Court of Appeals
of the
State of New York

MICHAEL HAYES,

Plaintiff-Respondent,

– against –

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC.,
FRED TURNER, CHAD DOUGLAS and KIRSTEN MILLIRON,

Defendants-Appellants.

MOTION FOR LEAVE TO APPEAL

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC
Attorneys for Defendants-Appellants
Myron Taylor Hall
Ithaca, New York 14853
Tel: (607) 255-9182
Fax: (607) 255-4196
cn266@cornell.edu

Appellate Division, Fourth Department Docket No.: CA 23-00819
Onondaga County Clerk's Index No.: 009463/2022

APPELLATE INNOVATIONS
(914) 948-2240

COURT OF APPEALS
STATE OF NEW YORK

MICHAEL HAYES

Plaintiff-Respondent,

– versus –

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC., FRED TURNER, CHAD DOUGLAS, AND KIRSTEN MILLIRON,

Defendants-Appellants.

Onondaga County Clerk
Index No. 009463/2022

Appellate Division
Docket No. 23-00819

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the accompanying memorandum in support of Defendants-Appellants' motion for leave to appeal, order of the Appellate Division with notice of entry, joint record in the Appellate Division including the order of the Supreme Court, Onondaga County, and brief filed in the Appellate Division, Defendants-Appellants will move this Court, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on the 12th day of August, 2024, for an order, pursuant to CPLR 5516 and Rule 500.22 of the Court of Appeals Rules of Practice, granting Defendants-Appellants leave to appeal to this Court from the order of the Appellate Division, Fourth Department, dated May 3, 2024.

Dated: July 24, 2024

Christina N. Neitzey
CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-9182
cn266@cornell.edu
Counsel for Defendants-Appellants

TO: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Dirk J. Oudemool
333 East Onondaga Street
Suite 600
Syracuse, New York 13202
(315) 474-7447
dirkj5640@outlook.com
Counsel for Plaintiff-Respondent

Court of Appeals
of the
State of New York

MICHAEL HAYES,

Plaintiff-Respondent,

– against –

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC.,
FRED TURNER, CHAD DOUGLAS and KIRSTEN MILLIRON,

Defendants-Appellants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC
Attorneys for Defendants-Appellants
Myron Taylor Hall
Ithaca, New York 14853
Tel: (607) 255-9182
Fax: (607) 255-4196
cn266@cornell.edu

Appellate Division, Fourth Department Docket No.: CA 23-00819
Onondaga County Clerk's Index No.: 009463/2022

APPELLATE INNOVATIONS
(914) 948-2240

Printed on Recycled Paper

21575

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Rules, Laws and Statutes:

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

Pursuant to CPLR 5516 and 22 NYCRR 500.22, Defendants-Appellants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas, and Kirsten Milliron respectfully submit this memorandum in support of their motion seeking leave to appeal.

PRELIMINARY STATEMENT

This matter merits review because it raises novel and important questions about the scope of New York's recently-amended Anti-SLAPP Law:[1] specifically, the statute's coverage of suits arising from statements made in "connection with an issue of public interest" and the meaning of its "substantial basis in law" standard. *See* 22 N.Y.C.R.R. § 500.22(b)(4); N.Y. C.P.L.R. § 3211(g); N.Y. Civ. Rights Law §§ 76-a(1)(a)(1), 76-a(1)(d). These questions carry significant implications for individuals' ability to speak freely about issues of public importance—in particular, about #MeToo-type allegations of sexual misconduct—without fear of lawsuits intended solely to punish or silence truthful speech.

New York's 2020 amendments to its Anti-SLAPP Law provide the protection that if an individual speaks publicly about anything other than a "purely private" matter, a court must dismiss any suit arising from that speech – and award the

[1] As used in this brief, "Anti-SLAPP Law" refers collectively to N.Y. C.P.L.R. §§ 3211(g), 3212(h), and N.Y. Civ. Rights Law §§ 76-a, 70-a.

defendant mandatory costs and attorneys' fees – unless the plaintiff can establish that his claim has a "substantial basis in law," or that his claim "is supported by a substantial argument for an extension, modification or reversal of existing law." *See* N.Y. C.P.L.R. § 3211(g); Civ. Rights Law §§ 70-a(1)(a), 76-a(1)(a)(1), 76-a(1)(d). But when Defendants-Appellants sought to realize this promise in the face of a meritless libel suit arising from their warnings to fellow members of the Central New York independent music scene about a colleague's sexual misconduct, they received none of the Anti-SLAPP Law's protections. Although Supreme Court dismissed Plaintiff-Appellant Michael Hayes' suit independent of the Anti-SLAPP Law under CPLR 3211(a)(7) because Hayes failed to set forth in his complaint "the particular words complained of" as required by CPLR 3016(a), it mistakenly found that the Anti-SLAPP Law did not apply, and, in turn, failed to award mandatory attorneys' fees under the Anti-SLAPP Law. On appeal of the Anti-SLAPP and attorneys' fees portion of the decision, the Appellate Division, Fourth Department, affirmed without explanation.

This Court should grant leave to appeal to correct this mistaken approach, and to clarify for all New York courts the scope of the amended Anti-SLAPP Law and the meaning of its "substantial basis in law" standard.

