SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 54

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against- Index No. 653118/2014

KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER,

Defendants.

KESA ROSE SEBERT p/k/a KESHA,

Counterclaim Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC, and DOES 1-25, inclusive,

Counterclaim Defendants.

June 30, 2021

Proceedings Held Via Microsoft Teams

B E F O R E:

HON. JENNIFER G. SCHECTER, Justice

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THE COURT: Good morning, everyone.

MR. MOVIT: Good morning.

MS. LEPERA: Good morning, your Honor.

THE COURT: It's great to see you all.

I've read your papers and we're going to get started with oral argument.

This is defendants' motion. That said, what I think we'll do is I'd like to start with the plaintiff and hear from Ms. Lepera and then what I'll do, Ms. Godesky, is let you have the final say and respond after that.

Ms. Lepera, let me just say straight from the outset, let's focus, really, most on the retroactivity here. Because I just do not believe that law of the case would have any impact on the ability to amend or to assert 76-a here.

The fact is, this really is the first opportunity that defendant had to meaningfully raise the issue. It should go initially to the trial court before it makes its way to the Appellate Division. That's how our law developed. And I am not going to rule that it's precluded by law of the case.

So, with that said.

MS. LEPERA: Okay. Understood.

I'll give it a little bit of argument on that front after I go through the retroactivity, as you've requested.

And, actually, your Honor, that is where I was planning on starting anyway, because I think that, with respect to the retroactivity analysis, that, you know, that defendant claims we, you know, halfheartedly or agree with. Not so. Not so whatsoever.

We think that the retroactivity analysis that they rely on is completely wrong and it starts from Palin.

THE COURT: Is it eight, now, judges who have addressed the issue; all eight of them are wrong?

MS. LEPERA: Yes.

And the reason why they're all wrong is they all follow Palin like a herd. They follow Palin -- you know, with all due respect to, Judge Rakoff, I would like to actually walk through the Palin decision with you very carefully because it is in conflict with the higher courts of this state. And I will give you specific references and citations to it. And the cases, of course, which none of them are binding on you, with respect to the post-Palin decisions in the federal court, the lower federal court and the lower state court all rely on Palin and they do very little analysis, if any whatsoever.

So Palin is the leader of the pack and the rest of them follow like a herd and they all get it wrong and here's why.

First, if you look at the Palin case, in no less

than three to four places, Judge Rakoff mistakenly refers to 76-a as applying to public figures.

For example, he says: "This is a motion for an order modifying the opinion" -- previous opinion -- "to reflect the fact that on November 10, 2020, New York amended its anti-strategic litigation against public participation law to expressly require that public figures prove actual malice by clear and convincing evidence."

THE COURT: But there, the provision had -- it didn't dramatically change the landscape of the case by any means --

MS. LEPERA: No, but --

THE COURT: -- but, constitutionally, it was always going to be the same standard no matter what.

And I appreciate that Judge Rakoff does refer to public figures several times in the analysis.

MS. LEPERA: Correct.

THE COURT: But, still, what's wrong with the analysis in terms of focusing on the remedial purpose of the statute and the presumption that, when statutes are enacted for a remedial purpose, they can have -- they will have retroactive effect if it's remedial?

MS. LEPERA: Because that's an incorrect statement of the law of the highest court, the Court of Appeals.

Judge Rakoff relied on Gleason and he cited Gleason

in a cursory manner. But if you look at Gleason and the case on which it relies, which is Majewski, Majewski versus Broadalbin-Pert Cent. School District, 673 New York Sup. 2d in 1998, when Judge Rakoff said that there's a presumption that there's retroactive effect in remedial legislation, he's completely incorrect.

And, in fact, the Court of Appeals has said: "Classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity, since the term may broadly encompass any attempt to supply some defect or abridge some super-fluidity in the former law."

So the presumption against retroactivity, in which the Court of Appeals in that particular case goes into great detail, as does the Regina case, which we cite also from the Court of Appeals, talks about the strength of this presumption against retroactivity. So simply because a statute may or may not be remedial -- and all statutes to some extent are remedial -- that does not create a presumption of retroactivity. Quite to the contrary.

That's an incorrect statement of law that Judge Rakoff made.

THE COURT: Well, one moment.

What about Gleason? Doesn't Gleason say that there are two different applicable principles, right? The principles articulated in Gleason, I think they said there

are two axioms of statutory interpretation, that statutes are presumed to have prospective effects unless the legislative preference for retroactivity is explicit or clearly stated.

MS. LEPERA: Correct.

THE COURT: However -- there's a however there -- remedial legislation should be given retroactive effect in order to effect the beneficial purpose of a statute, right?

And, in Gleason, the Court looked through the legislative history and saw the word "immediate" and said immediate -- well, in Majewski at least, it said -- immediate is -- isn't so helpful --

MS. LEPERA: Correct.

THE COURT: -- in ascertaining whether or not there's definitive legislative intent --

MS. LEPERA: Correct.

THE COURT: -- for retroactive or prospective. But what it does do is it evinces a sense of urgency. And, in Gleason, the Court laid out certain factors in terms of whether or not there should be retroactive application of the statute.

MS. LEPERA: In Gleason, however, there was a decision that spurred the Court to make the change in the legislation. There was a decision that they didn't like, Solartechnik, which they basically said was not good law and

they wanted, you know, to change that case that came down. That factor doesn't apply here at all.

The immediate issue, I think, is the other reason -- the other prong of the Palin case, where Judge Rakoff got it wrong, because not only does Majewski say that, makes, essentially, a neutral -- a neutral statement. It doesn't show a clear expression of intent to go retroactive.

And, in fact, in the subsequent case, Spitzer versus Daicel Chemical Industries, 42 A.D.3d 301, the First Department actually said very specifically that this is not to be deemed -- the language in the statute that it shall take effect immediately does not support retroactive application. Citing Majewski. Even remedial statutes are applied prospectively where they establish new rights or where retroactive application would impair a previously available defense.

So in the two concepts that Judge Rakoff relied on, which we think was a very facile, very sort of knee jerk, not a substantive analysis, a full and fair vetting of all the core principles behind why there's a fundamental body of law, long-standing body of law that retroactivity is viewed with suspicion and you need to have a clear expression of intent.

