

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

RICHARD K. LEHAN,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 2011 CA 004592 B
)	Judge Joan Zeldon
FOX TELEVISION STATIONS, INC., et al.)	Next Event: Hearing on Special Motion to
)	Dismiss
)	November 17, 2011 1:30 pm
Defendants.)	

**PLAINTIFF'S ADDITIONAL MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS**

COMES NOW, Plaintiff, Richard K. Lehan, by counsel, and submits this Additional Memorandum of Points and Authorities in Opposition to Defendants' Special Motion to Dismiss as follows:

I. Background

The negligence and acts of defamation committed by the Defendants which gave rise to the present cause of action occurred on or before January 3, 2011. On January 3, 2011, Fox Television Stations, Inc. ("Fox News") ran a television news story, and published an internet transcript of that story, authored by Defendant reporter Roby Chavez ("Chavez"), entitled "Allegations of Overtime Abuse in the D.C. Fire and EMS Department." Mr. Lehan was singled out and targeted in the story. The story repeatedly and inaccurately details private information about Mr. Lehan to intentionally place him in a negative light. The figures cited by the Defendants in the news story were deceptive, inaccurate and clearly wrong. After accusing Mr. Lehan of abusing the overtime process, with the use of inaccurate and deceptive figures, the story further defames him by stating falsely that he and his brother were actually in **charge** of the computerized overtime scheduling system (giving them control to abuse the process). In essence, the clear intent of the story was to target Mr. Lehan as

the "fox in the henhouse" with the means and method to abuse and steal from the District Government.

Mr. Lehan has not filed this lawsuit to muzzle free speech or silence Fox News. He is not a member of a political party. The facts of this case and the intent of the Anti-SLAPP Act are polar opposites.

Prior to the airing of the Fox News story, Mr. Lehan had a distinguished reputation in the community, having served as a firefighter for twenty-two (22) years. He has received numerous recognitions and life saving awards for service to the community as a firefighter, including a Gold Medal, one (1) Silver Medal and three (3) Bronze Bars for Valor; a Unit Citation Award and a Merit Award. He also received a certificate of award (enamel bar) for heroic duty at the Pentagon as a result of the September 11, 2001, terrorist attacks. Mr. Lehan is one of only a few members employed by FEMS who has a Commercial Driver's License (CDL) and who is a Certified Fire Investigator.

The incident at issue which gave rise to Mr. Lehan's complaint occurred on or before January 3, 2011. The District of Columbia Anti-Slapp Act of 2010 took effect on March 31, 2011. On June 10, 2011, Mr. Lehan filed the present cause of action based on the above news story, alleging Libel *Per Se* and Libel against Chavez and Fox News, on theories of direct liability and *respondeat superior*. On July 22, 2011, Defendants filed a Special Motion to Dismiss based upon the recently enacted DC Anti-SLAPP Act.

The Honorable Joan Zeldon asked for additional briefing only with respect to the issue of whether the Anti-SLAPP Act is substantive or procedural in nature. This issue will help the court determine whether the Act should be applied retroactively to the incident which gave rise to Mr. Lehan's claim. For the reasons set forth herein, the Anti-SLAPP Act is substantive in nature and

should not be retroactively applied to Mr. Lehan's claim. Defendant's Special Motion to Dismiss should be denied with prejudice.

II. D.C. Appellate Court Standard For Retroactivity of New Legislation

The D.C. Court of Appeals has been very clear with respect to the standard for conferring retroactive effect to newly enacted legislation. Statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given retroactive effect. *Bank of Am. v. Griffin*, 2 A.2d 1070, 1074 (D.C. 2010) (citing *Wolf v. District of Columbia Rental Accommodations Comm'n*, 414 A.2d 878, 880 n.8 (D.C. 1980)). The *Bank of Am.* court stated, "statutes are not to be applied retroactively unless the words used are so **clear, strong and imperative** that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied." *Id.* (quoting *Windsor v. State Farm Ins. Co.*, 509 F. Supp. 342, 344 (D.D.C. 1981)) (emphasis added).

Only laws that are clearly procedural, as opposed to substantive laws, are generally applied to pending cases absent clear legislative intent for retroactivity. *Montgomery v. District of Columbia*, 598 A.2d 162, 166 (D.C. 1991). In *Bank of Am.*, the Court of Appeals distinguished *Montgomery*, noting that the law at issue in *Montgomery* was purely procedural as it simply established a new tribunal for administrative appeals. The *Bank of Am.* court went on to state, in contrast, that the new *lis pendens* statute "is not so easily categorized as either a "procedural" or a "substantive" law." *Id.* at 1075. The court ultimately decided that a retroactive application of the *lis pendens* statute would most certainly affect the substantive rights of the litigants who had cases pending when the law was enacted. *Id.* at 1076.