PROCEDURAL HISTORY AND TIMELINESS

A. Defendants Warn Fellow Members of the Central New York Independent Music Community About a Colleague's Sexual Misconduct

The suit underlying this proposed appeal involves allegations that Defendants-Appellants defamed Plaintiff-Respondent Michael Hayes through several Facebook posts and reposts Defendants made about Hayes—primarily, warnings by Defendants to fellow members of the Central New York independent music community about Hayes, who Defendants understood to have engaged in sexually inappropriate behavior including unwanted sexual touching and comments at music festivals and in other settings ("Challenged Statements"). (*See* R27–32.)

For example, Hayes alleges that Defendant Fred Turner – his former bandmate – falsely stated via Facebook that Turner (quoting Hayes' paraphrasing from the complaint, since Hayes does not quote the Challenged Statements themselves in the complaint) "quit [Hayes'] band because he could not be associated with [Hayes] because [Hayes] was accused of sexual assault and harassment." (R30, ¶ 18.) Hayes alleges this statement was defamatory because Turner "had no basis for making such a statement other than information he received from the other defendants in this action and he never asked [Hayes] if this information was true[,] which it was not." (R30, ¶ 19.) Similarly, Hayes alleges that, in August 2022, Defendant Kirsten Milliron, a freelance photographer for local bands, stated falsely

via Facebook that (again, in Hayes' paraphrasing) "[Hayes] sexually harassed [Milliron's] friends, aligned himself with sexual predators, groped a person at a show[,] and has a 'handsy' reputation," and that Milliron "made similar statements thereafter." (R31, ¶¶ 21–23.)

B. Hayes Files Suit and Defendants File Anti-SLAPP Motion to Dismiss

On November 15, 2022, Hayes filed suit against Defendants for four counts of defamation, seeking $400,000 in damages. (*See* R26–32.) Defendants thereafter moved to dismiss under CPLR 3211(a)(7), as well as the Anti-SLAPP Law. (*See* R33–34, R40.) Defendants asserted that the "Complaint failed to state a cause of action upon grounds which relief can be granted, is an action involving public participation, and has been commenced without . . . substantial basis in law or fact." (*See* R33.) Defendants argued that the Challenged Statements, to the extent they could be discerned from Hayes' complaint, are either "true, hyperbolic . . . [or mere] opinion." (R44.) Defendants also argued that Hayes failed to establish that they made any false statement of fact with actual malice, which the Anti-SLAPP Law requires. (*See* R44–45.) Defendants then argued they were entitled to a mandatory award of attorneys' fees pursuant to the Anti-SLAPP Law. (R46.)

In support of their motion to dismiss, and as permitted under the Anti-SLAPP Law, Defendants each filed an affidavit in support of their motion to dismiss affirming that, based on their personal experience with Hayes and the accounts of

others whom they believed to be credible sources, they had reason to believe Hayes had engaged in the sexual misconduct and other predatory behavior described in the Challenged Statements attributed to them. (*See* R58–59, ¶¶ 3–4, 7, 9; R60–61, ¶¶ 2–4, 9, 12–13; R62–63, ¶ 3–6, 8, 10, 12–14; R64–65, ¶¶ 2–5, 7; R66–67 ¶¶ 4–7, 8; R68, ¶¶ 1–4.) Three Defendants also stated in their affidavits that Hayes' complaint mischaracterizes or inaccurately represents certain statements they made, or asserts they made statements they do not remember making. (*See* R58–59, ¶¶ 5–6, 7–9; R61, ¶¶ 10–14; R63, ¶¶ 9–11.) Four non-parties to the suit with personal knowledge about the allegations underlying the Challenged Statements also filed affidavits in support of Defendants' motion to dismiss.

C. Supreme Court Dismisses Suit but Fails to Apply Anti-SLAPP Law to Award Attorneys' Fees

On April 11, 2023, Supreme Court, Onondaga County, granted Defendants' motion in part. (*See* R6–12.) Supreme Court dismissed Hayes' suit pursuant to CPLR 3211(a)(7), but failed to award mandatory attorneys' fees to Defendants under the Anti-SLAPP Law. (*See* R12.) The lower court granted Defendants' motion to dismiss pursuant to CPLR 3211(a)(7) because Hayes failed to conform with CPLR 3016(a), which requires a complaint in a defamation action to set forth the "particular words complained of." (R11.)[2] Supreme Court denied Defendants' motion, however,

[2] Hayes filed a notice of appeal challenging this aspect of the lower court's decision, but did not perfect his appeal. (*See* R2–5.)

to the extent that it sought attorneys' fees under the Anti-SLAPP Law, holding that the Challenged Statements were not covered by the law. (*See* R10–11.)

Supreme Court acknowledged that application of the Anti-SLAPP Law hinges on whether Defendants' statements were made in "connection with an issue of public interest," and that the term "public interest" must be "construed broadly" to mean "any subject other than a purely private matter." (R10 (first quoting N.Y. Civ. Rights Law § 76-a(1)(a)(1); then quoting N.Y. Civ. Rights Law § 76-a(1)(d)).) Supreme Court also acknowledged that "sexual impropriety and power dynamics in the music industry . . . [are] indisputably an issue of public interest." (*Id.* (quoting *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y 2021)) (second alteration in original).) The court went on to state that "[s]tatements falling 'into the realm of mere gossip and prurient interest,' are *not* matters of public concern" and therefore not subject to Anti-SLAPP Law protections. (R11 (quoting *Aristocrat Plastic Surgery, P.C. v Silva*, 206 A.D.3d 26, 30 (1st Dep't 2022)) (emphasis added).) Supreme Court then summarily characterized the Challenged Statements as pure "gossip," and therefore not connected to an issue of public interest and not subject to the protections of the Anti-SLAPP Law. (*Id.*) The lower court explained that this finding was in part due to Noah and Alec Rich's use of the word "gossip" to describe information they heard about Hayes being kicked off a music festival. (*See id.* (quoting R61, ¶ 14); *see also* R59, ¶ 7.)

