UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM GILMAN, Plaintiff, v. ELIOT SPITZER and THE SLATE GROUP, LLC Defendants.	Case No. 11 Civ 5843 (JPO) ECF Case **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

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PRELIMINARY STATEMENT

It has been difficult to keep up with Defendants' changing theories of this case. In their memorandum of law in opposition to the motion to dismiss Defendants' counterclaim, Defendants argue both that: (1) Plaintiff William Gilman ("Gilman") filed the Complaint to silence Defendant Eliot Spitzer's ("Spitzer") comment on a non-existent Department of Insurance proceeding (Defs.' Mem. of Law at 9) and (2) Gilman filed the present Complaint to obtain discovery from Spitzer regarding another matter (Defs.' Mem. of Law at 15). In addition to being wholly inconsistent with each other, neither theory is true.

In addition, in their opposition to the motion to dismiss, Defendants argue that, in the defamation at issue, Spitzer was commenting on the appropriateness of Gilman being licensed to sell insurance, while in their motion for judgment on the pleadings, they argue that Spitzer was commenting on the behavior of Marsh as a company and, thus, not discussing Gilman at all (Dkt. #15 at 15). Again, not only are these readings of Spitzer's defamation wholly inconsistent, they are also not true from the plain reading of the defamation.

From these inconsistent theories, it is clear Defendants are grasping at straws to create some sort of protection for Defendants' false and defamatory comments. Unfortunately for Defendants, no such immunity applies and Defendants will have to face the consequences, and resultant liability, for their actions.

ARGUMENT

I. Defendants Do Not and Cannot Point to Any Court Decision Holding That New York's Anti-SLAPP Statute Applies To An Insurance Licensee.

As Gilman stated in his initial memorandum of law, New York's anti-SLAPP statute was passed to address "a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use

development and other activities requiring approval of public boards." *Chandok v. Klessig*, 632 F.3d 803, 818 (2d Cir. 2011) (quoting *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992)). As such, the anti-SLAPP statute definition of "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body" should be read in light of this intended purpose. N.Y. Civil Rights Law § 76-a(1)(b). An insurance license does not apply.

While courts had found certain types of action that "required government process [to] be satisfied to perform some other task" are covered, the statute is not limitless. *See, e.g.*, *Chandok*, 632 F.3d at 812 (2d Cir. 2011) (finding, despite involvement in a "government process" seeking funding, a claim by a researcher was not subject to anti-SLAPP liability because her research could be performed without government approval).

Defendants cannot point to a single case where an insurance license was found to be the basis of an anti-SLAPP claim and Plaintiff is not aware of any. Instead, Defendants attempt to bolster their claim by pointing out that *other* states have anti-SLAPP statutes that are more broad than New York and are not limited to public applicants and permittees. (Defs.' Mem. of Law at 12 n. 4.) However, contrary to Defendants' argument, the fact that other state legislatures have apparently chosen not to limit anti-SLAPP protection to "public applicants and permittees" highlights the importance of interpreting that limitation to mean something under the New York statute. *Cf. Liberty Synergistics, Inc. v. Microflo Ltd.*, No. CV 11-0523 (SJF) (ETB), 2011 WL 4974832 at *11 (E.D.N.Y. Oct. 26, 2011) (noting that, in contrast to the California anti-SLAPP statute, New York's anti-SLAPP statute only applied to public applicants and permittees).

The New York legislature intended the public applicant and permittee language to be a limitation. Under Defendants' interpretation, New York's anti-SLAPP statute would apply to

individuals who hold marriage licenses, driver's licenses, or dog licenses simply because the word "license" is used to describe the government-issued document.

Since "the anti-SLAPP law is in derogation of the common law and must be strictly construed," *Hariri v. Amper*, 854 N.Y.S.2d 126, 130 (1st Dep't 2008), New York's anti-SLAPP statute does not apply here.

II. The Documents Defendants Obtained Through a Freedom of Information Law Request To The Department of Insurance Highlight The Fact That There Was No Proceeding to Challenge Gilman's Insurance License.

Plaintiff reiterates that Gilman has been continually licensed by the New York Department of Insurance since 1976. There was never a proceeding to revoke his license. The documents Defendants attached to the Declaration of Jay Ward Brown ("Brown Decl.") highlight this fact and demonstrate that Defendants could not have been engaging in a challenge to Gilman's insurance license when they defamed him.

