

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 10/24/19
Mot Conf Held: 03/28/19
Mot Seq 001 MG; CASE DISP
Mot Seq 002 MD; CASE DISP

JOHN F. REEVE, SANDRA J. REEVE, J&S
REEVE SUMMER COTTAGES, LLC & 18
WHITES LANE LLC,

Plaintiffs,

-against-

WILLIAM F. ANDES, JR., LAW OFFICE OF
WILLIAM F. ANDES, JR. f/k/a ANDES &
ANDES, EVA ANDES, MARTIN SILVER &
DALE SILVER,

Defendants.

PLAINTIFFS' COUNSEL:

Campanelli & Associates, PC
1757 Merrick Avenue, Suite 204
Merrick, New York 11566

DEFENDANTS' COUNSEL:

Esseks Hefter Angel DiTalia Pasca LLP
108 E Main St, PO Box 279
Riverhead, New York 11901

In this electronically filed action, on defendants' motion to dismiss the complaint pursuant to CPLR 3211(g) and for summary judgment on their counterclaims pursuant to CPLR 3212(h) and on plaintiffs' cross-motion to dismiss defendants counterclaims pursuant to CPLR 3211(b), the Court considered the following papers: NYSCEF Docs. Nos. 3 – 12; 21 – 26; and upon due deliberation and full consideration of the same; it is

ORDERED that the parties' pending motions are hereby consolidated for purposes of disposition in the within decision and orders; and it is further

ORDERED that defendants' motion for dismissal pursuant to CPLR 3211(g) is **granted** for the following reasons; and it is further

ORDERED that plaintiff's cross-motion for dismissal of defendants' counterclaim pursuant to CPLR 3211(b) is **denied** for the following reasons; and it is further

ORDERED that defendants' motion for summary judgment as to liability on its counterclaim as against the plaintiffs pursuant to CPLR 3212(h) is **granted** for the following reasons; and it is further

ORDERED that defendants' counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon defendants' counsel forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Before the Court is the latest iteration of a long-running, ongoing dispute between the parties. This Court is intimately familiar with both plaintiffs and defendants as well as the gravamen of their dispute, having recently rendered decision and determination in a related underlying matter, defendants now disposed Article 78 special proceeding entitled *Matter of Andes v The Planning Bd. of the Town of Riverhead*, Index No. 1311/2018. In a short-form decision and order dated August 16, 2019, this Court granted in part the petition reasoning that the Riverhead Town Planning Board violated SEQRA, having misclassified plaintiffs' request for a letter of nonconforming use and "failed to take a hard look" at the same, and thus remanded to the Planning Board for further related proceedings.

By the parties' calculation, that matter and this, are only 2 of 6 other matters having been litigated before Supreme Court, Suffolk County and the Appellate Division, Second Department from as early as 2010 to the present. This Court went to great lengths and expended some degree of effort to outline the factual background and history underlying the parties' enmity in its prior decision. In furtherance of judicial economy and for the sake of brevity, this Court will not belabor the point by reiterating the history unless where necessary or dictated by the parties' arguments or contentions.

As noted above, the parties are adjoining property owners and neighbors owning land in fee on Whites Lane in Aquebogue, Suffolk County, New York in the East End on a body of water commonly called or known as Reeve's Creek. Plaintiffs for at least a decade have attempted to legalize a prior nonconforming marina use of their property, first by modifying certain substandard lots or plots comprising part of their property, and later, by seeking local municipal approval of construction of a floating dock to continue a preexisting marina, dock and shellfish use adjacent and appurtenant to their seasonal summer cottage business. Defendants, attorneys and neighbors immediately adjacent to and across the creek to plaintiffs, have in one form or fashion, over that same period of time opposed plaintiffs' efforts before the Town Planning Board, Building Department and Zoning Board of Appeals.

Presently, plaintiffs sue defendants in their self-styled effort to prevent further interference, opposition or intrusion by defendants in their efforts to obtain local land use or zoning permission or approvals to legalize and maintain the nonconforming use cited above. Thus, in a complaint electronically filed with the Court on November 20, 2018¹, plaintiffs assert against defendants two causes of action. In their first cause of action, plaintiffs seek recovery of compensatory damages against defendants William Andes and his law office for breach of fiduciary duty. In their second cause of action, plaintiffs seek recovery against defendants Martin Silver, an attorney, his wife Dale Silver, and Eva Andes, Mr. Andes' wife, for "aiding

and abetting a breach of fiduciary duty" for joining Mr. Andes' opposition to plaintiffs' various land use applications. By the wherefore clause of their complaint, plaintiffs seek recovery of \$500,000.00 in compensatory damages and \$750,000.00 of punitive damages jointly and severally as to the defendants on the first cause of action; \$500,000.00 in compensatory damages and \$250,000.00 in punitive damages jointly and severally as to the defendants on the second cause of action, and lastly a final permanent injunction enjoining and restraining defendants from further engaging in the public petitions process from opposing plaintiffs' land use and zoning applications as related to their property.