D. Appellate Division Affirms Trial Court's Refusal to Award Attorney's Fees Under Anti-SLAPP Law

On May 3, 2024, the Appellate Division, Fourth Department, entered a slip opinion unanimously affirming, without explanation, Supreme Court's denial of attorneys' fees to Defendant-Appellants pursuant to the Anti-SLAPP Law. (Op. at 1.)

E. Timeliness of Motion for Leave to Appeal

Plaintiff-Respondent did not serve a copy of the Appellate Division's May 3, 2024, order and notice of its entry on Defendants-Appellants. Defendants-Appellants' counsel served a copy of the May 3, 2024, order and notice of entry on Plaintiff-Respondent's counsel by mail on July 19, 2024. This motion for leave to appeal is timely made within 30 days of service of the notice. *See* CPLR 5513(b).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal because the Appellate Division's May 3, 2024, order affirming the April 11, 2023, order of the Supreme Court, Onondaga County, insofar as it denied Defendants-Appellants' request for attorneys' fees and costs under the Anti-SLAPP Law, constitutes a final order within the meaning of CPLR 5602(a)(1) which is not appealable as of right.

QUESTIONS PRESENTED FOR REVIEW

1. Does New York's Anti-SLAPP Law apply to a libel action arising out of Facebook posts warning a music community about a colleague's history of sexual misconduct? Supreme Court, Onandaga County, incorrectly held that it does not; the Fourth Department did not directly address this question, but its affirmance of Supreme Court indirectly answers this question, "No."
2. Does a libel claim subject to New York's Anti-SLAPP Law lack a substantial basis in law when the plaintiff fails to set forth the particular words complained of as required by CPLR 3016(a)? Neither Supreme Court, Onandaga County, nor the Fourth Department directly addressed this question.
3. Does a libel claim subject to New York's Anti-SLAPP Law separately lack a substantial basis in law where a plaintiff fails to establish that any defendant made a substantially false statement of fact about the plaintiff with actual malice? Neither Supreme Court, Onandaga County, nor the Fourth Department directly addressed this question.

ARGUMENT

I. THIS MATTER RAISES NOVEL AND IMPORTANT QUESTIONS ABOUT THE REACH OF NEW YORK'S RECENTLY-AMENDED ANTI-SLAPP LAW

This matter raises novel and important questions about the scope of New York's 2020 amendments to its Anti-SLAPP Law. First, this Court should grant

Defendants leave to appeal in this matter to clarify that the Anti-SLAPP Law applies to actions such as this one—a libel action arising out of Facebook posts warning fellow members of Defendants' music community about a colleague's history of sexual misconduct. Whether the communication giving rise to an action originated in "gossip" or rumor has no bearing on the relevant inquiry: whether a communication was made "in connection with an issue of public interest," with "public interest" "construed broadly" to mean "any subject other than a purely private matter." N.Y. Civ. Rights Law §§ 76-a(1)(a)(1), 76-a(1)(d), 76-a(2).

Second, this Court should grant review to clarify the Anti-SLAPP Law's "substantial basis in law" standard: specifically, that a complaint which fails to state a claim under CPLR 3211(a)(7) necessarily lacks a "substantial basis in law" for purposes of the Anti-SLAPP Law's CPLR 3211(g) standard. *See Reeves v. Associated Newspapers, Ltd.*, 210 N.Y.S.3d 25, 34–38 (1st Dep't 2024).

A. This Court's Review Is Necessary to Clarify the Anti-SLAPP Law's Definition of Statements Made in "Connection with an Issue of Public Interest"

Review is warranted in this matter to correct and clarify the lower courts' decisions regarding the Anti-SLAPP Law's applicability to this action. Supreme Court erred when it found that the Challenged Statements fall within the realm of "mere gossip and prurient interest" and that the Anti-SLAPP Law therefore did not apply. (R11 (quoting *Aristocrat Plastic Surgery, P.C. v Silva*, 206 A.D.3d 26, 30 (1st

Dep't 2022).) This finding—and the Appellate Division's decision affirming this finding—was incorrect as a matter of law and directly contradicts the text of the Anti-SLAPP Law.

The Anti-SLAPP Law applies to any "action involving public petition and participation." *See* N.Y. Civ. Rights Law § 76-a(2). "An 'action involving public petition and participation' is a claim based upon" "any communication in . . . a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." *Id.* § 76-a(1). The statute further commands that "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter." *Id.* § 76-a(1)(d).

Here, the Challenged Statements consist of warnings to fellow members of Defendants' music community about allegations that Hayes engaged in sexual misconduct and cyber-harassment—statements which fall squarely into the Anti-SLAPP Law's "broad[]" definition of statements "connect[ed to] an issue of public interest." N.Y. Civ. Rights Law §§ 76-a(1)(a)(1), 76-a(1)(d).

