York's anti-SLAPP statute. In the Final Order, R.9, the Supreme Court reiterated its determination that the complaint could be withdrawn on the ground that a willingness to voluntarily dismiss the complaint made consideration of defendant's motion moot, expressly denying the claims for monetary relief that had been included in the motion to dismiss.

After plaintiffs filed suit, Robbins, instead of issuing a groveling apology and entering into a non-disparagement agreement barring fair criticisms of the plaintiffs in the future, retained counsel and proceeded to defend against their defamation claims. Faced with opposition, plaintiffs decided that it would cost too much money to litigate the case and sought to withdraw it. But having put defendant to the cost, trouble, and anxiety of facing a seven-count complaint for damages, each count being valued at $65,000 or more, and having to find counsel to defend against that suit,

plaintiffs should not have been permitted to avoid the consequences of having filed a baseless defamation complaint.

In moving under the anti-SLAPP law to dismiss this lawsuit, and seeking fees, costs, and damages, defendant Robbins showed that the action was filed without any basis in fact or law, and presented evidence supporting an inference of a bad faith motivation for the suit. However, instead of addressing the defendant's claim first, the trial court elected to give precedence on the calendar to plaintiffs' decision to drop their lawsuit, and then proclaimed that Robbins' objections to the complaint were moot, warranting the denial of his claims for attorney fees, costs and damages. This appeal presents the question whether the denial of Robbins' anti-SLAPP claims for fees, costs and damages was justified.

STATEMENT OF QUESTIONS PRESENTED

1. Was plaintiffs' defamation complaint a SLAPP suit filed without a substantial basis?

The Supreme Court failed to address this issue.

2. Did the defamation defendant properly seek an award of attorney fees and other forms of monetary relief under New York's anti-SLAPP law by filing a motion instead of a counterclaim?

The Supreme Court did not expressly address this issue, but implicitly said no.

3. May a claim for attorney fees and other monetary relief under New York's anti-SLAPP law be denied on the ground that plaintiff responded to defendant's anti-SLAPP motion by dropping its lawsuit?

The Supreme Court did not expressly address this issue, but implicitly said yes.

STATEMENT OF THE CASE

A. Statutory Background: The New York Anti-SLAPP Law

The New York anti-SLAPP law was adopted in 1992 in response to a demonstrated history of lawsuits being filed against members of the public who had participated in proceedings in opposition to the activities of companies and individuals who were seeking or using government permits in ways which, according to the speakers, were unfairly or illegally prejudicing their interests. "SLAPP suits—strategic lawsuits against public participation— . . . are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *600 W. 115th St. Corp. v. Von Gutfeld,* 80 N.Y.2d 130, 137 n.1 (1992). The legislature's key concern, as stated in the legislative findings, was "that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in

public affairs." 1992 Sess. Law News of N.Y. Ch. 767 (A. 4299) (McKinney's), § 1. The Governor's signing statement similarly explained: "The aim of SLAPP suits is simple and brutal: the individual is to regret ever having entered the public arena to tell government what she thinks about something directly affecting her." Quoted in *Ent. Partners Group v. Davis*, 590 N.Y.S.2d 979, 985 (N.Y. Sup. Ct. 1992), *aff'd*, 198 A.D.2d 63 (1st Dept. 1993).

This Court said much the same in one of its decisions applying the statute: "The primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate [speakers] into dropping their [positions] due to the expense and fear of extended litigation. . . . The primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition." *Hariri v. Amper*, 51 A.D.3d 146, 149 (1st Dep't 2008) (internal punctuation omitted).

To address these concerns, the legislature took a four-pronged approach. It adopted special new procedures for handling any suit that is filed by a public applicant or permittee and is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." N.Y. CIV. RIGHTS LAW Section 76-a(1)(a). Under those procedures, a defendant is entitled to seek prompt dismissal of any action that falls within these anti-SLAPP

parameters, and the plaintiff is given a higher burden than non-SLAPPing plaintiffs face to defeat dismissal: if moving to dismiss under CPLR § 3211(g) as amended by the SLAPP law, the motion "shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law." If seeking summary judgment under CPLR § 3212(h), the plaintiff must show a substantial basis in both law and fact. Second, the defendant is entitled have a preference granted in hearing the motion. CPLR § 3211(c), final sentence. Third, when the claim is one for defamation, section 76-a(2) of the N.Y. CIV. RIGHTS LAW subjects plaintiffs to an even higher burden to oppose dismissal or, indeed, to prevail in the litigation: the plaintiff must meet the evidentiary standard that would be required by the First Amendment if a defamation plaintiff were a public figure, *Duane Reade v. Clark*, 784 N.Y.S.2d 920, at *4 (N.Y. Sup. N.Y. County 2004), *citing* 8 Weinstein–Korn–Miller, *N.Y. Civ. Prac.* ¶ 3211.51. Specifically, the plaintiff must establish "by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false." *See New York Times v. Sullivan*, 376 U.S. 254 (1964). Fourth, the statute gives a SLAPPed defendant three separate claims for monetary relief against a SLAPP plaintiff that cannot meet the burdens of proof set by the law:

Defendant has a claim for costs and attorney fees "upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law." N.Y. CIV. RIGHTS LAW § 70-a(1)(a). Defendant also has a claim for compensatory damages "upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights," *id.* § 70-a(1)(b); and for punitive damages upon yet an additional showing that the bad purpose set forth in subsection (B) was, in fact, "the only purpose for which the action was commenced or continued." *Id.* § 70-a(1)(c).

