

March 2022

Follow @Paul_Hastings



New York Appellate Court Holds Revised Anti-SLAPP Statute Not Retroactive

By [James Pearl](#) & Caitlin Devereaux

On March 10, 2022, a New York intermediate appellate court ruled that the state's strengthened, amended "anti-SLAPP" statute, signed into law on November 10, 2020, does not apply retroactively to existing claims. *Gottwald v. Sebert*, Appeal No. 15495, 2022 WL 709757 (1st Dep't March 10, 2022). The ruling unanimously reversed the lower court's June 2021 ruling, which granted a motion in favor of musician Kesha Rose Sebert (professionally known as Kesha) that New York's amended anti-SLAPP law applied retroactively to the defamation claims asserted against her by music producer and alleged abuser, Lukasz Gottwald (professionally known as Dr. Luke). The appellate court found "insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (see Civil Rights Law § 70 et seq.) to apply retroactively to pending claims[.]" *Id.* at *1.

Overview of Differences Between New York's Revised and Prior Anti-SLAPP Statute

New York's 2020 amended anti-SLAPP law significantly extended First Amendment protections and tools for defendants challenging frivolous lawsuits based on the exercise of free speech rights. The previous version of New York's statute was narrow, applying only to speech concerning permits, applications, zoning changes, or other entitlements from a government body. In practice, New York's earlier statute was typically limited to controversies regarding real estate development, and it failed to protect speech by journalists or traditional media outlets.

New York's revised anti-SLAPP law offers greater protection for public speech in connection with an issue of public interest (defined broadly as "any subject other than a purely private matter"), including speech by journalists, media and entertainment organizations, and individuals or companies speaking on matters of public interest—including on social media.

The amended law provides several important litigation tools to defendants that were not available under the earlier regime, including an automatic stay of discovery and all other hearings and motions, the ability for the court to consider evidence outside the pleadings when deciding a motion to dismiss a SLAPP suit, and an entitlement to attorney's fees and costs upon winning a motion to dismiss such an action intended to chill free speech.

To survive a motion to dismiss pursuant to the new anti-SLAPP law, a plaintiff must demonstrate that their claim "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."¹ This is a higher burden than a traditional motion to dismiss, which merely requires that a plaintiff plead facts that state a "cognizable" legal theory. The revised

statute also expressly requires a plaintiff to prove actual malice by clear and convincing evidence if the allegedly defamatory statement relates to issues of public concern. N.Y. Civil Rights Law § 76-a. Under the previous New York law, the burden to prove actual malice applied only to public figures.

The Ruling Denying Retroactive Application

Prior to the *Gottwald v. Sebert* ruling, courts applied the revised New York statute to earlier claims in at least eight cases, including *Palin v New York Times Co.*, 510 F.Supp.3d 21, 27 (S.D.N.Y. 2020) (the politician's defamation case against the newspaper publisher), which held that the revised anti-SLAPP law is a remedial statute that should be given retroactive effect. See also *Coleman v. Grand*, No. 18-CV-05663 (ENV) (RLM), 2021 WL 768167, at *7 (E.D.N.Y. Feb. 26, 2021) (agreeing with Judge Rakoff's analysis in *Palin*); *Sackler v. Am. Broad. Cos., Inc.*, No. 155513-2019, 2021 WL 969809, at *3 (N.Y. Sup. Ct. Mar. 9, 2021) ("This court finds that the anti-SLAPP amendments are intended to apply retroactively in order to effectuate the remedial and beneficial purpose of the statute."); *Goldman v. Reddington*, No. 18CV3662RPKARL, 2021 WL 4755293, at *4, n. 2 (E.D.N.Y. Apr. 21, 2021); *Sweigert v. Goodman*, No. 118CV08653VECSDA, 2021 WL 1578097, at *2 (S.D.N.Y. Apr. 22, 2021); *Kesner v. Buhl*, No. 20 CIV. 3454 (PAE), 2022 WL 718840, at *11 (S.D.N.Y. Mar. 10, 2022); *Reus v. ETC Hous. Corp.*, 72 Misc. 3d 479, 488, 148 N.Y.S.3d 663, 670 (N.Y. Sup. Ct. 2021), aff'd, No. 532765, 2022 WL 617904 (N.Y. App. Div. Mar. 3, 2022); *Harris v. Am. Acct. Ass'n*, No. 520CV01057MADATB, 2021 WL 5505515, at *13 (N.D.N.Y. Nov. 24, 2021).

Under New York law, amendments are "presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 997 (2d Dep't 2011) (citing *Matter of Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122 (2001)). Whether a revised statute is given retroactive effect is "a matter of judgment made upon review of the legislative goal," based on factors such as "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *Id.* at 997–98.

The New York legislature's stated justification for the revised anti-SLAPP statute included that the law as originally enacted had been "narrowly interpreted by the courts" and "failed to accomplish" the objective of protecting the free speech in public forums with respect to issues of public concern.² The legislature also stated that "courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by actions intended only to chill free speech."³ The bill specified that the act "shall take effect immediately."

In *Gottwald*, the New York appellate court acknowledged the decision of the motion court and other nonbinding decisions applying the statute reactively, but concluded "the 2020 amendments expanding the scope of Civil Rights Law § 76-a do not apply retroactively" to cover pending defamation claims. The Court explained that the New York Court of Appeals has previously noted that:

'[c]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law.' In addition, where, as here, the fact that the legislature has provided that amendments shall 'take effect immediately,' even though that may evince a 'sense of urgency,' the meaning of that phrase is, at best, 'equivocal' in an analysis of retroactivity.

Gottwald, 2022 WL 709757 at *1 (citing *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 (1998) (internal citations omitted)). The Court found “[t]he fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.” *Id.*

Impact for Ongoing Cases

Defamation claims filed before November 10, 2020 (the date the revised statute was signed into law) will continue under New York’s previous, narrow anti-SLAPP law. In practice, this means the additional protections and procedures put in place by the legislature will not be available to defendants in those pending cases. Plaintiffs considering asserting new claims in New York should be aware of the heightened legal burden and defenses available under the revised statute.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Century City lawyer:

James Pearl
1.310.620.5730
jamespearl@paulhastings.com

¹ 2020 N.Y. Senate Bill No. 52 -A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a> (amending Rule 3211(g) of New York’s Civil Practice Law and Rules).

² 2020 N.Y. Senate Bill No. 52 -A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a>.

³ *Id.*

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2022 Paul Hastings LLP.