Given the above case law from the DC Appellate Court, the standard for retroactivity in DC is extremely high and essentially requires the proponent of retroactivity to show it is a purely

procedural law. Absent a showing of a purely procedural law, i.e. where there is a question as to whether the law is substantive or procedural, there must be a clear legislative intent to establish retroactivity.

III. The Defendants Cannot Meet Their Burden to Establish Retroactivity

The DC Anti-Slapp Statute is not a “clearly procedural law” as required by the DC Appellate Court to confer retroactivity absent clear legislative intent. If it were, this Court would not require additional briefing on the issue.

For all of the reasons set forth below, the DC Anti-Slapp Statute confers substantive rights to litigants who fall within the Act.

A. The D.C. Anti-SLAPP Act Confers Substantive Rights As Stated By The D.C. Council

The Council on the District of Columbia Committee on Public Safety and the Judiciary, Report on Bill 18-893, Anti-SLAPP Act of 2010 (Nov. 18, 2010) (the “Committee Report”) clearly demonstrates the legislative intent that the Anti-SLAPP Act confer substantive rights to litigants. See, Committee Report attached as Exhibit A. Specifically, Section I. Background and Need, states, “Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant’s ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.” See, Exhibit A, Page 1 (emphasis added). Thereafter, the report states, “Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest. . . . Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court.” See, Exhibit A, Page 4 (emphasis added). Further, in

Section VI. Impact on Existing Law, the Committee report states, “the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. See, Exhibit A, Page 6 (emphasis added). Further, in a section by section analysis of the Act, on Pages 6 and 7 of the report, the Committee continues to enumerate the substantive rights conferred by the Act to a party subject to a claim under the Act.

The D.C. Anti-SLAPP Act must be read as one law and not analyzed in a piecemeal manner. The whole Act is construed as one and, if it contains substantive rights, then the entire Act is given only prospective effect. See, *District of Columbia v. Gallagher*, 734 A.2d 1087, 1091 (D.C. 1999) (“The literal words of a statute, however, are not the sole index to legislative intent, but rather are to be read in the light of the **purpose of the statute taken as a whole**, and are to be given a sensible construction and one that would not work an obvious injustice” (citation and internal quotation marks omitted) (emphasis added); See also, *In re Uwazih*, 822 A.2d 1074, 1079 (D.C. 2003) (“Statutory meaning is of course to be derived, not from the reading of a single sentence or section, but from consideration of an entire enactment against the backdrop of its policies and objectives.”) (citation omitted).

B. The Anti-SLAPP Act’s Reallocation Of The Burden Of Proof Further Establishes Its Substantive Nature

The DC Anti-SLAPP Act re-allocates the burden of proof at the motion to dismiss stage in a manner fundamentally different from DC Superior Court Rule 12(b)(6), and its federal counterpart, Federal Rule of Civil Procedure 12(b)(6). The Anti-SLAPP Act provides, “If a party filing a special

motion to dismiss under this section makes a *prima facie* showing that the claim at issue arises from an act in furtherance of the right to advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.” D.C. Code § 16-5503(b). Courts have found that a reallocation of the burden of proof is substantive. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) (“And it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law.”).

Indeed, the Act imposes a new pre-discovery burden-shift on the plaintiff to establish the likelihood of success on the merits. Absent this showing, the Act extinguishes plaintiff’s claim. Such a result can hardly be classified as purely procedural in nature.

C. The D.C. Anti-SLAPP Act’s Imposition Of Attorney’s Fees Further Establishes Its Substantive Nature

The D.C. Anti-SLAPP Act provides provisions for attorneys’ fees and costs for the prevailing party on a special motion. The attorney’s fee provision is further support in addition to a lack of intent for retroactivity. Numerous courts have held that the statutory provision of attorneys’ fees is a substantive, not procedural, right. *See, Judicial Watch Inc. v. Bureau of Land Mgmt.*, 391 U.S. App. D.C. 362, 365, 610 F.3d 747, 750, (D.C. Cir. 2010) (attorney fee provision under particular federal law held to have impermissible retroactive effects absent Congress making the statute retroactive, thus no attorney’s fees were awarded under the facts); *Summers v. Department of Justice*, 386 U.S. App. D.C. 343, 348, 569 F.3d 500, 505 (D.C. Cir. 2009) (attorney’s fees not retroactive because pre-enactment conduct would increase liability and no clear intent by Congress to apply particular law retroactively); *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007) (“We have held that when state statutes authorize fee awards to litigants in a particular class

of cases, the statutes are substantive for *Erie* purposes if there is 'no direct' collision with the Federal Rules."); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 971-73 (9th Cir. 1999) (concluding that California Anti-SLAPP statute's provision allowing attorneys' fees to a party successfully striking suit under the statute was substantive and could be applied in diversity cases).