Since the 2020 expansion of New York's Anti-SLAPP Law took effect, courts have regularly affirmed that public statements regarding allegations of sexual misconduct – particularly in the context of abuses of power in the entertainment industry – are statements made in connection with issues of public interest for

purposes of the Anti-SLAPP Law.[3] Similarly here, the Challenged Statements primarily concern allegations that Hayes engaged in sexual misconduct or threatened women. (*See* R28–31, ¶¶ 7, 8–13, 16, 18, 22.)

But Supreme Court, citing the First Department's pronouncement that "[s]tatements falling 'into the realm of mere gossip and prurient interest' are not matters of public concern," and noting two of the Defendants and Defendants' counsel had described certain rumors about Hayes as "gossip," found the statements were not made in connection with an issue of public interest and that the Anti-SLAPP Law's protections therefore did not apply. (R10–11 (first quoting *Aristocrat Plastic Surgery, P.C. v. Silva*, 206 A.D.3d 26, 30 (1st Dep't 2022); then quoting R61, ¶ 4 and R51, ¶ 13).) This was legal error.

This Court should grant Defendants leave to appeal and clarify that whether a challenged statement originated as gossip or rumor has no bearing on whether the

[3] *See, e.g.*, *Zeitlin v. Cohan*, 220 A.D.3d 631, 631–32 (1st Dep't 2023) (article discussing plaintiff's alleged harassment of a former romantic partner and "viewing websites where members could 'bid' on young teenagers"); *Gillespie v. Kling*, 217 A.D.3d 566, 567 (1st Dep't 2023) (statements on podcast describing defendant's experience of domestic violence and plaintiff's attendant mental health issues); *Watson v. NY Doe 1*, 2023 WL 6540662 at *2–3, (S.D.N.Y. 2023) (allegation of sexual assault made through Instagram account dedicated to collecting stories of sexual impropriety in advertising industry); *Margolies v. Rudolph*, 2022 WL 2062460 at *2, *7 n.39 (E.D.N.Y 2022) (statement in entertainment industry Facebook group alleging plaintiff "crossed the line" and stating that defendant would "always believe women and anyone who speaks up about sexual harassment, assault, and other abuses of power"); *Goldman v. Reddington*, 2021 WL 4099462 at *4 (E.D.N.Y. 2021) (Facebook and LinkedIn posts accusing plaintiff of sexual assault and containing "Me Too" hashtag); *Coleman v. Grand*, 523 F. Supp. 3d 244, 259–260 (E.D.N.Y. 2021) (email to friends and music industry colleagues alleging plaintiff used his age and status to harass and take advantage of defendant during their sexual relationship).

statement was made in connection with an issue of public interest for purposes of the Anti-SLAPP Law. While the origin of a specific allegation as "mere gossip" may have relevance to the separate inquiry of whether a libel defendant made a false statement of fact with actual malice, it has nothing to do with the threshold question of whether the Anti-SLAPP Law applies to an action: that is, whether the statements giving rise to the action concern anything other than "purely private matters." N.Y. Civ. Rights Law § 76-a(1)(a)(1). Here, because the Challenged Statements arise from Defendants' exercise of their free speech rights in connection with issues of public interest – that is, topics "other than [] purely private matter[s]" – the lower courts should have applied the Anti-SLAPP Law to this action. N.Y. Civ. Rights Law §§ 76-a(1)(a)(1); 76-a(1)(d). This Court's review is necessary to correct the lower courts' mistaken approach to this question, to disavow any relevance of a statement as "gossip" in determining the Anti-SLAPP Law's applicability to a given action, and to clarify that the statute's plain text controls: whether a communication was made "in connection with an issue of public interest" shall be "construed broadly" to mean "any subject other than a purely private matter." N.Y. Civ. Rights Law §§ 76-a(1)(a)(1), 76-a(1)(d).

B. This Court Should Grant Review to Clarify the Anti-SLAPP Law's "Substantial Basis in Law" Standard

This matter also raises important questions this Court has not yet addressed directly about the Anti-SLAPP Law's "substantial basis in law" dismissal standard.

Specifically, the proposed appeal provides an opportunity for this Court to clarify that a plaintiff who fails to state a claim under CPLR 3211(a)(7) necessarily lacks a "substantial basis in law" for purposes of the Anti-SLAPP Law's CPLR 3211(g) standard.

CPLR 3211(g)(1) – part of the Anti-SLAPP Law – provides, in relevant part, that "[a] motion to dismiss based on [CPLR 3211(a)(7)], in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in [N.Y. Civ. Rights Law § 76-a], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law." This provision of the Anti-SLAPP Law both "flip[s] the burden of proof ordinarily applied in" typical CPLR 3211(a)(7) motions to dismiss and imposes a standard which is "more exacting than the liberal pleading standard applicable to ordinary CPLR 3211(a)(7) motions." *Reeves v. Associated Newspapers, Ltd.*, 210 N.Y.S.3d 25, 31, 36 (1st Dep't 2024).

