New York Law Journal

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What Is a 'Substantial Basis' Under New York's Anti-SLAPP Law?

On Nov. 10, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend on how courts interpret a key concept in the statute.

By **Daniel Novack and Christina Lee** | November 17, 2020

Daniel Novack (left) and Christina Lee. (Courtesy photos)

For nearly three decades, New York—the nation's media capital—has had one of the country's least protective Anti-SLAPP statutes. These statutes —designed to protect our First Amendment rights from frivolous litigation—generally impose heightened pleading standards for claims predicated on speech and provide for fee shifting for prevailing defendants.

On Nov. 10, 2020, New York enacted legislation intended to strengthen free speech protections by modifying its nearly 30-year-old Anti-SLAPP law. But the vitality of these new protections will depend heavily on how courts interpret a key concept in the statute—whether a plaintiff's case has a "substantial basis."

Background

The new law is composed of four components:

1. CPLR Section 76-A, which enumerates the First Amendment conduct protected by the law.

2. CPLR Section 70-A, which defines the penalties associated with filing a SLAPP, including attorney fee awards for prevailing defendants.

3. CPLR Section 3211(g), which dictates that a court must grant a motion to dismiss unless the plaintiff demonstrates a "substantial basis" in law (or substantial argument for an extension, modification or reversal of existing law).

4. CPLR Section 3212(h), which dictates that a court must grant a jotion for summary Judgment against the plaintiff unless they demonstrate a "substantial basis in fact and law" (or substantial argument for an extension, modification or reversal of existing law).

The new law differs in three principal respects from its predecessor:

> First, CPLR § 76-A has expanded the scope of protected conduct. Under the old regime, only a narrow class of conduct relating to public permits was covered. In contrast, the new law is broad. It covers:
>
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.
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> New York Senate Bill S52-A (2019-2020 Legislative Session).
>
> Second, CPLR § 3211(g) now requires an immediate stay of discovery during the pendency of a motion to dismiss. Id.
>
> Third, while the prior regime made the award of fees discretionary, CPLR § 70-A now provides for mandatory attorneys' fees in instances where a suit was "commenced or continued without a substantial basis in fact or law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." Id. This language tracks CPLR §§ 3211(g) and (h)'s guidance on the standards applicable for an anti-SLAPP motion to dismiss and for summary judgment.

Because of the narrow class of claims covered by the prior Anti-SLAPP law, it was rarely applied in New York courts. The dramatic expansion in coverage is likely to lead to more frequent litigation and renewed interest in how courts assess whether a "substantial basis" exists in the contexts of dismissal and fees.

Plain Language & New York Pleading Standards

Unfortunately, New York's Anti-SLAPP law does not offer a definition of "substantial basis" or guidance on how it compares to the ordinary motion to dismiss and summary judgment standards, § 3211(g), (a)(7), and § 3212, respectively. All roads, however, point to a clear intent that courts impose a heightened standard.

First, the ordinary motion to dismiss and summary judgment standards:

- On a motion to dismiss, a court need only ascertain "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v Ginzberg*, 43 NY2d 268, 274-75 (1977). What is "cognizable?" CPLR § 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."
- At summary judgment, the burden is on the defendant to show "no material and triable issue of fact is presented," and summary judgment "should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *In re New York City Asbestos Litigation*, 33 N.Y.3d 20, 25 (2019).

Given that § 3211(g), (a)(7), and § 3212(h) appear within the same statute as the ordinary motions, it is clear that the Legislature intended them to be a distinct standard. Otherwise, each would have no operative effect. Under the rule against surplusage, a court's reading must not render statutory language extraneous. *Andryeyeva v. New York Health*, 33 NY 3d 152, 177 (2019).

Distinct how? The plain language of § 3211(g) and § 3212(h) indicates a heightened standard. On its face, the word "substantial" is more stringent than "cognizable."

