

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

ARTHUR G. NEWMYER, individually and on)
behalf of his minor daughter, L.N)

Plaintiffs,)

v.)

THE SIDWELL FRIENDS SCHOOL)

and)

JAMES F. HUNTINGTON)

Defendants.)

JAMES F. HUNTINGTON)

Counter-Plaintiff)

v.)

ARTHUR G. NEWMYER,)

Counter-Defendant)

Civil Action No. 2011 CA 003727
Next Event: Deadline for Discovery
Requests - 5/29/2012
Calendar No. 7
Honorable Michael Rankin

**COUNTER-PLAINTIFF JAMES F. HUNTINGTON'S SURREPLY
TO COUNTER-DEFENDANT ARTHUR G. NEWMYER'S
REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS
PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT**

Counter-Plaintiff, James F. Huntington, by and through counsel, Blank, Moorstein & Lipshutz, L.L.P., and Barton D. Moorstein, Esq., respectfully submits this Surreply to Counter Defendant Arthur G. Newmyer's Reply in Support of Special Motion to Dismiss Pursuant to the District Of Columbia Anti-SLAPP Act, and states as follows:

I. Mr. Newmyer's Special Motion To Dismiss Was Untimely Filed.

Mr. Newmyer admits in his Reply that he was late¹ in filing his Special Motion to Dismiss, but attempts to justify the late filing by arguing that the time limits are neither mandatory, jurisdictional and that, in any event, Dr. Huntington agreed to an extension of time for its filing. None of these arguments is correct or persuasive.

A. Dr. Huntington Consented To An Extension Of Time To File A "Responsive Pleading" And Not A Statute Based Special Motion To Dismiss.

On January 19, 2012, counsel for Dr. Huntington and Mr. Newmyer agreed to an extension of time for Mr. Newmyer to file a response to Dr. Huntington's Counterclaim.

Paragraph 11 of the parties' Joint Motion stated:

“Counter-Plaintiff and Counter-Defendant consent to extending the time to February 19, 2012 for Counter-Defendant to file a Response to Counter-Plaintiff’s Counterclaim.”

Dr. Huntington did not consent to an extension of time to file a separate statute-based claim, and did not have the ability, in any event, to extend the statutorily mandated time requirements. Mr. Newmyer never indicated that he would be filing a statute-based claim for relief, and never sought consent to extend the time for the filing of the Special Motion.

1. A Special Motion To Dismiss Is Not A Responsive Pleading.

A Special Motion to Dismiss is not a responsive pleading. Initially, it is not a "pleading" as defined by Rule 7². Additionally, it is not an "answer" (see Rule 12 (a)) nor is it a

¹ Dr. Huntington filed his Counter Complaint on December 30, 2011. Within 45 days, or by on or before February 13, 2012, Mr. Newmyer was obligated to file his request for relief under the Anti-SLAPP Act. On February 29, 2012, Mr. Newmyer filed his Special Motion to Dismiss.

² Rule 7 defines a pleading: There shall be a Complaint and an Answer; a Reply to a Counterclaim denominated as such; an Answer to a Crossclaim, if the Answer contains a Cross-claim; a 3rd-party Complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a 3rd-party Answer, if a 3rd-party Complaint is served. No other pleading shall be allowed, except that the Court may order a Reply to an Answer or a 3rd-party

"Motion" pursuant to Rules 12 (b), (c), (e) or (f). Rather, the Special Motion to Dismiss derives from statutory enactment of the Council of the District of Columbia.

2. **A Special Motion to Dismiss Is A Statutorily Created Substantive Right.**

The Council of the District of Columbia, in passing the Anti-SLAPP Act, stated that the law was passed in order to remedy the effect of a suit which chills the exercise of constitutionally protected rights. The statute "incorporate [s] substantive rights³..." In urging the Council to adopt this Bill, the District Of Columbia Committee on Public Safety and the Judiciary emphasized that the bill was intended to "... provid[e] Defendants with substantive rights to expeditiously and economically dispense of litigation." (Emphasis added). Accordingly, the anti-SLAPP Act established substantive, not procedural, rights as urged by Mr. Newmyer.

