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How NY SLAPP Defendants Can Recover Fees In Fed. Court

By **Theodore Boutrous, Lee Crain and Randi Kira Brown** (August 29, 2023, 4:04 PM EDT)


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Meritless defamation lawsuits have long plagued media defendants. These strategic lawsuits against public participation, often called SLAPP suits, are designed to chill speech.

States across the country have been experimenting with statutes to address this problem for over 30 years. New York — a jurisdiction that many newspapers, magazines, publishing houses and television networks call home — did not have a strong solution to this problem for many years, but the 2020 amendments to New York's anti-SLAPP law were meant to change that.

Among other things, New York's anti-SLAPP law protects defamation defendants by raising the standard of proof on defamation claims for plaintiffs and by providing for fee shifting, allowing victorious defamation defendants to recover the costs they spent in their defense.

Fee-shifting provisions are essential components of anti-SLAPP laws, as the purpose of SLAPP suits is often to punish and chill the exercise of speech rights by imposing litigation costs.

There is so far no federal anti-SLAPP law. Defamation defendants therefore often must consider whether, and to what extent, state anti-SLAPP laws apply in federal court.

If not, a litigious SLAPP plaintiff need only forum-shop to try to avoid any of the provisions of state anti-SLAPP statutes, including state anti-SLAPP fee-shifting rules.

In other words, if that plaintiff files a defamation claim in federal court, she can argue she is no subject to the specter of fee-shifting because the anti-SLAPP law only applies in state court.

Federal courts have been split as to whether certain anti-SLAPP laws apply in federal court under the U.S. Supreme Court's Erie doctrine from the 1938 case Erie Railroad Co. v. Tompkins. Under that doctrine, courts consider whether an anti-SLAPP law is procedural or substantive and, if procedural, whether it conflicts with the Federal Rules of Civil Procedure.

New York's anti-SLAPP law was specifically designed to avoid this problem. How? Legislative innovation.

Unlike other anti-SLAPP laws, New York law doesn't only create a motion-based procedural vehicle for a defendant to defeat a defamation claim and recover attorney fees.

Instead, a key innovation New York adopted to help SLAPP defendants was to establish a substantive cause of action for defendants to seek fee shifting for SLAPP lawsuits — effectively an anti-SLAPP tort.

Specifically, New York's fee-shifting provision provides a defendant the right 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 [a SLAPP] action," according to Section 70-a(1) of the New York Civil Rights Law.

So far, though, federal courts in New York have not consistently allowed parties to recover these fees, seemingly due to confusion about how the statute works and the best ways to invoke it in federal court.

For example, in Executive Park Partners LLC v. Benicci Inc. in May,[1] the U.S. District Court for the Southern District of New York refused to apply the fee-shifting provision of the anti-SLAPP statute, holding that the plaintiff cannot file a motion for fees in federal court.[2]

An anti-SLAPP motion, brought under Rule 3211(g) of the New York Civil Practice Law and Rules, conflicts with the Federal Rules of Civil Procedure, the court said, and is thus inapplicable in federal court.

By contrast, in 2021, the U.S. District Court for the Northern District of New York applied the fee-shifting provision in Harris v. American Accounting Association, though without addressing the difference between an anti-SLAPP fee-shifting motion and a cause of action to seek those same fees.[4]

The Southern District of New York appears to have suggested last year in Carroll v. Trump that even a counterclaim is not cognizable in federal court because a Section 3211(g) motion is inapplicable, though the court failed to specifically address why a substantive claim was subject to the same Erie analysis as a state-law motion.

By contrast, in March, the Southern District of New York expressly recognized in Max v. Lissner[5] that an anti-SLAPP claim is cognizable in federal court, even if an anti-SLAPP motion is not.[6]

Given this conflicting backdrop and the state of uncertainty, defamation defendants seeking to invoke New York's anti-SLAPP law in federal court need to tread carefully in deploying it.

Simply filing a motion under the statute for fees may well result in a denial under Erie. But New York law doesn't limit defendants to mere motion practice.

When a defendant prevails on a defamation claim, they should invoke their rights under the anti-SLAPP statute to counterclaim or bring a new action entirely under the statute to recover their fees — as the New York anti-SLAPP statute expressly allows.

And bringing such a substantive cause of action — essentially a substantive anti-SLAPP tort — will effectuate the Legislature's intent to ensure that the anti-SLAPP statute's protections are available in federal or state court.

It will ensure that courts will see the New York anti-SLAPP statute for what it is: A statute that confers

substantive rights on defendants that plaintiffs can't try to forum-shop their way out of simply by filing in federal court.

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[1] Exec. Park Partners LLC v. Benicci Inc., 2023 WL 3739093 (S.D.N.Y. May 31, 2023).

[2] Id. at *7.

[3] Harris v. Am. Acct. Ass'n, 2021 WL 5505515, at *15 (N.D.N.Y. Nov. 24, 2021). Rev'd on other grounds 2023 WL 2803770 (2d Cir. April 6, 2023) (assuming without deciding that fee-shifting applies in federal court but deeming the standard for fee shifting not met).

[4] See Carroll v. Trump, 590 F. Supp. 3d 575, 583 (S.D.N.Y. 2022).

[5] Max v. Lissner, 2023 WL 2346365 (S.D.N.Y. Mar. 3, 2023).

[6] Id. at *8.