B. Facts

This case arises out of a construction project at 315 West 103rd Street in Manhattan. R.13. In January 2009, the city's Department of Buildings issued Permit Number 11085283, authorizing construction on the premises. R. 30 ¶ 8. The project has been the subject of substantial public controversy: it has been discussed by community groups and a tenant association and has been the subject of extensive media coverage. R.153-199. More than a hundred local residents signed a neighborhood petition asking to have the construction halted, R.137-146, and several elected officials have written to the New York City Department of Buildings about

the project. R.126-136.

A local tenant association claimed that there had been errors in the permit application, and sought the issuance of a "Stop Work Order." R.102-103. Several such orders have been issued, R.94 ¶¶ 6-7. 113-114, and the building has been cited for violations of such orders as well as other building code violations. *Id.* Stop Work Orders contain a request that neighbors "contact the Department at the telephone number below . . . to report that work is taking place in violation of the **STOP WORK ORDER**." R.109 ¶ 16, 212 (emphasis in original).

Plaintiffs became the owners of the property in 2014. R.31 ¶ 11, 51-16. Following the transfer of ownership, plaintiffs applied to the Department of Buildings seeking permission to continue the construction. R.31 ¶ 11, 65-82. Permits were issued accordingly in October and November 2016. However, in between plaintiffs' acquisition of the property and the issuance of these permits, the City Landmarks Preservation Commission designated an extension of the Riverside-West End Historic District that encompassed 315 West 103rd Street; as a result, modifications to the property required approval of the Landmarks Preservation Commission. R.31 ¶ 12. Plaintiffs sought from the Commission a certificate of appropriateness for their work on the building, but as of the time that the case was being litigated below, no such certificate had been granted. R.31 ¶ 13, 83-84.

Defendant Richard Robbins owns a ground-floor cooperative unit at 317 West 103rd Street. Thus, he is a next door neighbor to plaintiffs' construction project; consequently, he is a first-line victim of the enlargement, damage to adjoining property, noise, and other issues caused by the construction at 315 West 103rd Street. R.103 ¶ 2. He has been among the neighbors who have complained about the project—specifically, he made four of the five telephone calls alleged in the complaint addressing perceived permit violations to 311. R.106-108, ¶¶ 9-15. 311 is the city hotline that permits citizens to report potential issues to city officials and to obtain information about the operation of their government. R.34 ¶ 18, 97-101.

On December 19, 2016, Robbins called 311 to report that plaintiffs' contractor was using a jackhammer to excavate in the rear of the building, while a Stop Work Order was in effect. R.108 ¶ 14. A Department of Buildings inspector dismissed this complaint, as work was not being performed on December 20, 2016 when the inspection occurred. *Id.* However, two days later, plaintiffs received a summons for violating the Stop Work Order. *Id.*

On April 28, 2017, a man whom Robbins understood to be connected to one of the plaintiffs visited 317 West 103rd Street. Robbins showed him damage to Robbins' property caused by the construction. R.106 ¶ 10. On May 3, 2017, the plaintiffs' agent sent Robbins an email offering to "send a handyman over to look at

the items u [sic] wanted addressed." R. 106-107, 201. Robbins sent a reply on May 19, 2017, telling the agent that Robbins had complained to the Department of Buildings about the property damage. *Id.*

According to the Department of Buildings web site, on May 18, 2017, plaintiffs had a hearing that resulted in a $1600 fine for failure to comply with Stop Work Order. *Id.* Plaintiffs sued Robbins less than three weeks after the hearing for the December violation and after Robbins had identified himself as the person who had filed a complaint about property damage. R.37-38 ¶ 26, 107 ¶ 10.

C. Proceedings Below

Plaintiffs filed this action on June 7, 2017, alleging that, in his reports to the Department of Buildings via the 311 hotline, defendant had made false statements regarding alleged violations of their building permits and ensuing Stop Work Orders. R.11-23. Plaintiffs alleged seven counts of defamation, injurious falsehood and prima facie tort, claiming special damages of $65,000 on each count. R.14-22.

If plaintiffs expected that defendant would be driven into a cowering silence through this litigation and an inability to afford counsel, those hopes were disappointed. Represented by counsel, Robbins moved to dismiss the complaint. R.25. The supporting affidavits, R.27-50, R.103-109, along with their attached exhibits, showed that Robbins' calls to the 311 hotline were communications to

government officials about the possibility that the conduct of government permittees was transgressing the requirements of a permit, or might otherwise be unlawful or contrary to sound public policy. R106-109. Given that context, Robbins argued that Section 76-a(2) of the NEW YORK CIVIL RIGHTS LAW required plaintiffs to establish, by clear and convincing evidence, that Robbins either knew he was submitting false information to the Department of Buildings or, at least, spoke with reckless disregard of whether his statements were false. R.37-38. Robbins noted that the complaint's defamation counts neither pleaded this state-law element of the claims, nor provided a substantial basis in fact for finding actual malice. R.39 ¶¶ 30-31. He also submitted evidence, in the form of his own affidavit as well as supporting documentary evidence, showing that he genuinely believed that his communications were accurate and that he had a sound basis for his statements. R.106-108. He argued that the complaint was subject to dismissal on that ground.[1]