The Anti-SLAPP Law itself does not specify what constitutes a "substantial basis in law," and this Court has not yet directly addressed this question. New York courts appear to agree based on legislative intent that a plaintiff's burden to demonstrate a *substantial* basis in law is higher than the typical "*reasonable* basis" burden at the motion to dismiss stage. *See* Siegel, Practice Commentaries,

McKinney's Cons Laws of NY, 3211:69 (emphasis added). But exactly what showing is required for a SLAPP plaintiff to satisfy this higher substantial basis standard remains unanswered. Certain lower courts have borrowed from cases applying the CPLR 3211(h) dismissal standard governing certain cases involving architects, engineers, and land surveyors, which also uses "substantial basis in law" language. *See, e.g.*, *Smartmatic USA Corp. v. Fox Corp.*, 213 A.D.3d 512, 404 (1st Dep't 2023) (treating the "substantial basis in law" language of CPLR 3211(h) and 3211(g) as coterminous, citing *Golby v. N & P Engineers & Land Surveyor, PLLC*, 185 A.D.3d 792, 793 (2d Dep't 2020), a 3211(h) case stating that a "substantial basis in law" requires "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact"). This proposed appeal provides an opportunity for this Court to clarify the meaning of the Anti-SLAPP Law's "substantial basis in law" dismissal standard—or, at a minimum, to hold explicitly that a plaintiff who fails to state a claim under CPLR 3211(a)(7) necessarily lacks a "substantial basis in law" for purposes of dismissal and mandatory attorneys' fees under the Anti-SLAPP Law. *See Reeves v. Associated Newspapers, Ltd.*, 210 N.Y.S.3d 25, 34–38 (1st Dep't 2024).

II. THIS MATTER RAISES QUESTIONS OF GREAT PUBLIC IMPORTANCE WITH SIGNIFICANT IMPLICATIONS FOR FREE SPEECH, ESPECIALLY IN THE CONTEXT OF ADVOCACY CONCERNING SEXUAL MISCONDUCT

This proposed appeal also merits review by this Court because the questions it raises carry significant implications for individuals' ability to speak about issues of public importance – in particular, about #MeToo-type allegations of sexual misconduct – without fear of lawsuits intended to punish or silence their truthful speech. Because the decisions below present issues of great public importance, review should be granted. *See* 22 NYCRR § 500.22(b)(4).

For the Anti-SLAPP Law to have the teeth the New York legislature intended, courts must enforce its mandate to award costs and attorneys' fees in any case arising from statements about matters of public interest where a libel plaintiff cannot establish a substantial basis in law for his claims. *See* N.Y. Civ. Rights Law § 70-a(1)(a). It is not enough for lower courts to "split the baby" by dismissing meritless libel suits without awarding attorneys' fees, as Supreme Court did here, and the Fourth Department affirmed. Indeed, this approach is inimical to the core purpose of the Anti-SLAPP Law, which is to prevent speakers on public issues from being intimidated into silence or cowed into conformity by the threat of a defamation lawsuit from a deep-pocketed plaintiff. *See Reeves*, 210 N.Y.S.3d at 27 ("A SLAPP suit, typically sounding in defamation, is brought to intimidate or silence a person who has spoken out about a matter of public interest."). Dismissing SLAPP suits

without also awarding mandatory attorneys' fees ignores the reality that the "threat of being put to the defense of a lawsuit may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *See Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (internal quotations and citation omitted).

These considerations are of significant public importance with respect to speech concerning *any* issue of public interest. And in the context of allegations of sexual misconduct – like the speech at the heart of this proposed appeal – these considerations take on an enhanced level of urgency and importance. In fact, a former staffer for Senator Hoylman, a sponsor of the 2020 amendments to New York's Anti-SLAPP Law, observed that "[o]ne of the arguments in support of strengthening New York's anti-SLAPP law was helping survivors of rape and sexual assault defeat bogus defamation suits by their abusers." @BurtonPhillips, Twitter (June 31, 2021, 9:25 PM), https://perma.cc/35RY-T4X6. *See also* Andrea Johnson, Ramya Sekaran, & Sasha Gombar, 2020 Progress Update: MeToo Workplace Reforms in the States, National Women's Law Center, 12 (Sept. 21, 2020), https://perma.cc/C8K6-ZRTN (noting "states have strengthened their anti-SLAPP and related laws to provide greater protection to those who speak up about sexual harassment and assault").

Unless this Court reverses the lower courts' decisions failing to apply the Anti-SLAPP Law to this action and refusing to award attorneys' fees, the New York legislature's efforts to protect those speaking out against sexual misconduct and other issues of public importance through the Anti-SLAPP Law are nothing but empty promises. Individuals seeking to speak out about sexual harassment and assault in their professional communities should be encouraged to do so, not punished and deterred. Allowing the lower courts' decisions to stand would not just punish Defendants further, it would also deter other individuals in the future from speaking out about these issues. On the other hand, granting leave to appeal and reversing the lower courts in this matter would send a powerful message to New Yorkers that our State's courts will not tolerate attacks intended to silence truthful speech on issues of public interest. Given the far-reaching impact of the issues raised in this proposed appeal, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court grant their motion for leave to appeal.

Dated: July 24, 2024
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC[4]

By: _____

Christina N. Neitzey
Mark H. Jackson
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (607) 255-4196
cn266@cornell.edu

Counsel for Defendants-Appellants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas, and Kirsten Milliron

[4] Nothing in this brief should be construed as representing the institutional views of Cornell Law School or Cornell University.