(Discussion held off the record)

(Record read)

MS. LEPERA: There's a long-standing body of law that makes it very clear that the courts in New York -- and there's cases that say -- should look to legislation being applied retroactively suspiciously, particularly if it does impair rights.

So the two things that Judge Rakoff said, which are his understanding of the expression of the legislative intent, was: One, that it was said to be immediate. The First Department said that's just not enough. Number two, the fact that it's immediate --

THE COURT: Well, Majewsky says that's not enough.

MS. LEPERA: No. So does Spitzer in the First Department --

THE COURT: I agree that immediately is not enough.

MS. LEPERA: Okay.

THE COURT: Though, again, it does convey a certain sense of urgency, but I don't know what "immediately" means in terms of prospective versus retroactive on a dispositive level.

MS. LEPERA: Right.

THE COURT: I'm not even going to focus today on Palin or the seven cases that were decided.

I really want to focus on the Court of Appeals precedent here.

MS. LEPERA: Yes.

THE COURT: But I want to go back to Gleason, because there are many similarities here with Gleason. You know, Gleason did have the word "immediate" and, again, the Court cited Majewski, which does not one way or the other, but it does evince some sense of urgency in terms of the purpose. So that's all I would look at the word "immediately" for.

But let's look at the factors that Gleason looks to in terms of whether remedial legislation should be given retroactive effect. And the one factor it raises is did the legislature make a specific pronouncement.

MS. LEPERA: Correct.

THE COURT: And we'll talk about that in a minute.

But the other thing it looks to is whether or not it conveyed a sense of urgency and, again, it looked to that "immediate". And here I do think there is the sense of urgency.

But the second issue that's a factor that the Gleason court looked at is was the statute designed to rewrite an unintended judicial interpretation or an unintended interpretation.

So, Ms. Lepera, doesn't the legislative history here weigh in favor of finding that that factor is satisfied? Because when they passed the statute, the sponsor's memo says that it was, in fact, to correct or to

further serve the purpose that the statute was originally intended to satisfy.

MS. LEPERA: I think that it broadened it. The language was not unclear. It was applied correctly. It was applied too narrowly. So when you change the law and you create a new body of law and new rights, you are immediately also altering rights that previously exist on the other side.

And that's why I respectfully submit that I do not believe that the Gleason pronouncement, that in looking at the take effect immediately itself, I think that's a neutral comment, and particularly since the First Department in Spitzer, after Gleason, six years later, said it had no effect, does not support retroactive application. So that --

THE COURT: It's not the immediate.

It's if we look at the memorandum, right, it talks about:

Section 76-a of the Civil Rights Law was originally enacted by the legislature to provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.

MS. LEPERA: Um-hum.

THE COURT: However, as drafted and as narrowly

interpreted by the courts, the application of 76-a has failed to accomplish that objective. In practice, the current statute has been strictly limited to cases initiated by persons or business entities that are embroiled in controversies over a public application or permit usually in a real estate development situation. By revising the definition of an action involving public petition and participation, this amendment to section 76-a will better advance the purposes that the legislature originally identified in enacting New York's Anti-SLAPP law. This is done by broadly widening the ambit of the law to include matters of public interest, which is to be broadly construed, anything other than a purely private matter.

Doesn't that indicate that what they're trying to do is bring this provision into line with what the intent always was?

MS. LEPERA: You know, that is possible.

But what it doesn't do is it doesn't address the retroactivity issue, which it could easily have done in the context of the statute and in the bill. On the other hand, and the cases are very clear, including the Court of Appeals discussion, if there's something in the body of amendment that is different in one place than in the other, and that is 70-a -- and here Judge Rakoff also gave short shrift to the fact that 70-a said "continue" and he said "Well, of

course, because that doesn't matter, because it's for a public figure." But it does matter because it's not in 76-a. You have two separate opportunities in both of these to essentially allow for a statement to be made by the legislation that essentially shows a clearly expressed intent for retroactivity. It is not in 76-a. In 70-a, it says if a case continues, it's going to be subsumed. And it says it specifically. Because one of the things that the legislation talks about a lot is that they didn't like the fact that it said "may" for the legal fee issue, too much discretion, and they changed it to "shall". And that, they said, was erroneously done in the past or not done sufficiently. So I think the fact that, actually, that they speak to this issue in the legislative history and they had the opportunity to clearly express their intent in one side of the amendment and not -- and didn't do it in the other -- and, again, I would submit, under the highest courts of the state, Gleason notwithstanding, the body of law consistently down through Spitzer says that that's a neutral statement, immediately".

You look at that and then you look at the absence of what they put in 70-a and you do not have a clear expression of intent.

But I think, even more importantly, and I know your Honor doesn't like the law of the case argument, but here's

the point on that. If you look at the cases, and even if there's, you know, arguably a remedial purpose to 76-a, you have to still look at the impact on rights and whether or not you are changing -- and also the longevity. Often cases talk about how long is this retroactive period. This case has been going on for eight years and none of the other cases are remotely analogous to the situation of where we are now. And the fact of the matter is that the appellate court has determined that Mr. Gottwald is a private figure, that's his vested right, that, now, a retroactive application --

THE COURT: Isn't that the ultimate question?

MS. LEPERA: -- would deprive him of a vested right of having pursued a matter under a particular burden that has now been confirmed to exist by the Appellate Division.

And all of the cases that we've looked at have absolutely no discussion of the substantive right issue. And in the Palin case, of course it was given short shift because it really didn't matter.

The only argument that defendant has is that "we pled actual malice". Well, that is no longer relevant because now it's been determined by the Appellate Division to have a particular size of duty. And when you change someone's duty retroactively, you are effectively changing a right that has vested. And there's a balance that has to

happen here. And that has not happened in any of those other cases because the circumstances are completely different.

So, I would submit to you --

THE COURT: But, Ms. Lepera, the Appellate Division decision was a three-to-two decision, so I don't know how -- in terms of the vested right, who knows how it would have come out --

MS. LEPERA: Well, it exists, though.

THE COURT: -- it was a very close call in terms of his argument.

But I didn't appreciate, when I read the brief, what his due process argument is.

So, for example, when I look at Matter of Regina, the other Court of Appeals case that you discussed --

MS. LEPERA: Yes.