Robbins also argued that, although the complaint alleged defamation based on plaintiffs' assumption that various entries in the Department of Buildings logs reflected word-for-word what Robbins had said during his telephone calls to the 311 hotline, the words that he actually spoke during some of those calls represented

[1] Knowledge of falsity was alleged, on information and belief, only in Count 6, the claim for injurious falsehood. R.21 ¶ 89.

questions and concerns about possible problems, rather than affirmative accusations of specific wrongful conduct. R.106-108. Consequently, he argued, plaintiffs' defamation claims about those calls were based on expressions of opinion and requests for investigation of potential problems, not affirmative statements of alleged fact that could be capable of a defamatory meaning. R.30-31.

Accordingly, Robbins' motion to dismiss argued this lawsuit qualified as a SLAPP suit under New York law and hence that, in addition to dismissing the complaint, the Supreme Court should award him the attorney fees incurred in defending against the complaint. R.47-50. In addition, Robbins argued that he should be given the opportunity to prove that the purpose of the lawsuit was to harass, intimidate or punish him rather than to vindicate a tenable claim, and thus that he was entitled to be awarded damages. *Id.*

In response to the motion, plaintiffs moved to discontinue their lawsuit entirely. R.216. According to plaintiffs' papers, "Plaintiffs have determined that the economics of the legal expenses Plaintiffs will incur to prosecute this action are not justified when considering the realm of damages that Plaintiff [sic] may recover." R.217 ¶ 5. Plaintiffs offered no explanation of how the anticipated expense of litigation had increased between the time they brought the complaint and the date they sought to withdraw it. But they accused Robbins of "acting irrationally in refusing

to consent to discontinuance of this action." R.219 ¶ 14. Plaintiffs submitted no evidence and no legal argument purporting to show that they had had a substantial basis for commencing suit in the first place.

Defendant Robbins opposed the discontinuance in part, objecting only to the "without prejudice" aspect of plaintiffs' motion, R.235 ¶ 10, and to plaintiffs' apparent hope that the Supreme Court would not address his claims for attorney fees and damages under the New York anti-SLAPP law. R.231-241. As his papers explained,

> The very purpose of the anti-SLAPP law is to prevent plaintiffs [from abusing] the courts with impunity. To allow the plaintiffs to be able to strategically bring an action to intimidate citizens from exercising their rights, and then withdraw without recourse when opposed [,] would create a dangerous precedent, opening Mr. Robbins and others within his community, and, in fact, all New Yorkers, to be forced to defend themselves against claims of this nature, claims the plaintiffs ultimately will not pursue when challenged.
>
> R. 238 ¶ 16.

However, on November 13, 2017, the Supreme Court granted plaintiffs' motion to discontinue, on the ground that "Plaintiff [sic] has changed its [sic] mind and does not want to sue defendant any longer." R8. After plaintiffs' counsel complained that oral argument was still scheduled to be held on Robbins' motion to dismiss, the court below elaborated on its ruling by saying that the motion to dismiss was "denied as moot" in that plaintiffs "decided it [sic] did not want to sue defendant any longer. .

. . To the extent defendant seeks anything other than dismissal (punitive damages, sanctions, etc.), the requests are denied." R.9. Plaintiffs served notice of entry of this ruling on on January 10, 2018, R.251, and defendant filed his notice of appeal on February 5, 2018. R.1.

ARGUMENT

I. DEFENDANT SHOWED THAT THIS LAWSUIT WAS A SLAPP THAT WAS COMMENCED AGAINST HIM IN CIRCUMSTANCES WARRANTING AN AWARD OF MONETARY RELIEF.

In the court below, Robbins was able to establish that this action was within the parameters of New York's anti-SLAPP law, in that it was brought by a permit holder against a member of the public who had complained to public authorities about his concerns about possible unlawful or inappropriate actions pursuant to the permit, and that, at the very least, plaintiffs did not have a substantial basis in fact or in law for suing the defendant for defamation. This was enough, under New York law, for Robbins to be awarded his attorney fees and costs. Additionally, the record below could support an inference that improperly inhibiting the free exercise of speech rights was among the purposes of the lawsuit, if not the main purpose, and hence that Robbins should have been awarded compensatory and possibly punitive damages.

First, plaintiffs in this case are permittees: as many documents in the record confirm, they received building permits from the Department of Buildings. R. 31-32,

¶¶ 11-14. Second, Robbins made several calls to New York City's 311 hotline, R.106-108, an established means for city residents to bring their concerns to the attention of city officials. R.34 ¶ 18, 97-101. His calls related to the manner in which plaintiffs were conducting themselves under their permits. R.106-108. Third, those calls were the subject of plaintiffs' defamation complaint. R.13-21.