Finally, the protective purpose of the statute militates in favor of a heightened standard. *People v. Andujar*, 30 N.Y.3d 160, 166 (2017) (holding that a court's primary consideration in statutory interpretation is to give effect to the intention of the Legislature). The Legislature's goal of disincentivising lawsuits attacking free speech can only be effectuated if they are procedurally and substantively easier to defeat. The clear legislative intent is also evident in the statute's burden shift from defendant to plaintiff.

Historical Application

This construction is generally consistent with New York courts' treatment of "substantial basis" under the prior version of the Anti-SLAPP law. Over the past 30 years, New York courts have evaluated the "substantial basis" standard under New York's former Anti-SLAPP statute dozens of times. The cases are summarized in an appendix below.

Appellate Division

All four departments of the Supreme Court, Appellate Division have had an opportunity to apply the substantial basis standard. Our review of 14 Appellate Division cases revealed:

- Four involved review of a successful motion to dismiss. The courts affirmed all four dismissals in favor of defendants (100%).
- Five involved review of a denial of a motion to dismiss. The courts overturned one denial (20%).

- Four cases affirmed the grant or denial of a defendant's motion for summary judgment. The court ruled in favor of defendants 2 out of 4 times (50%).
- Of the 14 opinions reviewed, eight cited a heightened standard (57%).
- Within that subset, four decisions referenced the "clear and convincing evidence" standard (26% of total appellate opinions reviewed). Defendants won both motions to dismiss (100%) and both motions for summary judgment (100%).
- In the remaining six cases, the court declined to substantively address the "substantial basis" analysis one way or the other, leaving it undefined.
- Overall: Defendants won 6 out of 10 motions to dismiss (60%) and 2 out of 4 motions for summary judgment (40%).

Supreme Court

Our review of 28 trial level cases that applied the "substantial basis" standard revealed:

- Defendants won 11 of 17 motions to dismiss (65%).
- Defendants won 8 out of 10 motions for summary judgment (80%).
- Of the 28 cases, 15 explicitly stated that heightened scrutiny applied (54%).
- Within this subset of 15 cases, 10 referenced the "clear and convincing evidence" standard (36% of trial opinions reviewed). Defendants won all six motions to dismiss (100%) and all four motions for summary judgment (100%).
- Defendants even performed well in instances where the court did not expound on "substantial basis," winning 4 out of 8 motions to dismiss (50%) and 3 out of 5 motions for summary judgment (60%).

SLAPP-Happy State Courts

While courts have not offered extended discussions to what exactly constitutes a "substantial basis," the extraordinarily high dismissal rates show it to be a robust standard. Overall, 17 out of the 42 SLAPP cases reviewed resulted in dismissal at the earliest stage (41%), with an additional 10 knocked out at summary judgment (24%).

Moreover, the numbers indicate that deeper analysis of the substantial basis test by courts coincides with more robust scrutiny; in cases where "substantial basis" was addressed even minimally by the trial or appellate court, defendants ultimately succeeded in 11 out of 14 motions to dismiss (79%).

Moreover, even cases in which plaintiffs' claims were found to have a substantial basis indicate that a strong factual backdrop is needed to survive an Anti-SLAPP motion to dismiss. For example, in denying a motion to dismiss, the court in *Allstate* held that "plaintiffs have demonstrated that their complaint has a substantial basis in law," because the complaint explained in "great detail" the investigation plaintiffs undertook and the scheme defendant allegedly employed. *Allstate Ins. Co v. Lev Aminov, International Medicine, P.C.*, 2017 N.Y. Misc. LEXIS 2141, *14-15.

Taken together, New York's courts have demonstrated that they understand substantial basis to require far greater scrutiny than a typical § 3211(a)(7) motion to dismiss. Courts demand to be presented with a factual backdrop supported by persuasive evidence.

What Happens In Federal Court?