D. Several Other Courts Have Deemed Anti-SLAPP Acts Of Other States To Be Substantive And Not Procedural.

Finally, although the cases clearly involved different Anti-SLAPP Acts of other states, other courts have recognized those statutes to be substantive. California in particular has a well-developed Anti-SLAPP statute which is recognized as substantive. See, *Batzel v. Smith*, 333 F3d 1018, 1025-26 (9th Cir. 2003) ("Because California law recognizes the protection of the Anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."); *Whitty v. First Nationwide Mortg. Corp.*, No. 05-CV-1021 H(BLM), 2007 WL 628033, at *11 (S.D Cal. Feb. 26, 2007) (California's Anti-SLAPP law is substantive in nature, and therefore a federal court exercising diversity jurisdiction follows California's law."). Similarly, other federal courts – in choosing to apply state anti-SLAPP acts under *Erie* – have found those Acts to be substantive. See, *Containment Techs. Grp., Inc. v. American Soc'y of Health Sys. Pharms.*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26 2009) ("[T]he Anti-SLAPP statute has a distinctly substantive flavor. The Anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case."); *Godin*, 629 F.3d at 86 (Maine Anti-SLAPP statute "governs both procedure and substance in the state courts").

IV. The DC Anti-Slapp Act Cannot Be Applied Retroactively In The Absence Of Clear Legislative Intent

Given that the DC Anti-Slapp Act is not a purely procedural statute, it may not be applied retroactively absent clear legislative intent favoring retroactivity. *Supra*, Section II. In this instance, there is absolutely no indication of a legislative intent for retroactivity of the Act.

The DC Anti-Slapp Act clearly establishes the effective date of the Act. See, D.C. Anti-Slapp Act, attached hereto as Exhibit B. Section 8 of the Act, entitled "Effective Date" states as follows:

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

The Act itself specifically provides an entire section dedicated to the date that the Act shall take effect. There is absolutely no reference in this section, or any other section of the Act, to indicate any legislative intent that the Act should have retroactive effect.

When legislatures intend to create retroactive laws, the language is unequivocal. For example, "any action that was pending on the date of enactment shall be immediately dismissed by the court in which the action was brought or is currently pending." *Bank of Am.* 2 A.3d at 1074 (citing *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 174 (D.C. 2008)) (internal quotation marks omitted). This type of language meets the standard for applying a law retroactively, not the complete absence of any language in the instant case. Even "pendency of an action" is insufficient to show an intent to apply the law retroactively. *Id.* The intent must be clear and silence on the issue, in the face of express language labeling the rights substantive, is not an indication of retroactive intent.

V. Assuming, Arguendo, That The Court Splits Certain Provisions As Retroactive And Others As Prospective, The Attorney's Fee Provision Is Clearly Prospective

If this Court decides that certain statutory provisions under the D.C. Anti-SLAPP Act are procedural and thus retroactive, the remaining substantive provisions should not be applicable in the instant matter. In Defendants' Reply in Support of Their Special Motion to Dismiss at 5, n.4, the argument is made that this Court need not consider the retroactivity of the attorney's fees as no defendants have made a claim for the fees and this Court can simply segregate this from the remainder of the statute. Plaintiff stands by its position that the substantive/procedural determination comes "not from the reading of a single sentence or section, but from consideration of an entire enactment." However, if this Court were to segregate the attorney's fees and not consider that in the retroactivity analysis, then this Court should also not award attorney's fees pursuant to that section if later a petition is made for the attorney's fees. If the section is disregarded for retroactivity purposes, then it must be disregarded for all purposes in the instant matter.

VI. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Special Motion to Dismiss Under The District of Columbia Anti-SLAPP Act of 2010 be denied, with prejudice, and reasonable attorneys' fees and costs be awarded.

RESPECTFULLY SUBMITTED:

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of October, 2011, I will electronically file the foregoing Plaintiff's Additional Memorandum Of Points And Authorities In Opposition To Defendants' Special Motion To Dismiss with the Clerk of the Court using the CaseFileXpress system, which will send a notification of such filing to the following:

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