3. **Statutorily Created Substantive Rights Cannot Be Extended By Agreement.**

The assertion of these statutorily created substantive rights cannot be extended beyond the statutory time requirement by agreement of the parties. Statutory deadlines are jurisdictional. See, e.g., Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 666 F.2d 595, 601-02 (D.C.Cir.1981); see Freeman Eng'g Assocs., Inc. v. FCC, 103 F.3d 169, 177 (D.C. Cir. 1997) ("An untimely appeal *must* be dismissed for lack of jurisdiction") (citation and internal quotation marks omitted; emphasis in original). Furthermore, the Court is not bound by any agreement between the parties that purports to abrogate this jurisdictional requirement. Cellular Telecommunications & Internet v. FCC, 330 F. 3d 502 (D.C.C.A 2003).

Answer.

³ The Committee Report is online at <http://www.dccouncil.us/images/00001/20110120184936.pdf>.

B. The California Anti-SLAPP Provides A "Built-In" Filing Date Extension That Does Not Exist In The District Of Columbia Act.

Mr. Newmyer's reliance upon California law to enlarge the time to file beyond 45 days is also misplaced. While there are many attributes of the District of Columbia Anti-SLAPP Act which are similar to the California Anti-SLAPP Act, the California Anti-SLAPP Act is a procedural rule that specifically allows for an extension of the filing date by which relief may be sought. This express authority does not exist in the District of Columbia Anti-SLAPP Act.

California's Anti-SLAPP statute is incorporated into the California Civil Procedure Code (see Cal. Civ. Proc. Code §425.16), whereas the District of Columbia Anti-SLAPP Act can only be found in the District of Columbia Code, and is not referred to or incorporated into any Rule of Court. Furthermore, Cal. Civ. Proc. Code § 425.16 (f) specifically allows for the filing of a Special Motion after the expiration of the 60 day time requirement. That rule states:

The special motion may be filed within 60 days of the service of the Complaint or, in the Court's discretion, at any later time upon terms it deems proper. (Emphasis added).

No such discretionary language is found in the District of Columbia Anti-SLAPP Act. As such, the language of the District of Columbia Anti-SLAPP Act which allows for the filing of a claim under this statute within 45 days is mandatory and California's permissive law does not apply here.

C. The 45 Day Filing Obligation Is Jurisdictional And Cannot Be Extended.

In Blumenthal v. Drudge, Civ.A. 97-1968(PLF), 2001 WL 587860 (D.D.C. Feb. 13, 2001), the Court ruled that time limits were to be enforced. There, Defendant Drudge's Special Motion to Dismiss under the California Anti-SLAPP statute was procedurally defaulted because it was filed well after the 60-day deadline provided in the statute. Blumenthal v. Drudge, Civ.A.

97-1968(PLF), 2001 WL 587860 (D.D.C. Feb. 13, 2001). The Court ruled that “[a]lthough the statute states that the Special Motion ‘may’ be filed within 60 days and not that it ‘must’ be filed within that time, [that provision] has been interpreted by both federal and state Courts in California to require filing within 60 days of the Complaint or Amended Complaint unless otherwise permitted by the Court in its discretion.” *Id.* at *2. The Court there saw no reason to exercise its discretion and permit filing out of time. It reasoned, among other things, that the “requirement that the Motion to Strike be filed soon after the filing of the Complaint best serves the purpose of the Anti-SLAPP statute—to provide for the early dismissal of meritless First Amendment-chilling lawsuits.” *Id.*

Here, as in Drudge, Mr. Newmyer plainly violated the statute. His Motion is procedurally defective. Accordingly, Mr. Newmyer was late in bringing his claim under the Anti-SLAPP Act.

II. Mr. Newmyer Has Failed To Make A Prima Facie Showing Regarding The Applicability Of The Anti-SLAPP Act To Dr. Huntington's Counter Complaint.

Mr. Newmyer argues that his claim posits an "issue of public interest" -- because he says so. He asserts, without any background or support, that the statements relate to "a public figure" -- and because Mr. Newmyer says the claim relates to "a public figure", it must be so.

As argued previously, creating a public circus by hiring a public relations firm to distribute a lawsuit to media outlets, which lawsuit contains highly personal and private email communications between private consenting adults regarding private matters does not rise to the level of an "issue of public interest." The subsequent filing of a meritless and now dismissed Complaint with a regulatory agency to justify wrongful actions also does not make the matter an "issue of public interest."