THE COURT: -- and there, by the way, the Court concluded that the legislature was clear that it was intended to have retroactive effect, but, nonetheless, did not apply it retroactively because it would disturb, you know, the landlord's behavior in terms of they had reason to believe that they were acting in a completely lawful manner. They didn't have the records anymore in accord with perfectly legal practice. And all of a sudden that would undercut that in a substantial way.

And I don't appreciate here what would Mr. Gottwald have done any differently.

MS. LEPERA: Well --

THE COURT: How would --

MS. LEPERA: -- he pursued this case -- he pursued this case -- excuse me, I didn't mean to interrupt.

He pursued this case under a very specific set of guidelines as to what his duty and burden was if he were to be deemed a private figure. And he is now currently vested with that particular set of duties. And if it's an increase in his duty, to now increase his burden, it's similar to essentially changing a defense or giving a new right. So now you have a situation where there's a new right that's being imbued to defendant to challenge his statement, increasing his burden.

Under -- the reason why -- the First Department decision that has come down and the reason why it would have behooved O'Melveny and defendant to have raised it then is that decision did vest him with something more significant than had it been before as did your decision.

Certainly, if that SLAPP statute had been on the books and they didn't raise it in summary judgment, they would have waived it.

The progeny of case law that we do cite in the brief, with all due respect, makes it very clear that they

had a full and fair opportunity to raise it and strategically they decided not to.

And we may be in the same place, but, ultimately, this has been delayed and deferred for a significant period of time.

But he has a vested size of a duty, if you would. And the cases talk about what's a substantive right. And a change in duty is a substantive right that's impaired. And a retroactive legislation that impairs a substantive right, size of duty, gives somebody a larger right, takes away something, that is something that needs to be balanced.

And none of these other cases have that quality or characteristic.

So, if you look at the standard of looking to whether the clear intent of the legislature is to be retroactive, with this balancing act, which is not done properly in Palin, I submit, but also has not been done in any other cases.

And in this particular case, where we have a very unique set of circumstances that distinguishes it considerably from anything else that has come before, and you view it in the context of where we are in this litigation and the First Department's ruling, you look, on the one hand, what is it that is supporting retroactivity with a clear intent. Nothing, other than clear -- the

immediacy, which I say is a wash.

Then you have this legislative discussion, okay, but you pair that up with 70-a and they had a clear opportunity to say "Wait a minute, I'd better make sure, since we want this to be retroactive, that we say so, because we've said it for 70-a, why wouldn't we say it for 76-a." They did not. And the cases in the Court of Appeals progeny are very clear that that's a significant difference to evaluate.

THE COURT: But the legislature, Ms. Lepera, isn't always careful and if it were, we wouldn't be here dealing with this today, we'd have a pronouncement that's explicit one way or the other.

But why, necessarily, when they said, you know, commenced or continued in 70-a, why can't I even glean from that that this is the same statutory scheme, the same article, that they had that same intent in terms of the urgency and wanted it to apply here? Why is that dispositively not the case here? They could have said "here too".

MS. LEPERA: I think it's very different. I think it's very different.

And that also relates to the counterclaim, because when you talk about something happening for the future conduct of a case, okay, ultimately, then you're dealing

with how that case projects going forward.

(Discussion held off the record)

(Pause in proceedings)

THE COURT: Do you recall where you were, Ms. Lepera?

MS. LEPERA: I was saying, you just said a minute ago, your Honor, with due respect, you said that it's not clear, you said that the pronouncement's not clear and sometimes they don't say things clearly and here we are and it's vague.

Well, the point is, you cannot have where retroactive application under the Court of Appeals progeny unless it is a clearly expressed intent, particularly if it affects substantive rights. So --

THE COURT: One moment.

What about Gleason? Gleason had, you know, retroactive effect and it wasn't clear --

MS. LEPERA: Because I believe, in that case, all they were doing is essentially saying arbitration provisions had to be consolidated. There wasn't a shred of discussion about taking away substantive rights. It was completely distinct.

In fact, if you look at the Spitzer case, there was a right of action that was given to indirect purchasers to sue, okay, for serious violations to protect New York

consumers. And even in that context, clearly, the legislation was looking to give a remedial effect for consumers to be able to have a broader cause of action, not retroactive.

So, again, if you have to -- if you have to parse it so that you can't see it, okay, there's got to be a balance. And, ultimately, here, the balance, if you take away the immediacy, which I think you have to under the case law, and if you look at a statement by them, there is none, except there's a contrary one in 70-a, I don't see how one could reconcile them as moving that language over to 76-a, when they had a full and fair opportunity to ultimately put that in the statute.

Then you look at the other side of the equation with the presumption against retroactivity and the strong fundamental assessment of whether rights are being changed, duties changed, substantive rights impacted. And here, I would submit, we have such a now -- whether it's three-two or not and whether it changes -- it's now a vested right that the Court of Appeals -- that the First Department has said we only have the burden of proof with respect to preponderance and negligence. That is something that he relied on in bringing the case and pursuing the case and is, in fact, now established that he was correct in that premise. That is something that has to be evaluated.

Whether you look at the law of the case or it's done in the retroactivity analysis, I think that, ultimately, you have a situation here where you do not have a clear expression of intent. And the retroactivity would impair substantial rights. So the presumption of being prospective obtained, it has not been overcome by any -- certainly not by any of the cases.

THE COURT: Ms. Lepera, he would not have brought the action if the statute were in effect when he commenced the case?

MS. LEPERA: Well, what is an interesting situation is, obviously, when you ask anyone that question, and they take a case under current laws and current reliance on laws, that's a hindsight question. But there was a reliance. So you don't -- you can't simply say "Well, okay, now, ultimately, you know, you can't -- just destroy that reliance on pre-existing, you know, case progeny and rights and duties." It has to be evaluated in the context of an impairment analysis, not whether someone would do it or not. It's an objective look at what is occurring by a retroactive application.

And, again, we start with this presumption, which no one seems to be really paying much attention to, including in the current eight cases, that it is prospective. And the only thing that changes that is the

clear expression of legislative intent. You can't --

THE COURT: That's not what Gleason says.

What Gleason says is:

It's presumed to have prospective effects unless the legislative preference for retroactivity is explicit. However, the case continues, remedial legislation should be given retroactive effect in order to effect the beneficial purpose.