As a result, to establish their right to proceed, and to defend against Robbins' contention that the suit had to be dismissed, plaintiffs first had to show that they had a substantial basis in law for bringing these claims. CPLR § 3211(g). Second, they had to show, by clear and convincing evidence, that Robbins made false statements of fact about them either knowing that the statements were false or with reckless disregard for whether they were true or false. Section 76-a(2), N.Y. CIV. RIGHTS LAW. Unless plaintiffs could make both of these showings, Robbins was entitled to an order dismissing the action; in the language of CPLR § 3211(g), "the motion shall be granted unless the party responding to the motion demonstrates" the substantial basis for the action. Not only does the law not give the plaintiffs the ability to avoid granting of the motion to dismiss by the simple tactic of refusing to oppose it or by dropping the lawsuit, but the final sentence of the Rule requires the Court to "grant preference in the hearing of such motion [to dismiss]." CPLR § 3211(g).

Plaintiffs failed to meet their burden in opposing the motion to dismiss in

several respects. Because the complaint was filed over Robbins' statements about the exercise or implementation of plaintiffs' building permits, the CIVIL RIGHTS LAW required them to plead and prove actual malice, and that proof had to be made by clear and convincing evidence. Section 76-a(2). But plaintiffs presented no proof on the issue of actual malice; actual malice was not even pleaded on the first five counts of the complaint. For that reason alone, dismissal under the anti-SLAPP law was mandatory. CPLR § 3211(g).

Plaintiffs also failed to show that they had a substantial basis for claiming that Robbins had made false statements of fact about how they were conducting themselves under their building permits. The complaint was based on the categories that the Department of Buildings had assigned to Robbins' 311 calls, but plaintiffs' complaint makes clear that they had no first-hand knowledge of what Robbins actually said on the 311 calls. Robbins explained in his affidavit that, in at least one of his 311 hotline calls, he only expressed concerns, based on information that he could observe personally, about whether Stop Work Orders or other limitations on plaintiffs' building permits might have been violated. R.107 ¶ 12. These statements expressed opinions rather than provably false facts, and hence were not actionable under New York law. *See Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 244-245 (1991) (forbidding defamation claims against statements of opinion). Moreover,

although some of Robbins' 311 calls did not result in the finding that plaintiffs had violated a Stop Work Order, other calls did result in such findings for the same issues, R.106 ¶ 10, R.107-108 ¶ 13, R.108 ¶ 14, further supporting Robbins' defamation defense by showing that there was some reasonable basis for the concerns that he expressed in his 311 calls. At least with respect to **those** calls, plaintiffs lacked a substantial basis for establishing the falsity allegations in their complaint. And again, plaintiffs produced no evidence of falsity of any of the statements that their complaint alleged were false.

Finally, Robbins' showing in support of his anti-SLAPP motion was, at a minimum, sufficient to support an award of monetary relief in the form of attorney fees and costs. Not only did the first five counts of the complaint fail to allege actual malice, but Robbins' affidavit affirmatively showed, with uncontradicted evidence, that he genuinely believed in the veracity of his 311 calls, and that he had a substantial reason for that belief, and hence was not speaking with reckless disregard of probable falsity. R.106-108. Plaintiffs never showed otherwise: they claimed that, if they had wanted to do so, they could have made a showing of "malice," but the context in which their papers used the word "malice" suggests that they had in mind only common law malice, not actual malice: they said they were seeking to discontinue their suit to avoid "the expense of proving Defendant's malice and spite

as a motivation for his false reports." R.250 ¶ 7. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 438 (1992) (explaining the difference between actual malice and common-law malice). This focus alone suggested that plaintiffs did not have evidence of actual malice and could not have presented such evidence. Hence, on the record below, the absence of actual malice was undisputed, and the trial court should have awarded Robbins his attorney fees and costs.

Moreover, in at least three respects, the trial court record supports an inference that at least part of the motive for commencing this suit was to punish, harass or intimidate Robbins to inhibit him from exercising his free speech rights, thus possibly supporting an award of damages in addition to the fees and costs. First, the complaint was filed against Robbins within weeks of plaintiffs being fined for committing a building code violation **and** being informed, almost simultaneously, that Robbins had called in a complaint about its construction work. This timeline could support an inference that this lawsuit represented plaintiffs' effort to punish Robbins for accurate 311 calls.

Second, plaintiffs alleged falsity even though they were aware, at the time they filed suit, that at least some of Robbins' statements were true. For example, on April 28, 2017, plaintiffs' agent personally observed the damage to Robbins' property; on May 3, 2017, that agent sent Robbins an email offering to send a handyman to

address the issues. R.106-107, 201. Yet plaintiffs' first cause of action states that Robbins' complaint of damage to his property was false when made and hence defamatory. R.14. Similarly, at the time of filing suit, plaintiffs were aware that they had received a violation on December 22, 2016 for the exact issue that Robbins had called 311 about on December 19, 2016, even though the December 19, 2016 complaint had been dismissed. R.108 ¶ 14. Yet plaintiffs' fifth cause of action alleged that Robbins' December 19 call included false statements and hence was defamatory. R.20-21.

The third fact that supports an inference of improper purpose is plaintiffs' explanation for their discontinuance of the litigation. Their explanation strongly implies that they never had any intention of proving their claims against Robbins, but rather filed this lawsuit in the hope and expectation that the mere filing would induce Robbins to be quiet. It was only after Robbins filed his anti-SLAPP motion to dismiss that plaintiffs told the Court that they did not want to proceed with the litigation because they recognized that the cost of proving their claims would be too expensive to make economic sense—that is, the costs would be higher than any possible damages that they might recover. But nothing about Robbins' motion told plaintiffs anything that they should not have known when this case began: that as defamation plaintiffs suing over complaints about their exercise of their public

permits, they had to prove actual malice, and that libel cases are expensive to prosecute. The only way that Robbins' anti-SLAPP motion could logically have increased the cost of winning their claims on the merits is if plaintiffs never had any intention of proceeding with their suit if Robbins did not roll over and play dead when they sued him. The clear implication is that it was the very fact that Robbins was ready to fight for his free speech rights, and that he had the wherewithal to defend himself—in other words, the fact that the lawsuit would not achieve the typical SLAPP objective of securing silence by imposing the burdens of litigation—that induced plaintiffs to lose interest in suing him.