ORDER OF THE APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT, DATED MAY 3, 2024, WITH NOTICE OF ENTRY, DATED JULY 19, 2024

Onondaga County Clerk's Index No. 009463/2022

Supreme Court of the State of New York
Appellate Division — Fourth Department

Appellate Case No.: 23-00819

MICHAEL HAYES

Plaintiff-Respondent,

– v –

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC., FRED TURNER, CHAD DOUGLAS, AND KIRSTEN MILLIRON,

Defendants-Appellants.

AFFIRMATION OF SERVICE

I, Christina Neitzey, an attorney duly admitted to practice before the courts of the State of New York, hereby affirm the following to be true under the penalties of perjury:

1. I am an attorney with the Cornell Law School First Amendment Clinic, counsel for Defendants-Appellants in this action.

2. On July 19, 2024, I served a true copy of the enclosed Notice of Entry and annexed decision on the following:

Dirk J. Oudemool
333 East Onondaga Street
Suite 600
Syracuse, New York 13202
(315) 474-7447
dirkj5640@outlook.com

3. I made such service by enclosing the aforementioned documents in a sealed, properly addressed FedEx envelope, which I caused to be deposited into the custody of FedEx for two-day delivery prior to the latest time designated for two-day delivery.

Dated: July 19, 2024

Christina N. Neitzey
CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-9182
cn266@cornell.edu
Counsel for Defendants-Appellants

Onondaga County Clerk's Index No. 009463/2022

Supreme Court of the State of New York
Appellate Division — Fourth Department

Appellate Case No.: 23-00819

MICHAEL HAYES

Plaintiff-Respondent,

– v –

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC., FRED TURNER, CHAD DOUGLAS, AND KIRSTEN MILLIRON,

Defendants-Appellants.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that annexed hereto as Exhibit A is a true and correct copy of the Decision and Order dated May 3, 2024, that was entered in the office of the Clerk of the Appellate Division, Fourth Department, on May 3, 2024.

Dated: July 19, 2024

Christina N. Neitzey
CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-9182
cn266@cornell.edu
Counsel for Defendants-Appellants

TO: Dirk J. Oudemool
333 East Onondaga Street
Suite 600
Syracuse, New York 13202
(315) 474-7447
dirkj5640@outlook.com
Counsel for Plaintiff-Respondent

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

376

CA 23-00819

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

MICHAEL HAYES, PLAINTIFF-RESPONDENT,

V ORDER

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC, FRED TURNER, CHAD DOUGLAS AND KIRSTEN MILLIRON, DEFENDANTS-APPELLANTS.

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC, ITHACA (CAMERON MISNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered April 11, 2023. The order, inter alia, denied the motion of defendants insofar as it sought an award of attorney's fees and costs and punitive damages.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

DECISION AND ORDER OF THE HONORABLE ROBERT E. ANTONACCI II, DATED APRIL 11, 2023, WITH NOTICE OF ENTRY, DATED APRIL 17, 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

----------X

MICHAEL HAYES

Plaintiff,

-against-

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC., FRED TURNER, CHAD DOUGLAS, and KIRSTEN MILLIRON

Defendants.

----------X

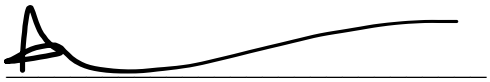
Index No.: 009463/2022

NOTICE OF ENTRY

COUNSELOR:

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of Hon. Robert E. Antonacci II, dated April 11, 2023, which was entered by the Office of the Clerk of the within named Court on April 11, 2023 with regard to Motion sequence 1.

Dated: April 17, 2023
New York, NY



ANNE LABARBERA
Anne LaBarbera P.C.
405 Lexington Avenue
9th Floor
New York, NY 10174
(212) 203-1910
anne@alpc.law

To: Dirk J. Oudemool, Esq. (via NYSCEF and US Mail)
Attorney for Plaintiff
333 Onondaga Street
Syracuse, NY 13202

At a term of the Supreme Court of the State of New York, held in and for the County of Onondaga, on January 25, 2023.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

MICHAEL HAYES,

Plaintiff,

v.

ALEC RICH,
NOAH RICH,
RHODA RICH,
JUNEXA, LLC,
FRED TURNER,
CHAD DOUGLAS and
KIRSTEN MILLIRON,

Defendants.

DECISION AND ORDER
Motion Sequence # 1
Short Form

Index No. 009463/2022

Appearances: Dirk J. Oudemool, Esq.
Attorney for Plaintiff

Anne LaBarbera, Esq.
Attorney for Defendants

ANTONACCI II, J.S.C.