And then it goes through the factors, you know. Was there a specific pronouncement? Here, there was not. Was there a conveying a sense of urgency? And, again, there, they looked at the language "immediate" for -- in favor of urgency as opposed to explicit legislative pronouncement. But was the statute designed to rewrite an unintended judicial interpretation? Does the enactment itself reaffirm legislative judgement about what the law should be?

Don't all those factors that are announced in Gleason weigh in favor of applying this retroactively?

MS. LEPERA: No, because there's not a single discussion in Gleason about the substantial -- substantive right issue.

And if you read Spitzer, which I urge you -- the Court to do, it specifically says that even if there's -- remedial statutes are to be applied prospectively -- this is

the First Department -- when they establish new rights or where retroactive implication would impair a previously available defense.

Analogous to that is impairing a duty, changing a duty, creating a new right, which is what now defendant would urge she has, which is to defend in this manner in connection with a lower -- with a higher burden.

So the First Department has said there is no presumption of retroactivity, as the Palin court said and as the Gleason court may seem to be suggesting, there's no presumption of retroactivity just because there's a remedial statute. Quite to the contrary. There's a continuing presumption of prospectivity, unless there's a clear expression of intent.

Here, in this particular statute, it is, I think, quite clear that the legislature chose not to put anything in 76-a, like 70-a, when they could have very easily. It was two words, okay? They didn't do it. So that is -- that goes on the side of the opposite of retroactivity.

Let's put on the columns pro and con for retroactivity.

What they argue for retroactivity, other than these eight cases, which don't mean anything, is the immediacy language. Majewski and Spitzer says that's neutral at best. It's remedial.

THE COURT: I'm not going to buy the immediacy.

MS. LEPERA: Understood, but I'm trying to put everything on the column of what they say is pro retro.

THE COURT: Okay, but you got me at the immediacy.

MS. LEPERA: Pro retro, all they have is immediacy. That's gone. We agree on that.

And then, on the other point, the remedial. As Majewski and Spitzer both say clearly, that's not enough. You have to look at the substantive right. It's not an automatic shifting of going from presumption of prospectivity to presumption of retroactivity just because its arguably remedial. All statutes are remedial.

And if you look at Gleason, Gleason is extremely different in the sense of both what the right was that they were effecting, an arbitration consolidation; no one was being deprived of any substantive right of a burden or a defense or a claim. It was just a consolidation of proceedings for judicial efficiency. There was a case that came down that they took immediate issue to when they basically said "This is a wrong decision. We have to change the law now." So those senses of urgency in Gleason are different.

And there's no substantive right impairment.

So on the pro retroactivity, you have no immediacy, doesn't count; you have remedial, which is not enough to

change the presumption. And that's it.

Oh, excuse me -- right, that's it on the pro retroactivity side.

On the pro prospectivity side, you have, you know, no clear expression of intent in the statute; a contrary expression in 70-a. You also have an impairment of substantive rights.

So when you measure this balance, you have low weighing on pro retroactivity and you have continued support for the presumption of prospectivity.

And I say this because, if you really look at the way that these eight -- and the fact that there's eight courts that did this, all following Palin, which is just wrong on the law and even its interpretation of the statute, gives apparent weight to it, but it's really, effectively, a meaningless body of eight cases that are not thoughtful, are not looking at this issue under the Court of Appeals precedent in Majewski and Spitzer and are not really dealing, in any of those cases, with a substantive impairment of rights, other than here.

And I think, ultimately, it would be error to allow a finding of retroactivity when the pro retroactivity column has nothing, no immediacy, we've agreed on that, and a remedial which doesn't shift the burden.

And on the pro side, a statute that could have said

this applies going forward to retroactive -- cases that are continued, meaning cases that are on the books already this applies to. And they didn't do that. They only did it in 70-a.

And the reason it's, I think, a different concept in 70-a is because, at the conclusion of the case, here, obviously, there's nothing that would support the counterclaim from a matter of fact or law because he has proven, to this juncture, in this case, a substantial basis in fact and law, under both your decision and the Appellate Division decision.

So, in the event down the road, as a -- hypothetically say something magical happened at trial and there will be something new. It's essentially equivalent to a fee shifting that would happen in the event they prevail, but not automatically, because it's not an automatic shifting, it's only in the event they prevail and then the Court would then look to see whether fees should be awarded because, at that point, something occurred in the trial where you could conclude there's no substantial basis in fact and law.

So we think the counterclaim, while it could, theoretically, at some point be ripe, right now it's contrary to all of the jurisprudence in this case. There is, at this moment, a substantial basis in fact and law.

Down the road, I would submit, if they were to renew it, it should be denied without prejudice to renewal after trail.

It's not a jury question, either. They're all wrong on that. It's a judge's decision. The cases they cite are all sanctions cases for post-trial activity.

THE COURT: How do we know it's a judge decision, by the way?

MS. LEPERA: Because it's analogous to the fee shifting statute. And the cases they cite in their own brief where there had been a determination, for example, that the case was solid through summary judgment, but then something happened at trial which rendered it frivolous or the like and, at that point, after that point, then there's a determination by the judge as to whether or not sanctions should be forwarded. And they cite to Title IX cases, they cite to Rule 11 cases. So they're analogizing it. And I think it is somewhat to be analogized. But, for now, that counterclaim has no current merit, because the facts and the law have already been determined at this stage to have substantial basis in fact and law.

I say it's speculative, premature and not ripe. Could it be after trial? Conceivably. But that's not a ground for an amendment now, which would just give us a right to basically amend as well, because there's nothing different.

Frankly, if she has a claim now that seems to stifle his speech for bringing a case, which is a communication, okay, in a forum that is about a right, ultimately, you know, we would be arguing the same thing. So it just seems to me that that should be set for post trial. It's premature. Otherwise, we could be back with summary judgment on the counterclaim prior to trial, because it's -- there is a substantial basis in fact right now, as a matter of fact, as a matter of law and law of the case.

But I digress on the counterclaim and I do want to make it really clear that -- and I know this is -- there's a lot of -- what's the word? -- you know, sentiment about this statute and its application. That doesn't mean it's retroactive. There's a very clear line of demarcation in the case law as to when that can occur. And it is an uphill battle with a presumption of prospectivity. You can't take that uphill battle of prospectivity and basically say it's no longer valid unless you have factors that are sufficient to remove that presumption.