II. THE TRIAL COURT ERRED BY DISCONTINUING THIS ACTION AND CLOSING THE DOCKET WITHOUT ADDRESSING ROBBINS' CLAIMS UNDER NEW YORK'S ANTI-SLAPP LAW.

A. Because Robbins' Motion for an Award of Attorney Fees Was a "Claim" Under the Anti-SLAPP Law, the Case Should Not Have Been Terminated Without Affording Robbins a Hearing on His Motion.

In the court below, plaintiffs argued that it was unnecessary to consider defendants' motion seeking an award of fees because, in the absence of a counterclaim under the anti-SLAPP law, there was no pending "claim" that needed to be preserved. R.249 ¶ 5. To the extent that the trial court may have accepted this argument as a basis for denying Robbins' motion, it was based on a misreading of the statute. The New York anti-SLAPP statute allows a SLAPP defendant to "maintain

an action, claim, cross claim, or counterclaim to recover damages, including costs and attorney's fees." N.Y. CIV. RIGHTS LAW § 70-a(1). Defendant does not dispute that he did not commence an action or make a cross claim or counterclaim. However, defendant's notice of a motion seeking a court order to award attorney's fees and damages constituted a "claim" according to that term's ordinary meaning and its contextual meaning within the New York anti-SLAPP statute.

"[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *People v. Golo*, 26 N.Y.3d 358, 361 (2015) (quoting *Majewski v. Broadalbin–Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998)). Here, whether defendant should have been allowed to maintain his demand for monetary relief turns on the meaning of "claim." A claim is "[a] demand for money, property, or a legal remedy to which one asserts a right." BLACK'S LAW DICTIONARY (10th ed. 2014). Elsewhere, "claim" is defined to be "a demand of a right or supposed right" or "a demand for compensation." WEBSTER'S NEW INTERNATIONAL DICTIONARY 414 (3d ed. 1961). Because it was a demand for money, defendant's motion that the court order plaintiffs to pay attorney's fees, costs and damages was clearly a "claim" within that term's ordinary meaning.

Although complaints, cross-claims and counterclaims typically include claims, it does not follow that something is not a claim unless it is included in one of those

documents. Indeed, limiting a "claim" to something that is included in a complaint would create surplusage in the New York anti-SLAPP statute. "Under well-established principles of interpretation, effect and meaning should be given to the entire statute and 'every part and word thereof.'" *People v. Giordano*, 87 N.Y.2d 441, 448 (1995) (quoting *Sanders v. Winship*, 57 N.Y.2d 391, 396 (1982)). That is, statutory language should be construed to avoid "surplusage." *Id.* In the anti-SLAPP law, "claim" cannot mean a demand for relief in a separate "complaint" that would commence an "action," because the statute already includes those terms in describing how contentions that plaintiff has filed a SLAPP suit are presented to courts. *See* N.Y. CIV. RIGHTS LAW § 70-a(1). Similarly, "claim" cannot be limited to a "cross claim, or counterclaim" contained in an answer, inasmuch as these too are included. *See id.* If "claim" had any of these meanings, it would serve no independent purpose in the statute. Rather, "claim" should be given its broader, ordinary meaning: a demand for a legal remedy. This would "avoid a construction which makes the word[] superfluous." *Giordano*, 87 N.Y.2d at 448.

Together, these "well-established principles of interpretation" require that "claim" be understood in its more general sense as a demand for money or a legal remedy. And this plain-meaning reading of the term encompasses defendant's motion seeking a court order awarding attorney's fees and damages under § 70-a(1).

Indeed, this Court's decisions have commonly used the term "claim" to describe a request for an award for attorney fees that is included in a motion made by a defendant. *See Biderman v. Biderman*, 172 A.D.2d 379, 380, 568 N.Y.S.2d 760, 761 (1st Dep't 1991) ("The IAS court's denial of defendant's claim for attorneys fees and costs was not an abuse of discretion"); *Arch Specialty Ins. Co. v. Kam Cheung Const.*, Inc., 104 A.D.3d 599, 961 N.Y.S.2d 443, 444 (1st Dep't 2013) (where defendant-appellant had unsuccessfully moved for summary judgment seeking attorney's fees, but court affirmed on the merits, "we need not address defendant's claim for attorneys' fees"); *Peck v. Wolf*, 157 A.D.2d 535, 536, 550 N.Y.S.2d 9, 10 (1st Dep't 1990) ("since neither the lease nor the statute imposes an obligation to pay the successful party's attorney's fees. . ., defendant's claim for attorneys' fees is without merit"). *See also In re Ancillary Receivership of Reliance Ins. Co.*, 55 A.D.3d 43, 47 (1st Dep't 2008), *aff'd*, 12 N.Y.3d 725 (2009) (the term "claim" in an insurance contract includes any "demand for money or services").