Federal courts have rarely had occasion to apply the "substantial basis" standard, but of the seven reported cases identified, six identified it as imposing a heightened burden, albeit mostly in dicta.

However, due to a recent Second Circuit decision, federal courts in New York will likely decline to apply the substantial basis standard to motions to dismiss or for summary judgment due to the Erie doctrine. In *La Liberte v. Reid*, the Circuit held that the California Anti-SLAPP law's provision dictating dismissal of claims lacking a probability of success was procedural and therefore in conflict with the Federal Rules of Civil Procedure. *La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020). Instead, it held that the plausibility test set out by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), should apply in federal courts. Id.

Regardless, because the fees provision of § 70-A is substantive rather than procedural, federal courts will nonetheless have to apply the substantial basis standard in assessing whether to award fees. This means that, unlike in New York state courts (where dismissal on one hand is necessarily tethered to an award of fees on the other by virtue of both statutes employing the same standard), federal courts will weigh two different standards: plausibility for dismissal and substantial basis for fees. Surely a claim dismissed for lack of plausibility must necessarily lack a substantial basis in law.

Not so fast. Two Southern District cases have said otherwise.

Federal Versus New York Pleading Standards

At least one court examined this issue prior to the Supreme Court's decision in *Ashcroft v. Iqbal*. In *Friends of Rockland Shelter Animals, Inc. v. Mullen*, the court stressed the then-discretionary nature of attorney fee awards after dismissing a claim under the plausibility standard set out in Federal Rule 12(b)(6): "[E]ven if FORSA's action is as a SLAPP suit within the meaning of the statute, defendants are not entitled to damages." *Friends*, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004) (emphasis added).

The court further held that, "even if we concluded that FORSA's suit was brought 'without a substantial basis in law and fact,' we would decline to award costs and fees at this stage of the litigation because we do not believe they are warranted in the present case." Id. (citing *In re West Branch Conservation Assoc., Inc. v. Planning Board*, 222 A,D.2d 513 (2d Dep't 1995)) (upholding discretionary aspect of fee awards under 70-A).

Rather than simply resting on that discretion, the court—gratuitously—reached for an explanation as to why the claim did have a substantial basis, finding that the plaintiff's claim was "cognizable." Id. The opinion fails to explain how a theory could be cognizable, have a substantial basis, yet remain implausible, but it prefaced its analysis with a statement that "we are wholeheartedly sympathetic with FORSA's mission." Id. at 345.

Second, in the post-Iqbal case of *Egiazaryan v. Zalmayev*, the court similarly declined to award fees despite granting a motion to dismiss. *Egiazaryan v. Zalmayev*, 2014 U.S. Dist. LEXIS 36285, *24–25. Again, rather than simply exercise its discretionary authority, the court performed the same gymnastics as *Mullen*. Only this time, the court offered a more detailed, albeit no less confusing, rationale.

Arbitraging the state and federal standards, the court held:

> A dismissal for failure to state a claim does not necessarily determine that a claim lacks a substantial basis in fact and law. The "substantial basis in fact and law" standard is distinct from the standard to grant dismissal for failure to state a claim under Rule 12(b)(6), which requires a plaintiff to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).Egiazaryan, 2014 U.S. Dist. LEXIS 36285 at *17–18.

While future federal courts will likely look to these decisions, they should not be followed for the simple fact that "substantial basis," on both its face and as interpreted by New York state courts, undoubtedly imposes a higher standard than the federal dismissal standards.

Rather than dance on the head of a pin to try to explain how a nonplausible claim could have a substantial basis, federal courts should instead reach for the common sense conclusion that a SLAPP dismissal necessarily requires an award of fees. **Conclusion**

Given the plain language of New York's Anti-SLAPP statute, the policy intention animating the law, and the manner in which state courts have applied it, "substantial basis" should be understood as a heightened standard, one that requires plaintiffs to plead persuasive factual evidence in support of their claims. And when SLAPP claims are dismissed, fees should follow.

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