And I will say again, and I submit that under the cases, certainly, that I've read and that I've analyzed, the core fundamental proposition of prospectivity has to be given serious consideration in the context of where we are.

And if you agree with me that the immediacy is irrelevant, the fact that it's remedial is not a change in

the presumption, particularly when there's a substantive right involved.

And the remedial can also be looked at with the legislative intent and the difference between 76 and 70-a. And when Judge Rakoff basically said "Well, of course they didn't have to put it in 76-a because there's actual malice for public figures," again there's this facile sort of suggestion that it's automatically retroactive, maybe because of some sort of public, you know, sentiment that seems to be in this whole movement issue. But that doesn't change the clear body of law and the linear concepts that have to be applied here strategically and sensibly with the presumption in mind and with a substantive right being changed.

The arbitration consolidation in Gleason, no substantive right change. Case came down, it was -- okay, they wanted for judicial efficiency to not have multiple arbitration proceedings. Makes sense. Let's do it right away. Let's apply it to cases that are in the can already. Not analogous.

Majewski is more analogous. Spitzer is more analogous dealing with consumers. Consumers clearly want to sue. They've been given a right by the legislature to sue for Donnelly violations. This is serious. It's a remedial act to help New York consumers. Not retroactive. It's

impairing a right --

THE COURT: Does it matter, the significance of the remedial purpose, in terms of affecting free speech and -- you know, again, I look at some of the things that the legislators have said about this provision --

MS. LEPERA: I understand.

It doesn't make it retroactive -- sorry.

(Discussion held off the record)

THE COURT: For example, that the statute's enacted to provide the utmost protection for the free exercise of speech and how the original legislation intended to do that, but failed to accomplish the purpose.

I mean, it seems so important to the legislature.

And, sure, would it have been better if I had the explicit pronouncement one way or the other? Of course it would be better. It would be better if we had that in all legislation so that it's very clear and these issues don't come up. But we don't have it in a lot of legislation. But it's not just this section, it's we don't have it oftentimes and that's why we have these cases that apply all these different presumptions and principles and rules.

And in trying to harmonize them, you know, I keep seeing the theme remedial legislation should be given retroactive effect to, you know, effectuate the beneficial purpose that was intended. And we have legislators talking

about how -- the fact that, you know, without this, our democracy is threatened.

Why doesn't that evince that this has a significant remedial purpose?

MS. LEPERA: Again, under Spitzer and the First Department language -- excuse me -- "Even remedial statutes are applied prospectively when they establish new rights or where retroactive application would impair a previously available defense." And there's cases that talk about what these rights are that are impaired by retroactive. They speak of duties. They speak of legal claims and rights.

So, again, just because it's remedial doesn't mean it's retroactive. And this is where the facile concept comes down the road, where it can be remedial and prospective. It can be a deterrent for future situations so there aren't frivolous cases brought in the future. It doesn't mean if it's remedial, it's retroactive.

And here's why there needs to be a clear expression of intent, because it tramples on substantive existing rights. And we keep saying the same thing. There is no clear expression here. Because there's no clear expression, the presumption has to obtain her prospectivity. And they had the opportunity to make the presumption -- excuse me -- to make it clear that it's retroactive and they chose not to do that.

THE COURT: What about in the cases where there was a remedial purpose and no explicit one way or the other in those cases? Do I balance the substantive right --

MS. LEPERA: Yes.

THE COURT: Well, in Regina, the Court found there would be a violation of due process.

What if I don't believe --

MS. LEPERA: That's what we're saying --

THE COURT: One moment.

MS. LEPERA: I'm sorry. It's hard for me to tell when there's a lag.

THE COURT: I understand.

Welcome to the world of virtual proceedings.

MS. LEPERA: My apologies.

THE COURT: But if I don't buy the due process argument, that this would work a violation of due process, then why would it be incorrect to do -- go down the remedial road and say remedial presumed retroactive and no due process violation here?

MS. LEPERA: In Regina, they actually struck down as unconstitutional a retroactive application that was in there. Different. It doesn't have to be a violation of due process in order to weigh it. It has to affect substantive rights or impair them, which brings due process concerns. Okay? That is the difference.

And I think that, ultimately, that is where we stand now, having a duty expressed by the Court -- the First Department as to what his legal right is that is going to be vacated or taken away. That is taking away a right, taking away his vested standard of duty. And that is something that is a due process concern.

Is the statute violating -- violating due process? No, because it doesn't say it's retroactive, so it doesn't take that whole analysis that Regina did to determine whether the statute is unconstitutional.

Here, we're just simply looking at the statute and, as the cases make it very clear, there's three things.

One, there's a presumption of prospectivity. No dispute. And it's a strong one. It's valued one. It's a fundamental cannon that goes back prior to the republic. Retroactive legislation is supposed to be looked at suspiciously. These are not my words. These are the words of the Court of Appeals and the First Department.

Two -- so you have the presumption.

Two, to overcome it you have to have a clear expression of legislative intent. Clear. We don't have it. We do not have a clear expression. We have immediacy, which doesn't count. We have a suggestion of remedial. But remedial, as the First Department has said, does not overcome the presumption of prospectivity. Remedial

statutes can be deemed prospective. And so, then, you have very little to establish anything overcoming the presumption of prospectivity.

THE COURT: I feel like "the law is remedial" doesn't work, except for when it does. That's how these cases go.

MS. LEPERA: Everything is remedial, though. Every statute tries to address something to make something better in the law. Every statute is remedial. It's a very vague and conclusory term. If you're remedying something, it doesn't mean it's retroactive. That's why the First Department said that in Spitzer. It doesn't mean it's retroactive. There's a strong remedial purpose for just enacting the statute prospectively.

THE COURT: Let me hear from Ms. Godesky.

MS. GODESKY: I'd like to open by saying that there absolutely is a dispute with regard to this presumption of prospectivity because, as your Honor pointed out, the Gleason case makes clear that that presumption does not apply in cases involving remedial legislation. And the axiom of statutory interpretation is that, when you're dealing a with a remedial statute, a statute that's intended to fix or to cure something, it necessarily applies retroactively.