The Department of Insurance has the power to initiate a proceeding to revoke a person's insurance license. N.Y. Ins. Law § 2110. The Department of Insurance chose not to do so. (*Compare* Brown Decl. Ex. 9 ("Although the Superintendent of Insurance has the statutory authority, under Insurance Law § 2110(a), to revoke or suspend Mr. Gilman's broker's license under certain enumerated circumstances, the Superintendent's authority may only be exercised 'after notice and hearing.'" *with* Brown Decl. Ex. 10 ("In order that we can close our file with no disciplinary action being taken against Mr. Gilman, please send us the following . . .").) Instead, the Department of Insurance chose only to monitor the criminal proceedings. Even between the time of Gilman's conviction and Justice Yates vacating that conviction, the Department of Insurance did not initiate a proceeding to revoke Gilman's insurance license. (Brown Decl. Exs. 9 and 10.) In fact, Defendants have not pointed to any interaction at all between Mr. Gilman and

the Department of Insurance between June 26, 2008 – over two years prior to Defendants' defamation – and January 28, 2011 – over five months after Defendants' defamation.

Nor did Justice Yates take any action against Gilman's insurance license while he presided over the criminal matter deferring instead to the Department of Insurance. (Brown Decl. Ex. 6 (The Court stated "[m]aybe I should just say whatever the superintendent does is what the superintendent does, and I stay out of it.").) Even what remained of the criminal case did not threaten Gilman's insurance license when the Defendants defamed him.

Further, none of the correspondence between Gilman and the Department of Insurance was public. Presumably, prior to Defendants' Freedom of Information Law request, Defendants had no knowledge of any of the letters from the Department of Insurance or Gilman's responses. *Harfenes v. Sea Gate Assoc., Inc.*, 647 N.Y.S.2d 329, 333 (N.Y. Sup. Ct., N.Y. Cnty. 1995) (finding that, where "plaintiffs were unaware of the [application at issue] at the time it was made, and never participated in the application process in any manner . . . . the plaintiffs [we]re missing an element necessary to receive protection under section 70-a").

Here, there was no proceeding for Defendants to challenge and certainly no public discussion of a challenge to Gilman's license for Defendants to participate in. As such, their anti-SLAPP claim fails. *See* **7** Weinstein Korn Miller, N.Y. Civ. Pract. § 3211.51 (2d ed.).

III. Defendants' Opposition Conflates Two Issues Discussed By New York Courts And, As A Result, Fails To Address Plaintiff's Argument That Defendants' Defamation is Not Materially Related to Any Efforts to Challenge Gilman's Insurance License.

Contrary to Defendants' contention, there is no confusion among New York courts that would impact the Court's determination here. Under the standard articulated by any New York court, Defendants' defamatory statements were not "materially related" to an application of Plaintiff to renew his insurance license. *Chandok*, 632 F.3d at 18 ("the public applicant or

permittee of that application must file a lawsuit against a person who is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission") (internal quotations omitted).

Defendants are correct that the Second Department has applied a slightly more expansive view of the anti-SLAPP requirement that there be a nexus between the defendant's communication and the plaintiff's petition or application. *See Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops*, 182 Misc. 2d 447, 452 (N.Y. Sup. Ct., N.Y. Cnty. 1999) ("some lower court decisions from the Second Department . . . indicate a more expansive construction of the anti-SLAPP law than is found in th[e First] Department"). While some courts indicate that the defamation defendants must be directly challenging the plaintiff's permit or application, other courts find a more indirect challenge sufficient such as in the press. *Compare Harfenes*, 647 N.Y.S.2d at 333 (declining to apply the anti-SLAPP statute because the defendants "must directly challenge a license or permit application in order to establish a cause of action under Civil Rights Law §70-a" and the defendants were unaware of the plaintiff's status as an applicant and, thus, did not participate in the permit process") *with Adelphi Univ. v. Committee to Save Adelphi*, N.Y.L.J., Feb. 6, 1997, at 33 (2d Dep't Feb. 6, 1997) (finding that "communications to the press [which] were calculated to elicit public interest in [the Plaintiff's] alleged wrongful activities and pressure state regulators to act" were sufficient to "satisfy the 'materially related' element of the SLAPP statute").

However, the debate Defendants reference is about whether the defamation defendant must be an actual participant in the application process or whether other participation in a public debate regarding the application is sufficient. The Court need not reach that debate.