The following papers having been considered by the Court on the Defendants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas and Kirsten Milliron's [hereinafter collectively "Rich, *et al.*"] motion for an order dismissing the summons and complaint of the Plaintiff Michael Hayes [hereinafter "Hayes"] pursuant to CPLR 3211(a)(7), CPLR 3211(g) [erroneously identified as "CPLR 2311(a)(7), CPLR § 2311(g)"], and Civil Rights Law § 76-a as the complaint fails to state a cause of action upon grounds which relief can be granted, is an action involving public participation, and has been commenced without a substantial basis in law or fact; and (b) granting judgment in favor of defendants for their attorney's fees and costs pursuant to Civil Rights Law § 70-a (1)(a) [erroneously identified as " Civil Rights Law § 76-a (1)(a)"]; and (c) granting discretionary punitive damages under Civil Rights Law § 70-a (1)(c) [erroneously identified as "Civil Rights Law § 76-a (1)(c)"]:

NYSCEF Documents 9 through 21 and 26 through 31

Hayes alleges that

> 6. On August 18, 2022, the defendant Alec Rich on Facebook stated that plaintiff has a long history of inappropriate behavior, plaintiff makes fake profiles to harass people and upon information and belief, he reiterated these slanderous statements at various band performances.
>
> 7. On August 20, 2022, the defendant Alec Rich on Facebook stated that plaintiff was prohibited from performing at 3 musical festivals for threatening women and that plaintiff hacked Noah Rich's Facebook account.
>
> 8. On August 30, 2022 and September 2, 2022, the defendant Alec Rich stated on Facebook that the plaintiff has been accused of sexually assaulting females.
>
> * * *
>
> 14. Each and everyone of the foregoing defamatory statements by the defendant's [*sic*] Alec Rich . . . are false.

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Alec Rich provides only hearsay statements with respect to the truth of the statements contained in ¶¶ 6 and 8 of the Complaint attributed to him, with the exception of the allegations contained in ¶ 7 of the Complaint. Alec Rich states that he "does not recall making the statement" with respect to the music festivals and did not make the statement with respect to alleging that Hayes "hacked Noah Rich's Facebook account." NYSCEF Document 13 [Affidavit of Alec Rich dated December 12, 2022].

Hayes alleges that

> 9. On August 18, 2022, defendant Noah Rich on Facebook stated there were sexual assault and harassment allegations against plaintiff and that plaintiff has manipulated others into bullying him.
>
> 10. On August 20, 2022, defendant Noah Rich on Facebook stated that plaintiff was kicked off Rust Fest for threatening a woman, that plaintiff was a dangerous predator and has sexual assault allegations pending.
>
> 11. On August 23, 2022, defendant Noah Rich on Facebook stated that plaintiff was a parasite with sexual assault allegations pending against him.
>
> 12. On September 5, 2022, defendant Noah Rich on Facebook stated plaintiff had sexually assaulted multiple women.

* * *

> 14. Each and everyone of the foregoing defamatory statements by the defendant's [*sic*] Noah Rich . . . are false.

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Noah Rich provides only hearsay statements with respect to the truth of the statements contained in ¶¶ 9 through 12 of the Complaint attributed to him. NYSCEF Document 14 [Affidavit of Noah Rich dated December 12, 2022].

Hayes alleges that

> 13. On August 18, 2022, defendant Rhoda Rich on Facebook stated plaintiff is a sexual predator and she was going to get plaintiff and his band blacklisted at venues his band is scheduled to perform at and on August 22, 2022, she stated plaintiffs victims are everywhere.
>
> * * *
>
> 14. Each and everyone of the foregoing defamatory statements by the defendant's [*sic*] Rhoda Rich . . . are false.

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Rhoda Rich (identified as Rhoda Stockmeier) provides only hearsay statements with respect to the truth of the statements contained in ¶ 13 of the Complaint attributed to her with the exception that she does "not remember making a post stating that I "was going to get [Hayes] and his band blacklisted". NYSCEF Document 15 [Affidavit of Rhoda Stockmeier dated December 12, 2022].

Hayes alleges that

> 16. On August 21, 2022, defendant Chad Douglas republished on Facebook the foregoing false statements made by the defendant's [*sic*] Alec Rich, Noah Rich and Rhoda Rich.
>
> 17. The republication of those obviously defamatory statements about plaintiff were made without verification of the allegations or any contact with plaintiff regarding the same. Those republished statements were false . . .

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Chad Douglas provides only hearsay statements with respect to the truth of the statements contained in ¶ 16 of the Complaint attributed to him. NYSCEF Document 16 [Affidavit of Chad Douglas dated December 10, 2022].

Hayes alleges that

> 18. On August 16, 2022, defendant Fred Turner on Facebook stated that he quit plaintiff's band because he could not be associated with plaintiff because plaintiff was accused of sexual assault and harassment.
>
> 19. The defendant Fred Turner had no basis for making such a statement other than information he received from the other defendants in this action and he never asked the plaintiff if this information was true which it was not.
>
> 20. By reason of the foregoing plaintiff was defamed in the music industry . . .

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Fred Turner provides only hearsay statements with respect to the truth of the statements contained in ¶ 18 of the Complaint attributed to him, with the exception of the statement that "I have witnessed [Hayes] engaging in gaslighting and other manipulative behavior". NYSCEF Document 16 [Affidavit of Fred Turner dated December 10, 2022].

Hayes alleges that

> 21. Defendant Kirsten Milliron does business under the assumed name of Milliron Design, as a freelance photographer and publicist for local bands and maintains a Facebook page wherein she posts photos and comments about various local bands including plaintiff's band and defendants' bands.
>
> 22. On August 16, 2022, defendant Kirsten Milliron on Facebook stated that plaintiff sexually harassed her friends, aligned himself with sexual predators, groped a person at a show and has a "handsy" reputation and she made similar statements thereafter on August 17th, 18th and 20th, 2022.
>
> 23. All of these statements she made are false and defamed plaintiff . . .