THE COURT: What about Ms. Lepera's point that all

amendments are remedial, right, otherwise there wouldn't need to be an amendment if the statute was perfect?

MS. GODESKY: That may be true, but I think your Honor hit the nail on the head earlier when you went through the legislative history and you pointed out how it is abundantly clear, when you read the legislative history, that the legislature felt there was a significant problem in New York law that needed to be corrected; there was a serious problem when it came to the protection of free speech rights in this state and they wanted to fix it.

And, your Honor, this is exactly the type of case that they had in mind when they decided to immediately correct the statute. And that's because this is a case where, under the old regime, even if Kesha were to prevail at trial and the jury found that she's telling the truth about her sexual assault, she wouldn't really win. She would have lost 10 years of her life to this litigation with absolutely no consequence to Dr. Luke, whose net worth means that paying legal bills is really no obstacle to continuing this case.

The effect on defendants of a case like this cannot be overstated. When you are sued for money you don't have because you reported a sexual assault, it is an all-consuming source of stress, anxiety, depression, financial stress, even physical pain.

And that's why, when you look at the legislative history, you have one of the sponsors who says this law is intended to fix and cure a problem because we currently have survivors of sexual abuse who are being dragged through the legislative system, the judiciary, through retaliatory litigations. That's what they wanted to fix. That's what they wanted to cure.

And so this needs to apply retroactively.

And your Honor's analysis is dead on under Gleason. Gleason is a Court of Appeals case that is still good law. It is controlling. And that is a case, just like this one, where, you're right, the legislature didn't specifically say this needs to take retroactive effect, but there, just like here, the legislature said it needs to take immediate effect. And that was a factor. That was something --

THE COURT: But, Ms. Godesky, not much was at stake, really, in Gleason. I mean, whether or not you had to buy a new index number doesn't seem like such a big deal.

MS. GODESKY: Well, I think the Court of Appeals laid out three factors that the Court should consider when it's conducting a retroactivity analysis. Right?

You look for urgency. We talked about that at length. The fact that the statute takes immediate effect is relevant to that.

Then you look to see whether the legislators were

intending to correct a problem in judicial interpretation. Your Honor previously read out loud the stated justification for this law, which is to correct the narrow application of this law in the courts. They wanted to fix that and make sure that there was the utmost protection for the free exercise of speech.

And the third factor, your Honor, is whether the amendment reaffirms a legislative judgment about what the law should be. And we have that, too. We have the legislators saying this amendment will better advance the purposes that the legislature originally intended when it enacted New York's Anti-SLAPP law.

All three criteria are satisfied.

And as for whether some sort of substantive rights or due process rights are involved here, they are not. Dr. Luke has not identified a single substantive right, some action, some conduct that he previously undertook in reliance on some idea that he wouldn't have to satisfy an actual malice standard. And that's because this law isn't really about Dr. Luke's conduct, it's about protecting Kesha's conduct and the right to exercise free speech. There is no impaired substantive right here.

And while Ms. Lepera keeps talking about a, quote-unquote, vested right that the actual malice standard will not apply, that is not right.

First of all, from the beginning of this case, plaintiffs have pled that they could satisfy the actual malice standard. That was not something that merely came up at the pleading stage. That was something they used to obtain far-reaching discovery throughout the pendency of this case. We cited in our papers motion to compel after motion to compel where the Court granted them leave to get discovery so that they could prove actual malice. We exchanged a trial exhibit list last year, your Honor. All of the documents that Dr. Luke had continuously cited as saying it proves actual malice, all of those are on his trial exhibit list.

And, yes, most recently the First Department held in a split decision that the actual malice standard won't apply, but Kesha has not exhausted her appellate rights on that issue. And there shouldn't have been a day that went by where Dr. Luke felt that he had a vested right to that legal standard because we filed this motion before the First Department even issued its decision on the public figure issue.

You do not have a right to a particular legal standard. Judge Rakoff got it right in Palin where he said, you know, "I don't need to think about private figures in this case because Ms. Palin is obviously a public figure." But he said "To be sure, states are free to subject to the

actual malice standard rule plaintiffs who otherwise wouldn't fall within it under the First Amendment."

And that is exactly what the New York legislators did here. Right? This is really targeted at private figures, because there was no need to urgently protect defendants in cases involving public figures, who are already subject to the actual malice standard. This was needed to protect plaintiffs in private-figure cases.

And you see this has been applied in the Coleman versus Grand case, where you had a private figure, saxophonist. The Goldman versus Reddington case, where you had a college student, right, this is --

THE COURT: Well, that's the exact issue here.

I don't think anyone disputes that Palin was a different case from this one in terms of changing the trajectory of the case. In this situation, the Civil Rights Law will change the case. And in Judge Rakoff's case, in the Palin case, it did not have that type of impact.

What about the point that plaintiff makes about the legislature could have explicitly said so and it could have used the language that was in 70-a, the commenced or continued, but it didn't do so?

So why shouldn't I take that as a clear indication that maybe it meant take effect immediately, as in starting now forward?

MS. GODESKY: First of all, your Honor, I want to say that this wouldn't really change the case because, again, we've been litigating this case from the beginning under the actual malice standard and there still isn't clarity on that issue.

And this is just like what the courts observed in Coleman and Sackler. When you have hitched your wagon to the actual malice standard from the beginning of the case, it's not really changing anything that now there's a separate, independent vehicle to that same legal standard.

And in response to your question about --

THE COURT: Well, I see it changing the case, because I made the determination that actual malice wouldn't apply without this law and the Appellate Division affirmed that. So until the Court of Appeals speaks, that is clear. And it would have a, you know, tremendous effect on this case as it stands now.

MS. GODESKY: I understand, your Honor, that it would have an effect on the way that the case -- the trial -- the trial goes.

But I just want to make clear that it doesn't have an effect on Dr. Luke's rights to this date because he has litigated this case and found evidence that he says satisfies the standard. That's the point I'm trying to make.

THE COURT: What about the commenced or continued language?