Stepping back and reviewing whether Dr. Huntington's Counterclaim is the type of claim to be suppressed by the Anti-SLAPP Act, it is clear that Dr. Huntington is not seeking to chill or repress constitutionally protected speech, but is simply seeking to redress wrongs created by the unfounded and hateful claim filed by Mr. Newmyer. This case, therefore, is entirely distinguishable from the type of action the District of Columbia had in mind when it enacted the District of Columbia Anti-SLAPP Act. As the US District Court for the District of Columbia has described them, "SLAPP suits are often brought for "purely political purposes" in order to obtain "an economic advantage over the Defendant, not to vindicate a legally cognizable right of the Plaintiff." Drudge, 2001 WL 587860, at *3. Unlike a traditional SLAPP suit, there is no economic bullying here, and Dr. Huntington is certainly not a "large private interest[] [aiming] to deter common citizens from exercising their political or legal rights." *Id.*, at *3. To the contrary, Dr. Huntington is a lone individual who was meritoriously seeking legal recourse for damage to his reputation after Mr. Newmyer published false and misleading statements of fact about him to a national audience.

Finally, in an absolute example of tautological reasoning, Mr. Newmyer argues that his Complaint is specifically protected by the Anti-SLAPP Act simply because he filed it, and it is therefore "an issue under consideration or review by a judicial body" within the definition of D.C. Code § 16-5501(1)(B). This argument makes no sense, as, if carried to its logical conclusion, every lawsuit filed would automatically be protected by the Anti-SLAPP Act simply because it was filed.

III. Dr. Huntington Is Likely To Succeed On The Merits Of His Counter Claims.

Dr. Huntington violated no statute, breached no fiduciary duty, committed no malpractice, and breached no civil duty. An independent regulatory body of the District of Columbia, after reviewing all of the documentation submitted by Mr. Newmyer, including Mr. Newmyer's Complaint that Dr. Huntington violated professional ethics, has determined that Dr. Huntington committed no wrong, and that there was "no evidence to indicate that Dr. Huntington provided psychological services" to LN.

Mr. Newmyer has sued Dr. Huntington for Professional Malpractice (Count II), Breach of Fiduciary Duty (Count III) and Intentional Infliction of Emotional Distress (Count IV) deriving from the existence of a therapeutic relationship. As a regulatory body has determined that no therapeutic relationship existed between Dr. Huntington and LN, there can be no professional malpractice, there is no duty upon which is based a breach of fiduciary duty, and there can be no emotional distress caused by any alleged wrongs of Dr. Huntington. Dr. Huntington will prevail in his defense.

With respect to Dr. Huntington's Counterclaim, the evidence and all reasonable inferences that can be drawn from his allegations reflect that he will prevail on his Four Count Counterclaim. Mr. Newmyer acted to disseminate his defamatory statements (that Dr. Huntington alienated his Wife's affections and interfered in his marriage while rendering psychological care to his daughter and while having sexual relations with his Wife) to as broad an audience as possible when he knew this was not the case. Mr. Newmyer retained the services

of a public relations firm to assist him in disseminating this information.⁴ His stamp-filed Complaint was published on the WJLA-TV website within 2 hours of the filing of his Complaint – almost every media outlet in the country knew of the claim by the end of the day, and published these scurrilous allegations. Dr. Huntington was terminated from his employment with the psychological practices with which he had previously been affiliated as a result of Mr. Newmyer's actions, and he has suffered material distress and financial harm.

Dr. Huntington's claim is specific, well pled, and replete with actionable facts. It asserts the defamatory statements made by Mr. Newmyer. Based on the foregoing, there is a substantial likelihood that Dr. Huntington will succeed on the merits of his claims. Accordingly, even if the Court finds that the Anti-SLAPP Act applies, Dr. Huntington has carried his burden and should be allowed to proceed with his claims.


IV. Dr. Huntington Is Entitled to Attorneys Fees.

This Special Motion was filed late. It was filed without any statutory basis. The issues raised are purely private. The only effect that the Special Motion has had is to cost Dr. Huntington more money in defending another unjustifiable proceeding and to delay Mr. Newmyer from providing discovery. This Special Motion is frivolous or brought for delay purposes only, and Dr. Huntington should not have to pay the costs of these proceedings.

⁴ Although ordered by this Court to provide information regarding the public relations firms that he retained to disseminate his defamatory statements, Mr. Newmyer is violating the Court's Order and still refuses to produce this information. Mr. Newmyer's refusal to obey this Court's Order derives from his knowledge that compliance with the Court Order, by answering Interrogatories and producing documents, will support Dr. Huntington's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2012, a copy of the foregoing Counter-Plaintiff James F. Huntington, s Surreply to Counter-Defendant Arthur G. Newmyer's Reply in Support of Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act was electronically filed and mailed, postage prepaid, upon:


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