NYSCEF Document 12 [Exhibit A (Summons and Complaint)].

In response, Kirsten Milliron provides only hearsay statements with respect to the truth of the statements contained in ¶¶ 21 and 22 of the Complaint attributed to her. NYSCEF Document 18 [Affidavit of Kirsten Milliron dated December 9, 2022].

Applicability of Civil Rights Law § 76-a

Civil Rights Law § 76-a (1) provides that

> 1. For purposes of this section:
>
> (a) An "action involving public petition and participation" is a claim based upon:
>
> (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.
>
> (b) "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.
>
> (c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.
>
> (d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.
>
> 2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

The question before the Court is whether the statements attributed to the several defendants are "in connection with an issue of public interest" (Civil Rights Law § 76-a(1)[a][2] and [d]).

"[S]exual impropriety and power dynamics in the music industry, as in others, [are] indisputably an issue of public interest". *Coleman v Grand*, 523 F Supp 3d [ED NY 2021]; *see also Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26 at 31 [1st Dept 2022].

The parties themselves in *Coleman* were involved in a sexual relationship that contained issues of "power dynamics in the music industry" (*Coleman, supra* at 250).

The case before the Court is more accurately described as

> This situation only involves two Central New York bands competing for audiences and the associates of Junexa accusing the plaintiff of unsupported illegal reprehensible personal conduct, as a means to increase their popularity and audience and diminish that of the plaintiff.

NYSCEF Document 28 [Memorandum of Law to Motion to Dismiss] at 3.

"Statements falling 'into the realm of mere gossip and prurient interest' are not matters of public concern" (*Aristocrat Plastic Surgery, P.C. v Silva*, 106 AD3d 26 at 30 [1st Dept 2022], citing *Huggins v. Moore*, 94 NY2d 296 at 302-303 [Ct App 1999]).

Rich, *et al.*, have themselves identified the statements complained of as gossip.

> I remember posting on Facebook about this topic but recall only discussing *gossip* about which festival [Hayes] was kicked off of for his conduct.

NYSCEF Document 14 [Affidavit of Noah Rich] at ¶ 14 (emphasis added).

> Most, if not all of the alleged statements . . . could be characterized as *gossip*.

NYSCEF Document 11 [Affirmation in Support of Motion to Dismiss of Anne LaBarbera, Esq., dated December 15, 2022] at ¶ 13 (emphasis added).

The Court therefore finds that the statements complained of and attributed to the various defendants do not fall within the definition of "in connection with an issue of public interest" but are statements in "the realm of mere gossip and prurient interest" and are not subject to the provisions of Civil Rights Law § 76-a.

Common Law Defamation

> Defamation has long been recognized to arise from "the making of a false statement which tends to ' "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" ' " (*Foster v Churchill*, 87 NY2d 744, 751, quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379, *cert denied* 434 US 969, quoting *Sydney v MacFadden Newspaper Publ. Corp.*, 242 NY 208, 211-212). The elements are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (Restatement [Second] of Torts § 558). CPLR 3016 (a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (*Arsenault v Forquer*, 197 AD2d 554; *Vardi v Mutual Life Ins. Co.*, 136 AD2d 453).

Dillon v. City of New York, 261 AD2d 34 at 37–38 [1st Dept 1999].

CPLR 3016(a) requires that "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

The complaint must set forth the "*actual words* complained of" (*Golia v Vieira*, 162 AD3d 865 at 869 [2nd Dept 2018])(emphasis added); the Complaint herein contains what can only be described as paraphrasing of the same.

The Court will therefore, pursuant to the inherent authority contained in the omnibus request for "such further and different relief as to the Court may seem just and proper and equitable under the circumstances", dismiss the Complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) due to the failure to satisfy the requirements of CPLR 3016(a).

NOW, it is hereby

ORDERED AND ADJUDGED that the Defendants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas and Kirsten Milliron's motion for an order dismissing the summons and complaint of the Plaintiff Michael Hayes pursuant to CPLR 3211(a)(7), CPLR 3211(g), and Civil Rights Law § 76-a as the complaint fails to state a cause of action upon grounds which relief can be granted, is an action involving public participation, and has been commenced without a substantial basis in law or fact, is hereby denied, and it is further

ORDERED AND ADJUDGED that the Defendants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas and Kirsten Milliron's motion for an order granting judgment against the Plaintiff Michael Hayes for their attorney's fees and costs pursuant to Civil Rights Law § 70-a (1)(a) is hereby denied, and it is further

ORDERED AND ADJUDGED that the Defendants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas and Kirsten Milliron's motion for an order granting judgment for discretionary punitive damages under Civil Rights Law § 70-a (1)(c) against the Plaintiff Michael Hayes is hereby denied, and it is further

ORDERED AND ADJUDGED that the Defendants Alec Rich, Noah Rich, Rhoda Rich, Junexa, LLC, Fred Turner, Chad Douglas and Kirsten Milliron's motion for an order granting such further and different relief as to the Court may seem just and proper and equitable under the circumstances is hereby granted and the summons and complaint of the Plaintiff Michael Hayes is hereby dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7) due to the failure to satisfy the requirements of CPLR 3016(a).

Dated: April 11, 2023

ENTER,

HON. ROBERT E. ANTONACCI II, J.S.C.