Plaintiffs' action is premised on the notion that Mr. Andes is plaintiffs' former attorney, who performed estate work, handled landlord tenant and personal injury matters, and helped prepare applications for the lot line modifications of plaintiffs' property that formed the impetus of the parties' litigation history. The complaint alleges that in 2006 and 2007, Andes prepared and ultimately filed deeds for transfers of the plaintiffs' property in accordance with a Town Planning Board resolution reflective of the lot line modifications necessary to effectuate plaintiffs' stated intent of expanding and continuing the nonconforming dock/marina use. Plaintiffs assert that thereafter, Andes worked to undermine his legal work performed on their behalf and to oppose their applications to legalize their nonconforming use before the various town municipal land use agencies. Thus, plaintiffs claim that Andes, their former family attorney, breached his duty of loyalty to them, his former clients, and that further his wife and other neighbors who joined onto this opposition campaign, have aided and abetted this breach.

Defendants joined issue filing an answer on December 20, 2018 denying certain allegations and asserting as defenses that the complaint failed to state a cause of action; that plaintiffs' claims were barred by the applicable statutes of limitations; that plaintiffs' claims are barred by issue and/or claim preclusion; and that plaintiffs' action should be dismissed as violative of CPLR 3211(g), CPLR 3212(h) and Civil Rights Law §§ 70-a & 76-a as an illegal strategic litigation against public participation ("SLAPP") lawsuit. Further, defendants by their answer interposed a counterclaim calling for the recovery as against the plaintiffs for attorney's fees, costs, and compensatory and punitive damages for plaintiff's litigation of a SLAPP lawsuit. Plaintiffs have replied to the counterclaim denying its assertions.

Following joinder of issue, defendants moved to dismiss the complaint and for summary judgment on liability on their counterclaim. Plaintiffs then cross-moved to dismiss defendants' counterclaim and further to deny defendants motion for dismissal. This Court then held a pre-motion conference on the parties' respective applications and thereafter submitted the motions for decision.

DISCUSSION

Summary of the Parties' Respective Contentions

Taking in turn, the parties each move for dismissal: defendants seeking complete dismissal of the action and for judgment as a matter of law on their counterclaims; plaintiffs for dismissal of the counterclaims on the law and opposing defendants' dismissal application. Each motion and its underlying claims in support and in opposition thereto are discussed thoroughly below.

Defendants argue that plaintiff's complaint violates the New York State Legislature's prohibition against SLAPP lawsuits, originally enacted in 1992 and recognized by the New York Court of Appeals citing the legislation's original intent stating:

In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits—strategic lawsuits against public participation—such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future . . . In response, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation (*see*, L.1992, ch. 767) . . .

(*600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 138 n.1 [1992][internal citations omitted])

Arguing in support of dismissal of plaintiffs' pleadings as a matter of law, defendants contend that Andes was a public citizen and neighbor employing his rights to free speech as protected by the First Amendment to the U.S. Constitution when he began to oppose plaintiffs' applications for various approvals to legalize their dock/marina nonconforming use. Defendants concede that Andes was plaintiffs' attorney in 2006 and 2007, but that the scope of his representation was, as relevant here, limited to the preparation of deeds and related tax filings and returns, for a lot line modification. However, defendants deny that Andes knew then that these tasks were in furtherance of expansion or continuation of the nonconforming use. Rather, Andes claims that he only learned of that fact from his neighbor and co-defendant Martin Silver once conditional approvals had already issued and a survey process had already begun on plaintiffs' property. Thereafter, Andes made application for the Town's file under FOIL to learn the true extent of plaintiff's designs.