Furthermore, although SLAPP'd defendants often file counterclaims to seek their attorney fees and damages, *e.g.*, *Edwards v. Martin*, 158 A.D.3d 1044, 72 N.Y.S.3d 606 (3d Dep't 2018); *Southampton Day Camp Realty v. Gormon*, 118 A.D.3d 976, 990 N.Y.S.2d 30, 32 (2d Dep't 2014), other defendants have sought monetary anti-SLAPP relief by including that claim in their motions to dismiss or for

summary judgment. *See Kamalian v. Reader's Digest Ass'n*, 29 A.D.3d 527, 814 N.Y.S.2d 261 (2d Dep't 2006)*; Guerrero v. Carva*, 10 A.D.3d 105, 779 N.Y.S.2d 12, 16 (1st Dep't 2004). In *Duane Reade*, the Supreme Court held that SLAPP fees sought only in a motion to dismiss were due to be awarded, *id.* at *1; and although the claims for fees in *Kamalian* and *Guerrero* were unsuccessful, the reviewing courts did not suggest that the motions in question were procedurally improper. Thus, defendant was entitled to "maintain" his claim, rather than have it denied as moot.

Finally, "[t]he civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." N.Y. C.P.L.R. § 104. This philosophy is embodied in the rule on irregularities, § 2001, and the rule on the construction of pleadings, § 3026. The former allows a court to ignore or correct an irregularity of procedure. *See* § 2001; *see also* 1 *Weinstein, Korn & Miller CPLR Manual* ¶ 13.01 (2018). These rules have been invoked, for example, to allow a court to address a motion for summary judgment incorrectly styled as a cross motion, as long as the technical defect did not prejudice the other party. *See Daramboukas v. Samlidis*, 84 A.D.3d 719, 922 N.Y.S.2d 207, 209 (2d Dep't 2011). Similarly, the rule on the construction of pleadings stipulates that "[p]leadings shall be liberally construed" and that "[d]efects shall be ignored if a

substantial right of a party is not prejudiced." N.Y. C.P.L.R. § 3026. The spirit of Rule 3026, together with Rule 2001 on irregularities, counsels in favor of allowing defendant to "maintain" his "claim" against plaintiffs, even if his motion to dismiss was not technically a pleading and a "pleading" was required.

B. Plaintiffs' Willingness to Drop Their Lawsuit in the Face of Robbins' Anti-SLAPP Motion Was Not a Proper Reason to Deny That Motion.

In the lower court, plaintiffs contended that their willingness to discontinue their defamation lawsuit was reason enough to warrant denial of Robbins' claims under the anti-SLAPP law, and the trial court's orders allowing plaintiffs' discontinuance—stating that plaintiff no longer wanted to proceed against Robbins, R.8, 9—suggests that it agreed with that reasoning. However, denial of fees and/or damages on that ground is contrary to both the language and the purposes of the anti-SLAPP statute.

First, each of the subsections of section 70-a of the Civil Rights Law provides for awards of fees, costs and compensatory and/or punitive damages if the SLAPP suit "was commenced **or** continued" (emphasis added) without a substantial basis in fact, for the identified improper purpose, or solely for the improper identified purpose. Thus, an improper commencement alone is a sufficient basis for awarding the monetary relief that is justified by the record, even if the action is promptly

discontinued when the SLAPP claim for monetary relief is advanced. Had the Legislature wanted courts to deny fees and other forms of monetary relief to defendants when plaintiffs sued them, but did not pursue their actions to judgment, it would not have provided for fees when a SLAPP suit has been "commenced" without a substantial basis in law or fact, or for an improper purpose.

Moreover, allowing a plaintiff to sue without a substantial basis in both fact and law, but then escape having to pay monetary awards to the defendant just by dropping its suit as soon as defendant makes an effort to oppose, would be contrary to the statutory purpose of creating a financial disincentive for suits over protected free speech. To be sure, dropping suit when the defendant appears by counsel and defends against the suit reduces the financial impact of the litigation on that particular defendant, but it does nothing to reduce the phenomenon that the Legislature sought to prevent: the commencement of baseless litigation against protected speech to the government about public permit applicants and permittees. Indeed, barring fee awards when the plaintiff promptly responds to an anti-SLAPP motion by dropping its suit would tend to protect the most baseless litigants against the financial consequences of their bullying.

Indeed, courts in other states with anti-SLAPP statutes have consistently held that plaintiffs who dismiss their SLAPP suits in response to anti-SLAPP motions

remain exposed to the fees and other forms of monetary relief claimed by the defendants. *Carr v. Cesari & McKenna*, 2017 WL 2623126, at *4 (Mass. Super. Mar. 27, 2017); *Rauhauser v. McGibney*, 508 S.W.3d 377, 388 (Tex. App.–Fort Worth 2014); *Winthrop Healthcare Inv'rs, L.P. v. Cogan*, 2010 WL 5891673, at *2 (Mass. Super. Dec. 9, 2010) *Kyle v. Carmon*, 84 Cal. Rptr. 2d 303, 314 (Cal. App. 3d Dist. 1999). As the court explained in *Carr*,

