Second Circuit Holds California's Anti-SLAPP Statute Inapplicable in Federal Court Proceedings

On July 15, 2020, in *La Liberte* v. *Reid*, the United States Court of Appeals for the Second Circuit vacated a district court's ruling striking a defamation suit under California's "anti-SLAPP" statute. 2020 WL 3980223 (2d Cir. July 15, 2020).[1] The Second Circuit held, for the first time, that California's anti-SLAPP statute was inapplicable in federal court proceedings because it increased plaintiff's burden to overcome pretrial dismissal and therefore conflicted with Federal Rules of Civil Procedure 12 and 56. The Ninth Circuit Court of Appeals (which has jurisdiction over federal cases from California) previously had held that California's anti-SLAPP statute poses no such conflict.[2] *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999). The decision in *La Liberte* creates a circuit split over the applicability of the California anti-SLAPP statute in federal courts, which ultimately may be resolved by the Supreme Court. The decision is also relevant because the New York State legislature has recently passed an anti-SLAPP bill bearing similarities to the California statute.

I. Background

SLAPPs, short for "strategic lawsuits against public participation," are actions brought by wealthy and powerful corporations or individuals to intimidate and silence their critics. SLAPPs aim to curb negative media coverage through the threat of baseless litigation and the associated cost of defending the suit. Twenty-eight states have enacted anti-SLAPP statutes to combat suits where the challenged speech involves a matter of public concern.[3] The aim of these statutes is to prevent litigants from using courts to chill First Amendment rights by providing a mechanism for early dismissal and allowing prevailing defendants to collect their attorneys' fees from plaintiffs. California's anti-SLAPP statute allows defendants to file a special motion to strike within 60 days from when a complaint is filed. Cal. Civ. Proc. Code § 425.16(b)(1). Courts must grant the defendant's motion "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.* The statute allows any prevailing defendant in their motion to strike to recover its attorneys' fees and costs. *Id.* § 425.16(c)(1).

California state courts use a two-step analysis when determining whether to grant special motions to strike. The court first determines whether "the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity [i.e.,] . . . acts . . . taken 'in furtherance of the defendant's right of petition or free speech.'" If the defendant clears this hurdle, the court then will assess whether the plaintiff "has demonstrated a probability of prevailing on the claim," by assessing "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."

Plaintiff Roslyn La Liberte is a California resident who opposed California Senate Bill 54 ("SB 54"). This legislation, which was passed in 2017, limited cooperation between local law enforcement and federal immigration authorities. Cal. Gov't Code § 7284.6(a)(1). In an effort to garner opposition to SB 54, La Liberte attended and spoke at several city council meetings. On June 25, 2018, La Liberte spoke out against SB 54 at a Simi Valley meeting with hundreds of people in attendance. She was photographed engaging with a fourteen year-old Hispanic

[1] Unless otherwise noted, all quotations in this memorandum are taken from this decision.

[2] The Ninth Circuit also recently has applied the Texas anti-SLAPP statute to federal court proceedings – something the Fifth Circuit has expressly declined to do – because it found that statute to be materially the same as the California anti-SLAPP statute. *Clifford* v. *Trump*, 18 Civ. 06893 (9th Cir. July 31, 2020).

[3] *State Law: SLAPPs*, DIGITAL MEDIA LAW PROJECT, available at http://www.dmlp.org/legal-guide/state-law-slapps (last visited July 20, 2020).

teenager. The photograph depicted La Liberte with "her mouth open and her hand at her throat in a gagging gesture."

On June 29, 2018, social-media activist Alan Vargas posted the photograph with a caption suggesting that La Liberte had used racially-charged language in addressing the teenager. The caption further instructed viewers to share the photograph. The photograph went viral, and that same day, MSNBC commentator Joy Reid shared it on her Twitter account to approximately 1.24 million followers. Reid also posted the photograph on her Instagram account with a caption suggesting that La Liberte had directed racial slurs at the teenager. The teenager was subsequently interviewed on television and stated that La Liberte used no racial slurs and had engaged in a civil discussion. On July 1, 2018, Reid posted on Instagram and Facebook, juxtaposing the picture of La Liberte with a 1957 photograph of the Little Rock Nine walking past a screaming white woman. After being contacted by La Liberte's lawyer, Reid removed the posts from her social media accounts and issued an apology to La Liberte.