MS. GODESKY: So the commenced or continued language, all that that does is show that Section 70-a, the counterclaim section of the statute, obviously encompasses cases like this one. It is not a magic term of art that somehow signals retroactivity. In fact, that language has been in the statute since its original form in the 1990s. It's not something that was specifically added with the amendment. And as your Honor observed before, you know, sometimes the legislators aren't that careful. They didn't include the language. But we know from Gleason that that is not dispositive. And when you look at the language from the legislators -- we quote this in our brief -- they say "Together these two amendments, Section 70-a and Section 76-a, will work to protect the free speech rights that we want to insure have protection in this state." Together.

And there's really no reason why you would give a defamation defendant the right to assert a counterclaim but not also impose the actual malice standard, because, again, the two sections of the statute really need to work in harmony in order to insure the utmost protection in this state, which is what the legislators so clearly intended.

THE COURT: Okay.

MS. GODESKY: Your Honor, if I can turn to Section

70-a, I do want to say a few things about that.

As I noted before, there is no dispute about retroactivity for 70-a and the legal standard is also not in dispute. Right?

As your Honor held when plaintiffs sought to amend their pleading, the only reason to deny leave to amend is if the claim is clearly devoid of merit. This is not devoid of merit. Dr. Luke's only argument for why she shouldn't be allowed to assert a counterclaim was that he says, well, no one could ever find that he brought this defamation suit without a basis in law or fact because he survived summary judgment and we're headed to trial. That's the argument they made in their papers and it's dead wrong. Right? Because, as everyone has known from the beginning, and no one moved for summary judgment for this reason, this is a he-said-she-said case where you need a credibility determination from a fact finder. Your Honor observed in the summary judgment ruling, by not moving for summary judgment, the parties were, quote, "acknowledging the obvious, it cannot be resolved until the jury hears from Dr. Luke and Kesha."

And I hear Ms. Lepera now sort of retreating from the argument they made in their briefs and she's now asking you, well, the counterclaim may have merit down the road after trial, let's just put it on the back burner.

No. There's no basis to delay. Kesha has shown her entitlement --

THE COURT: One moment.

Does it really make a difference if I put it on the back burner until after trial or allow the amendment now, when there's still going to have to be the assessment of who prevails in this case?

If I allow it now and, you know, and the plaintiff prevails in this case, I just don't understand the difference that it makes.

And you know what? I'll let you, Ms. Lepera, speak to that and then I'll pick up with Ms. Godesky again.

But, Ms. Lepera, what difference does it make if I allow it now versus if you're saying just defer it until after trial? I'm not going to make the determination now.

MS. LEPERA: Exactly.

So here here's the distinction.

THE COURT: Who cares?

MS. LEPERA: I don't really think there's a difference between what I said now and what we said in our papers, because our point is -- and this is where -- you can't assert a claim unless there's a basis in law and fact, right? There's no basis in law and fact right now for her entitlement under 70-a to anything, nothing. It only arises -- so it's speculative, it's premature. And if she

asserts this now, it's going to make us want to assert one back. And, ultimately, it becomes this never-ending -- never-ending set of claims under 70-a that are not ripe because the predicate time to assert one -- and this is why it's devoid of merit now, because of the summary judgment decision affirmed by the Court of Appeals. There is, as a matter of law, right now, a substantial basis in fact and law. There's nothing new in their pleading to change that. So the only time it could be changed and become ripe is if they establish something post trial. I want to keep this case in line. I believe they want to do this so they have the specter that she has some counterclaim out there. And the reality of the situation is this counterclaim only arises in the event of a win by her and not even then an automatic fee.

Because what the 70-a did -- and here's the difference -- the 70-a, you know, which is talked a lot about in the legislative history -- and to Ms. Godesky's prior point about how the money is being siphoned off of these people who have to defend themselves -- was meant to protect them in a case, on an ongoing basis, that they could prove after, whatever the time period was, summary judgment or at trial, that there was no substantial basis in fact and law.

They can never establish that under the current set

of circumstances, so the claim is not ripe, it is speculative under all standards of --

THE COURT: One moment, Ms. Lepera.

The defendant here is asserting that she was, in fact, drugged and sexually assaulted and that her speech was true and she's asserting that the plaintiff knows that what she's saying is true.

MS. LEPERA: Right.

THE COURT: So just because you have a claim doesn't mean you win.

MS. LEPERA: It's not a question of being right. It's also a question of where it stands in the case right now, because the claim is that there is no substantial basis in fact and law for his claim. As it stands right now, you and the Appellate Division have said there is a substantial basis in fact and law for his claim. So she has no entitlement to any fees now. There would have to be new facts and new evidence post trial to give rise to a claim to say that there's no substantial basis in fact and law. It's different than saying what they've been saying all along. It's not that it's he-said-she-said. It's the standard. The standard under 70-a is that there has to be a determination that there's no substantial basis in fact and law. And, right now, the claim is devoid of merit because that's already been determined at this stage.

THE COURT: But who's to say, in that respect, that it should always wait to amend until the end when we know one way or the other who's correct and who's incorrect?

There is no determination in this case as to credibility.

MS. LEPERA: No. There is a determination that there's a substantial basis in fact and law.

And the difference between this case and other cases, where of course in the beginning you can assert claims and counterclaims, here, this counterclaim is currently barred by the existing facts and circumstance and that's why it currently devoid of merit and that's why it is speculative -- there's no new facts in it. You can't assert a claim that is completely incorrect under the law now. Under the law, the standard being substantial basis in fact and law.

THE COURT: I don't know that it's incorrect. I just know that it's undetermined.

MS. LEPERA: It's premature.

THE COURT: The fact that it's -- it's not that it's premature. It's whenever there's this type of situation, there has been no determination. And if what she's saying is true, then there is absolute support for the counterclaim. And I don't know one way or the other as I sit here today.

MS. LEPERA: Only if that's what happens after trial.

Again, the standard is very simply, there's no substantial basis in fact and law to support the claim. The claim now is precluded by the decisions that currently exist, because if she were to seek fees right now -- let's say she was to seek fees right now -- and this is what happens in 3211(g) and (h) or (h) cases, where --

THE COURT: Ms. Lepera, one moment.

I'll ask Ms. Godesky if they're going to seek fees now, but I'll be very clear, I'm not going to award fees now.

And I appreciate what you're saying. Of course I can't award fees in this case. Everyone knows the posture of this case. And everyone knows that it is a he-said-she-said situation. And until that is determined, I don't know whether there's a substantial basis in fact. But that has to be determined.