> Allowing a party to file a SLAPP suit and avoid liability if the other side incurs the expense of defending and filing a special motion to dismiss would perpetrate the harm that [the Massachusetts anti-SLAPP law] seeks to prevent: "[t]he object of a SLAPP suit is not necessarily to prevail, but rather, through the difficulty and expense of litigation, to discourage and intimidate individuals from exercising their constitutional right of petition." *[Cardno] Chemrisk [v. Foytlin*, 476 Mass. [479], 483 [2017]. Indeed, in this very case, the Defendants initially used their abuse of process counterclaim as a bargaining chip, in an attempt to leverage concessions from Carr before unilaterally withdrawing that claim. While that strategy may reduce the amount of fees incurred by the moving party, the Court does not agree that an offending party can avoid [anti-SLAPP] liability entirely, through hit-and-run tactics.
>
> 2017 WL 2623126, at *4 (reference to footnote omitted).

To be sure, such other states have allowed the plaintiff to resist the anti-SLAPP motion by showing either that the speech over which the plaintiff sued does not fall within the scope of the statute, or by showing that it had a sufficient factual and legal predicate for suing. *Entravision Commun. Corp. v. Salinas*, 487 S.W.3d 276, 282 (Tex. App.– Corpus Christi 2016); *Coltrain v. Shewalter*, 66 Cal.App.4th 94, 107,

77 Cal.Rptr.2d 600 (Cal. App. 4th Dist. 1998). But, as explained above, plaintiffs here made neither such showing here; consequently, the lower court's denial of Robbins' anti-SLAPP motion was error. [2]

Additionally, allowing attorney fees' claims like Robbins' to proceed is vital to making New York's anti-SLAPP law work in practice. An anti-SLAPP fee-shifting provision "encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement." *E.g.*, *Ketchum v. Moses*, 24 Cal.4th 1122, 1131, 17 P.3d 735 (2001). But the rule of law for which plaintiffs argued below would negate the fee-shifting provision that the Legislature included, by making it much harder for a SLAPP defendant to get counsel on contingency: defense lawyers would know that plaintiffs can just walk away if the defense makes a persuasive anti-SLAPP claim. Thus, affirmance of the ruling below could set a precedent that is opposite of the legislative intent by allowing a "free SLAPP" with no risk to plaintiffs: if the defendant doesn't pursue an anti-SLAPP

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[2] An alternate approach would be to hold that, because Robbins had a claim pending at the time plaintiffs sought to discontinue, it was an abuse of discretion fot the Supreme Court to have allowed the discontinuance, at least without imposing the condition of paying defendants' claimed fees, costs and damages. 1 N.Y. JUR. 2D ACTIONS *Generally* § 137, *Terms and Conditions* §138, and § 140 *Prejudice to Opposing Party* ("The court must consider whether substantial rights have accrued."); *Willetts v. Browning*, 198 A.D. 551 (1st Dep't 1921).

claim, the harassment works; and if the defendant does, the plaintiffs can walk away unscathed.

Finally, although plaintiffs may point to language in the CIVIL RIGHTS LAW providing that the defendant "may" recover fees and/or damages, this language does not defeat Robbins' right to have his claim for attorney fees and damages considered. The Second Department has indicated that this language gives trial judges a measure of discretion in deciding whether to grant the part of a motion for summary judgment that sought an award of anti-SLAPP fees or damages. *West Branch Conservation Ass'n v. Planning Board of the Town of Clarkstown,* 222 A.D.2d 513, 514, 636 N.Y.S.2d 61, 63 (2d Dept. 1995). But the occasion for the exercise of discretion in that case was the panel's apparent qualms about whether the counterclaim in that case, claiming that a lawsuit was an abuse of process, was truly within the scope of the anti-SLAPP law. Here, as argued above in section I, there can be no question that this lawsuit was over speech within the purview of the anti-SLAPP law.

And, in any event, any trial court discretion should be guided by the broad purpose of the CIVIL RIGHTS LAW to eliminate the financial disincentives for defending protected speech. The comparable permissive language in federal civil rights law provisions for the award of attorney fees, providing that attorney fees "may" be awarded to the prevailing party, creates a strong presumption in favor of fee

award to parties who vindicate their civil rights by suing. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (construing 42 U.S.C. § 1988); *Newman v. Piggie Park Enterprises*, Inc., 390 U.S. 400, 401-03 (1968) (construing 42 U.S.C. § 2000a-3(b)). Under those statutes, parties who vindicated their civil rights "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* The New York Court of Appeals has followed this construction of section 1988 as well. *Johnson v. Blum*, 58 N.Y.2d 454, 458 (1983).