La Liberte sued Reid in the Eastern District of New York, asserting that she had been defamed by Reid's posts on social media. *La Liberte* v. *Reid*, 18 Civ. 05398 (E.D.N.Y. Sept. 30, 2019). The district court struck La Liberte's claim under California's anti-SLAPP statute and granted Reid attorneys' fees under the California statute. *Id.* at 15. The district court also dismissed La Liberte's claim regarding Reid's June 29, 2018 post under Federal Rule of Civil Procedure 12(b)(6). The court held that, although Reid was not immunized by Section 230 of the Communications Decency Act,[4] the pleadings were insufficient to state a viable claim for defamation. *Id.* at 15. Specifically, the court held that La Liberte was a limited-purpose public figure and had failed to plead actual malice. *Id.* at 12. The district court also dismissed La Liberte's claim as to Reid's July 1, 2018 post, finding that it expressed a nonactionable statement of opinion. *Id.*

II. The Second Circuit's Decision in *La Liberte*

On appeal, the Second Circuit reversed the district court's decision, holding that California's anti-SLAPP law was inapplicable in federal proceedings because it conflicted with Federal Rules of Civil Procedure 12 and 56. The Second Circuit also vacated the district court's dismissal under Rule 12(b)(6), holding that La Liberte was not a limited-purpose public figure "because she lacked the regular and continuing media access that is a hallmark of public figure status." As a result, La Liberte was not required to plead actual malice. The Court also held that the district court erred in characterizing Reid's July 1, 2018 post as nonactionable opinion.

In addressing the applicability of California's anti-SLAPP statute in federal proceedings, the Court first analyzed whether the statute answered the same questions as the applicable Federal Rules of Civil Procedure. The Court held that the statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56." The Court reasoned that California's anti-SLAPP statute abrogated the plausibility-pleading standards of Rule 12(b)(6) by requiring the plaintiff to establish that its claims are probable. Although Rule 56 "enables plaintiffs to proceed to trial by identifying any genuine dispute of material fact," California's anti-SLAPP law "nullifies that entitlement by requiring the plaintiff to prove that it is likely, and not merely possible that a reasonable jury would find in his favor." The Second Circuit explained that "California's special motion requires the plaintiff to make a showing that the Federal Rules do not require." The Court applied the Federal rules, rather than California's anti-SLAPP statute and held that attorney's fees were not available because Reid had not prevailed on her special motion to strike.

[4] Section 230 of the Communications Decency Act immunizes a range of websites from tort liability, including defamation, for distributing third-party content.

The Second Circuit then turned to the district court's dismissal of La Liberte's claim, arising from Reid's June 29, 2018 posts under Rule 12(b)(6). The Court affirmed the lower court's determination that Reid was not immunized by Section 230 of the Communications Decency Act because Reid authored the allegedly defamatory posts at issue — as opposed to merely distributing third-party content. However, it disagreed with the district court's determination that La Liberte was a limited-purpose public figure, rejecting the district court's reasoning that La Liberte qualified as such because she attended and spoke at multiple city council meetings and appeared in a photograph in the *Washington Post* about the SB 54 controversy. Rather, the Second Circuit explained that, "[t]hin as the findings are to begin with, the district court did not take into account the requirement that a limited purpose public figure maintain 'regular and continuing access to the media.'" The Court concluded that, "[s]ince La Liberte was not a limited purpose public figure, the district court erred by requiring her to allege actual malice as to the June 29 Post."

Finally, the Second Circuit addressed the district court's dismissal of La Liberte's claim as to Reid's July 1, 2018 post. The Second Circuit disagreed with the district court's finding that the post expressed non-actionable statements of opinion, reasoning that "[a] reader could have understood the July 1 Post as equating La Liberte's conduct with archetypal racist conduct." The Second Circuit held that, "[b]ecause that accusation is capable of being proven or disproven, the district court erred by characterizing the July 1 Post as nonactionable opinion."

III. Conclusion

The Second Circuit's decision in *La Liberte* creates a circuit split on the applicability of California's anti-SLAPP statute to federal proceedings, and this issue may be ripe for review in the Supreme Court of the United States. It remains to be seen how this circuit split will be resolved.

The *La Liberte* decision is also significant in light of recent legislative developments in the State of New York. On July 22, 2020, the New York State legislature passed a new anti-SLAPP bill, expanding the scope of protections to include matters of "public interest," which "should be construed broadly." S.B. 52A, 2019–2020 Leg. Sess. (N.Y. 2020). The bill requires a stay of all discovery upon a party's filing of a motion to dismiss pursuant to the statute. In deciding the motion to dismiss, the court "shall consider the pleadings, and supporting affidavits stating the facts upon which the actions or defense is based." *Id.* A party that prevails in their motion is entitled to attorneys' fees. The bill, which bears similarities to the California statute, has yet to be signed into law by Governor Andrew Cuomo, and it remains to be seen whether this legislation will be found to be applicable in federal court.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor at 212.701.3445 or jmacgregor@cahill.com; or Alexandra Settelmayer at 212.701.3174 or asettelmayer@cahill.com; or email publications@cahill.com.