To be clear, if the next step was to move for summary judgment at this point, on that counterclaim, before a trial -- and I see Ms. Godesky shaking her head no -- that would be nonsense.

But, go ahead, Ms. Godesky, let me let you finish up.

MS. GODESKY: Thank you, your Honor.

Of course not. We're not going to seek an immediate ruling for attorneys' fees or move for summary judgment because we need a jury to decide whether Kesha's counterclaim has merit and all that Kesha --

THE COURT: One moment.

To be clear, there is going to be no determination of this counterclaim until the jury has spoken.

MS. LEPERA: Exactly.

THE COURT: I'm asking.

MS. GODESKY: No, no --

MS. LEPERA: Yes.

MS. GODESKY: What Kesha is asking for, your Honor --

THE COURT: I'm confused.

You're saying you don't agree with that, that your counterclaim will not be determined, as in decided, as in adjudicated, until the jury has spoken?

MS. GODESKY: I do agree with that.

But we are asking -- what we are asking for is leave to assert our counterclaim now, which Kesha is entitled to do under the law, because it is certainly possible under the rulings that exist in this case that the fact finder could eventually find that Dr. Luke brought this case without a basis in law or fact. So we would like leave to assert our counterclaim now.

The Court does not make parties prove their claims before they are allowed to plead them, as Ms. Lepera is suggesting.

It would turn litigation on its head to say that Kesha doesn't have a right to plead a claim at this stage, that she's clearly entitled to, because she may not be able to prove it.

And I'd like to refer the Court, if I could, to the Goldman versus Reddington case, which was very similar to this one. That is a case where there was a college student at Syracuse University who sued a young woman who publicly accused him of sexual assault. And she, like Kesha, recently brought a motion seeking leave to assert a Section 70-a counterclaim. And Judge Lindsay, when she was presented with that motion, the defamation plaintiff, the man in that case, said "Oh, she shouldn't be allowed to assert this counterclaim. The Court has already found that I adequately pleaded defamation per se." And Judge Lindsay emphasized that she absolutely had the right to assert the counterclaim because it is not yet clear whether he will prevail on the merits. And so, in that case, just like in this one, she was allowed to assert her counterclaim and it would be part of the trial, right alongside the underlying defamation claim.

And that's what we're asking for here, your Honor.

The questions presented by Kesha's counterclaim, whether Dr. Luke's lawsuit has a substantial basis in law or fact or whether he initiated the suit simply to harass her, those are questions that are the jury needs to decide. And the same jury that's impaneled to hear all of the testimony about the defamation case should, obviously, also rule on these counterclaims. She's not bringing this as a separate case.

THE COURT: Ms. Godesky, I have another question.

Ms. Lepera, I really just don't think I need more in terms of --

MS. LEPERA: I just have to one make point, your Honor. It's very important.

THE COURT: Please --

MS. LEPERA: It's very important because I think what slipped by here is that intention that the jury is going to decide this counterclaim, i.e. is there a substantial basis in fact and law, as opposed to after the jury speaking and we win or lose, then this counterclaim is decided. That is a critical difference. Because they want to try to bring this counterclaim in front of the jury and there's absolutely no basis for that, including under the cases you just cited.

THE COURT: You know what? You can argue that, who gets to decide it later.

But the point -- all I'm trying to say now is that it won't be decided until after the jury has spoken. Whether it's the jury deciding it or whether it's me deciding it, it will not be resolved until there is a resolution in this case, whether it's at the same time or whether it's afterward. So, in that respect, I don't see the harm in the amendment at all, so long as everybody understands that. Because that's the practical reality in the case.

I have a question for you, Ms. Godesky.

I wanted to follow up on the Section 70-a, the commenced or continued language.

Was that in the statute before the amendment?

MS. GODESKY: Yes.

THE COURT: So that appeared in Section -- that was there before 2020?

MS. GODESKY: Yes.

MS. LEPERA: I don't think that's right because it was highlighted and underlined in the amendment.

MS. GODESKY: Your Honor, I am almost certain. I am certainly not intending to mislead the Court. We could make a supplemental submission after this argument, but I do believe it is long existing in the statute.

MS. LEPERA: We'll check.

THE COURT: I don't know that it makes that much of

a difference to me, but I found it interesting because I thought I heard you say that.

Because, at the end of the day -- look, again, I've read the cases, I've read your submissions and there is nothing explicit in the legislative history here to give me the clear guidance in terms of there are no words themselves that show whether it was intended to be prospective or whether it was intended to be retroactive.

I am, however, going to follow the case of Matter of Gleason, 96 New York 2d 117, a 2001 case decided by the Court of Appeals.

The legislative history here does establish that the amended statute was intended to conform with the original intent of the provision and to have immediate effect. And while, again, immediacy does not establish retroactive intent, it does show a sense of urgency that I can take into account.

Now, in addition, the statute was designed to rewrite an unintended judicial interpretation or an unintended interpretation altogether. And the enactment reaffirms legislative judgment about what the law was intended to have always been and be. In that sense, the provision is clearly remedial.

And, in this case, it should be applied retroactively in order to give effect to its beneficial

purpose.

I do not find that the plaintiff established that retroactive application would affect his due process rights nor is the Court convinced that use of the commenced or continued language in Section 70-a -- that doesn't establish that the legislature didn't intend for 76-a to have retroactive effect and, given its remedial purpose, it should here. There are many statutes that don't contain explicit direction one way or the other.

But based on the important purpose that this legislation has, it should apply to pending cases.

Additionally, defendant is permitted to amend her answer to assert the counterclaim pursuant to Section 70-a. Leave is freely given.

The amendment is not patently without merit, it is not futile. Again, it will not be decided until there has been a determination by the jury in this case and there would not be any undue prejudice.

The defendant's motion is, therefore, granted.

Section 76-a applies in this action and leave to amend is granted.

Defendant is to e-file the amended answer within 10 days and a copy of this transcript within 30 days.

And with that, I wish you a good summer.

Thank you very much.

MS. LEPERA: Thank you, your Honor.

MS. GODESKY: Thank you, your Honor.

THE COURT: Be well.

(Proceedings adjourned)

Certified to be a true and accurate transcript of the foregoing proceedings

anne Marie Scribano

Anne Marie Scribano