Newman and its progeny construed the federal civil rights laws as constituting the lawyers who take civil rights cases as a species of "private attorney generals," and the broad presumption in favor of attorney fee award in civil rights cases both was "intended to facilitate access to the judicial process for victims of civil rights violations who might not otherwise be able to afford it [and] help to insure that those who violate the Nation's fundamental laws could not proceed with impunity." *Johnson*, 58 N.Y.2d at 458. Indeed, as reflected in *Ketchum*, 24 Cal.4th at 1128, and *Dowling v. Zimmerman*, 85 Cal.App.4th 1400, 1424 n.23, 103 Cal. Rptr. 2d 174, 193 n.23 (Cal. App. 2001), just as the attorney fee provisions in section 1988 and other federal civil right statutes fostered the emergence of a segment of the bar who could specialize in representing civil rights plaintiffs, California's anti-SLAPP statute has given rise to a cadre of lawyers who can take on the defense against SLAPP suits,

sometimes even on a contingent fee basis, recognizing that the state's anti-SLAPP law can provide a reliable basis for awards of attorney fees in cases where the lawyer can predict a likelihood of winning a prompt dismissal.[3]

Similar reasoning applies here. A presumption favoring awards of attorney fees in favor of defendants who file anti-SLAPP motions that succeed either by being granted or by inducing the plaintiff to drop its suit to avoid having to further litigate the issue encourages lawyers to take on the defense against SLAPP suits, encourages defendants to stand up for their free speech rights and, indeed, encourages members of the public to make justifiable calls to 311. This construction of the statute helps ensure that those who contravene New York's fundamental policy of protecting the right of public participation do not proceed with impunity.

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[3] *See*, *e.g.*, Brown & Goldowitz, *The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA*, https://www.ifs.org/wp-content/uploads/2012/11/Brown-2010-Public-Participation-Act.pdf ("the single most important component of anti-SLAPP legislation is the ability of a defendant to recover attorney's fees. The ability to recoup fees allows a defendant who otherwise could not afford an attorney to secure one on a contingency basis."); *Is it likely that I can find an attorney who will file and anti-SLAPP motion for me on a contingency fee basis?*, https://www.avvo.com/legal-answers/is-it-likely-that-I-can-find-an-attorney-who-will--2981044.html (responses from James Treglio and Mark Risner indicate that California lawyers take SLAPP cases on contingency). *See also Ramona Unified Sch. Dist. v. Tsiknas*, 135 Cal.App.4th 510, 523 37 Cal. Rptr. 3d 381, 392 (2005) (lawyer offered reduced rate representation to defend SLAPP suit, with contingent fee for the balance).

In this case, proper application of the presumption should lead to reversal of the decision below denying Robbins' motion for an award of attorney fees or damages under the anti-SLAPP law. Although no special circumstances appear to be present that would make such an award unjust, the Court might elect to remand to allow the trial court to address that question in the first instance, as well as to determine whether Robbins can establish that plaintiffs' purpose for suing was to impede his exercise of his free speech rights.

CONCLUSION

The denial of the plaintiffs' anti-SLAPP motion seeking an award of attorney fees, costs and damages as moot should be reversed, and the case should be remanded for further proceedings consistent with the Court's reasoning.

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APPELLATE DIVISION - FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

It is hereby certified, pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v), that the foregoing brief was prepared on a computer using Word Perfect 8.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x
315 WEST 103 ENTERPRISES LLC and 315 W 103 ST. DEVELOPMENT LLC,

Plaintiffs,

–against–

RICHARD A. ROBBINS,

Defendant.
----------x

PREARGUMENT STATEMENT
Index No.:
155205/2017

1. The title of the action is set forth in the caption above.

2. The full names of the parties appear in the caption, and all of the parties that were ever in the action are in the caption.

3. The addresses and telephone numbers of counsel for appellant appear below in the signature block.

4. The address and telephone number of counsel for appellees is

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5. This was an action for defamation based on calls made (or alleged to have been made) by the defendant to a government hotline complaining about construction by plaintiffs near defendant's residence. Defendant responded to the complaint with a motion to dismiss that included claims asserting that the lawsuit was a Strategic Litigation Against Public Participation ("SLAPP") and that the Court should award defendant damages, attorney fees and costs. In support of these claims, defendant submitted an affirmation asserting that suit has been

"commenced for the sole purpose of harassing, intimidating, punishing and maliciously inhibiting Mr. Robbins' free exercise of speech and petition, while attempting to burden him with the costs and hardship of a legal defense."

6. In response to the motion to dismiss, plaintiffs discontinued their lawsuit, indicating that they no longer wished to pursue their claims against the defendant. Defendant objected to any dismissal that did not include an award of SLAPP remedies. Plaintiffs argued that SLAPP remedies should be denied because including a request for SLAPP relief in a motion to dismiss does not constitute a "claim." Plaintiffs asserted that they could show that there was a substantial basis for their defamation claim even though they were not doing so at the time because, they said, having learned that defendant could retain counsel to defend against the lawsuit, instead of simply giving in because legal defense is too expensive, they preferred to drop the suit.

7. The Court allowed the plaintiffs to discontinue their lawsuit, explaining that plaintiffs no longer wanted to sue defendant, and said that the motion to dismiss, which included defendant's claims for fees and damages, was "moot." No further explanation was provided for denying defendant's claim for attorney fees and other SLAPP remedies.

8. The denial of defendant's SLAPP claim should be reversed because NewYork Civil Rights § 70-a(1) allows a defendant 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" (emphasis added). Defendant's requests for damages, fees, and costs, set forth in the motion to dismiss, and supported by an affirmation showing the factual basis for the statements by defendant, were "claims" under that statute. Plaintiffs only alleged that the statements were false, but never supported that assertion with evidence of falsity, Because

plaintiffs chose not to present any evidence showing a substantial basis for their defamation claims, the SLAPP remedies should have been awarded. At the very least, defendant was entitled to judicial consideration of his claims and resolution on their merits.

/s/ Paul Alan Levy
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February 5, 2018