All courts are clear that, contrary to Defendants' contention, whether the defendant is an actual participant in the application process or not, the defendant's "communications must have been 'substantially related to such application or permit.'" *Bridge Capital Corp. v. Ernst*, 877 N.Y.S.2d 51, 52 (1st Dep't 2009) (quoting *Guerrero v. Carva,* 779 N.Y.S.2d 12, 22 (1st Dep't 2004)). *See also Adelphi Univ.*, N.Y.L.J., Feb. 6, 1997, at 33 (anti-SLAPP statute protects "statements made in the course of 'participat(ing)' in the broad public debate about the issue"), *Duane Reade, Inc. v. Clark*, 2 Misd. 1007(A), 2004 WL 690191 at *6 (N.Y. Sup. Ct., N.Y. Cnty. Mar. 31, 2004) (maintaining anti-SLAPP counterclaim finding it was "beyond peradventure that Duane Reade's lawsuit is one *materially related* to efforts by Clark to oppose Duane Reade's application for a permit") (emphasis added).

Defendants rely heavily on *Duane Reade*, even shockingly referring to the decision as "on all fours" with the current matter. Defendants' reliance is misplaced however, as the *Duane Reade* facts are far from the instant case and actually demonstrate why Defendants' anti-SLAPP must fail here. First, *Duane Reade* dealt with debate over a building permit, 2004 WL 690191 at *2, which is precisely the type of permit the anti-SLAPP statute was intended to cover. *See, e.g.*, *Chandok,* 632 F.3d at 818-19 (citations omitted). Second, the court in the *Duane Reade* matter found the defendant's actions to be "reasonably targeted to make [the New York City Department of Buildings] aware of his concerns *during the time it was reviewing permission for the sign*." *Duane Reade*, 2004 WL 690191 at *7 (emphasis added). Indeed, the court stated explicitly that the fact that the alleged defamation at issue was made during the pendency of a government action distinguished its decision from others where that fact was missing. *Id.* Finally, the alleged defamation in *Duane Reade* "occurred on the heels" of other publications *specifically* protesting the Department of Buildings decision at issue in that case, lending public

context to the alleged defamation. *Id.* at *6. As such, the court stated it was "beyond peradventure that Duane Reade's lawsuit is one *materially related* to efforts by Clark to oppose Duane Reade's application for a permit." *Id.* at *6 (emphasis added).

The cases of *Harfenes* and *Guerrero* are much more analogous to the present circumstance and hold that a nexus must exist between the alleged defamation and a challenge to a public permit or application in order to implicate the anti-SLAPP statute. *Harfenes,* 647 N.Y.S.2d at 333 ("plaintiffs must directly challenge a license or permit application in order to establish a cause of action under *Civil Rights Law § 70*-a"); *Guerrero*, 10 A.D.3d at 118 ("At a minimum, the anti-SLAPP statute should be read to require that a defendant identify, at least in general terms, the application or permit being challenged or commented on, and that the defendant's communications be substantially related to such application or permit.").

Here, Defendants' defamation was not related to Plaintiff's insurance license in any way, much less materially related. As discussed above, there was no proceeding to challenge – the Department of Insurance had chosen not to bring a proceeding. (Brown Decl. Ex. 9.) Nor was there any public debate regarding Gilman's insurance license – all of the Department of Insurance exhibits to the Declaration of Jay Ward Brown that Defendants rely on to try to retroactively create a challenge to Gilman's license are non-public correspondence between Gilman (and, in one instance, Marsh) and the Department of Insurance. The public was not privy to any of these communications. Certainly Defendants were not aware of the private discussion and cannot credibly claim that they were participating in a public discussion regarding those private communications. *See* **7** Weinstein Korn Miller, N.Y. Civ. Pract. § 3211.51 (2d ed.) ("The legislation focuses on retaliatory litigation commenced or maintained for the purpose of

intimidating persons who have voiced opinions in public meetings or discussions inimical to those of the person controlling the litigation.").

As such, Defendants' defamation was not materially related to a challenge to Gilman's insurance license and, therefore, Gilman's present suit cannot be a suit brought to silence Defendants' "participation" in that challenge.

IV. Defendants Have Also Failed to Establish That Gilman's Defamation Claim Lacks Merit Or That He Brought The Claim To Silence Defendants' Purported Challenge To His Insurance License.

Defendants apparently have two theories of Gilman's motive here: (1) that Gilman is attempting to silence Defendants' alleged challenge to his insurance license; and (2) that Gilman is seeking discovery from Defendant Spitzer regarding another matter. (Defs.' Mem. of Law at 15.) Both of these alleged motives are without merit.

In addition to the fact that Defendants' defamation was not a challenge to Gilman's insurance license in any way, the timeline here precludes the first alleged motive. Defendants' defamation occurred on August 22, 2010. As demonstrated by the Department of Insurance website, Gilman's insurance license was renewed on July 20, 2011. Gilman filed the Complaint here on August 19, 2011. There would be no reason for Gilman to bring a claim seeking to silence a purported challenge to his insurance license a month after his license had been renewed and a year after the Defendants' defamation occurred. *See, e.g. Duane Reade*, 2004 WL 690191 at *7 (finding that the statements at issue were "reasonably targeted to make [the New York City Department of Buildings] aware of his concerns *during the time it was reviewing permission for the sign*").

The second motive is loosely supported only by the fact that Plaintiff's counsel requested the deposition of Defendant Spitzer during the Initial Pre-trial Conference on December 2, 2011.

First, Defendants mischaracterize the request of Plaintiff's counsel – Plaintiff's counsel actually simultaneously requested the depositions of Spitzer *and* the person at Defendant The Slate Group that handled any fact checking for Spitzer. (Brown Decl. Ex. 15 at 3-4 ("we do feel fairly strongly that it would appropriate to have at the earliest possible time the – and this may not entail any document discovery – the deposition of the Defendant Spitzer and deposition of that person from Slate who is in charge of the, whatever fact-checking process did or did not occur").) Second, the request to depose Spitzer and Defendant The Slate Group early in discovery is due to the fact that Gilman is not in a position to determine what, if any, documents exist regarding the process by which Spitzer's article was published – particularly any drafts or fact-checking regarding the article. (Brown Decl. Ex. 15 at 3-4.) That Defendants would use this reasonable request as evidence of an improper motive – in fact, their only evidence of any improper motive – highlights the weakness of their asserted counterclaim.

Further, Defendants' counterclaim does not contain factual allegations that Gilman's defamation claim does not have "a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." N.Y. Civ. Rights Law § 70-a(1)(a). Defendants' bullet point list of "facts" from their Counterclaim – presumably single-spaced in violation of Local Civil Rule 11.1(b) to avoid the Court's 25-page page limit – points to conclusions of law such as the list of affirmative defenses or recitation of the dismissed criminal charges without an factual allegations about how they render Gilman's defamation claim meritless – no such allegations can be asserted. (Counterclaim ¶¶ 7-40.)

Defendants fail to allege, for example, that Gilman has not, at all times, maintained his innocence nor provided any other basis to believe that Gilman's claim that the defamation is false is made in bad faith – they cannot do so. Defendants fail to assert any factual allegation

that Gilman's claim that Defendants' defamation is "of and concerning" Gilman is made in bad faith.[1] Defendants fail to make any factual allegations from which the Court could conclude that Defendants are entitled to immunity – obviously Spitzer is no longer a government official and Defendants' claim that 47 U.S.C. § 230 applies to Defendant The Slate Group is not at all established by factual allegations in the Counterclaim. Nor would Defendants be able to correct these fatal omissions by amending their Counterclaim – they cannot make any such allegations.

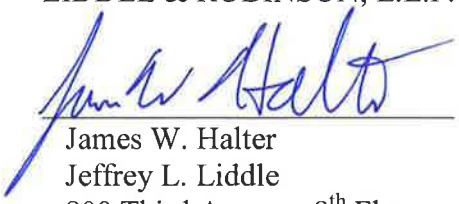
Defendants do not, and cannot, allege facts from which a factfinder could conclude that Plaintiff's claim for defamation per se by libel is without merit. Defendants' Counterclaim fails to state a claim upon which relief can be granted as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully renews his request that Defendants' Counterclaim be dismissed with prejudice.

Dated: January 6, 2012
New York, New York

Respectfully submitted,
LIDDLE & ROBINSON, L.L.P.



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[1] Defendants attempt to make much of the allegation that Gilman did not request a retraction. However, requesting a retraction is not an element of defamation under New York law and can be a reasonable decision, *Cf. Kehoe v. New York Tribune*, 229 A.D. 220, 223 (1st Dep't 1930) ("When the libel is published the harm is very often accomplished, and its republication by way of a retraction may accentuate and render it more damaging."). Regardless, a retraction would be irrelevant to the present motion.