In that fashion then defendants seek summary dismissal of the pleadings contending that their opposition to plaintiffs' land use activity constitutes statutorily protected public participation materially related to plaintiffs' applications. They further contend that plaintiffs' action lacks any substantive merit other than to threaten, harass, injure or annoy them sufficiently to work a chilling effect in derogation of their free speech and public participation rights. Moreover, they emphasize that any claims of breach of fiduciary duty must fail as time-barred under the applicable statute of limitations, noting that Andes' representation of the plaintiffs commenced in 2006 and concluded in 2007, but this action commenced in 2018, approximately 11 years later.

Following this line of argument, defendants further seek judgment as a matter of law on plaintiffs' liability on their counterclaims for compensatory and punitive damages and recovery of reasonable attorney's fees for having to defend this action, which they deem meritless.

Plaintiffs oppose both motions and separately cross-move to dismiss the counterclaims arguing that their action has substantive merits and is not a SLAPP lawsuit. More specifically, plaintiffs argue that their claims of breach of fiduciary duty do not relate to defendants'

campaign of opposing their land use activity, but rather address Andes' breach of loyalty insofar as performing legal work in support of a lot line modification, and then in turn opposing the fruits of that labor once conditional approvals were granted by town officials. Plaintiffs additionally contend that this matter cannot constitute a prohibited SLAPP lawsuit because they claim that no applications presently pend before the Town's various land use and zoning agencies, entities or officials. Thus, they reason that defendants' opposition cannot constitute statutorily protected "public participation" where no land use petitions, or applications presently exist. Moreover, plaintiffs dispute that their breach of fiduciary duty claims are time-barred, at once acknowledging the creation and cessation of an attorney-client relationship in 2006-2007, but at the same time claiming that defendants' opposition has taken form of additional actions occurring in the last 3 years (2015 to 2018) including ticketing and local administrative or criminal enforcement action, which they believe was at defendants' behest.

Plaintiffs support their application to dismiss the counterclaim arguing that if their suit is not classified as a SLAPP lawsuit and has substantive merit, then defendants counter claims must fail.

Standards of Review

Substantive Law of New York's Anti-SLAPP Statutes

Following New York's enactment of an anti-SLAPP law, the CPLR and Civil Rights Law were amended to adopt particular provisions to give life to procedural and substantive remedies and effectuate the statute's remedial purposes. Procedurally speaking, a defendant perceiving a lawsuit to lack merit and constitute a SLAPP action may seek its dismissal under CPLR 3211(g), entitled "Standard for motions to dismiss in certain cases involving public petition and participation" which provides:

Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, 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 paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, **shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.** The court shall grant preference in the hearing of such motion.

(CPLR 3211(g)[McKinney's 2020][emphasis supplied])

A companion section of the CPLR dealing with summary judgment motion practice was also added entitled "Standards for summary judgment in certain cases involving public petition and participation" which states:

A motion for summary judgment, 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 paragraph (a) of

subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(CPLR 3212(h)[McKinney's 2020]))

With regard to the remedial nature of the legislation, Civil Rights Law provides as relevant here:

1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

(a) costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;

(b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and

(c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

2. The right to bring an action under this section can be waived only if it is waived specifically.

(Civil Rights Law § 70-a[McKinney's 2020]))

Substantively speaking, the Civil Rights Law defines "action involving public petition and participation" as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission" (Civ. Rights L. § 76-a(1)(a)[McKinney's 2020]). A "public applicant or permittee" means "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission" (Civ. Rights L. § 76-a(1)(b)).

Our courts have thus remarked concerning the legislative scheme that strictly construed the above referenced statutes specifically parroting the CPLR's mandate that "[w]here a party has established that the action, claim, or counterclaim against it is a SLAPP suit, that party is entitled to summary judgment unless the party asserting the action, claim, or counterclaim can demonstrate that it has 'a substantial basis in fact and law' (*Waterways at Bay Pointe Homeowners Ass'n, Inc. v Waterways Dev. Corp.*, 132 AD3d 975, 979, 19 NYS3d 536, 541-42 [2d Dept 2015]).

Therefore, where movant defendant establishes "that the action involves the rights of 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' [and] 'summary judgment must be awarded to the defendant unless the plaintiff demonstrates, in opposition, that the action has 'a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law' " (*Novosiadlyi v James*, 70 AD3d 793, 794, 894 NYS2d 521, 522-23 [2d Dept 2010]). Stated in the converse then, to survive dismissal or judgment as a matter of law, the proponent of the putative SLAPP suit must sustain the burden in opposition to a motion to dismiss or for summary judgment under either CPLR 3211(g) or CPLR 3212(h) by demonstrating in clear and convincing form that the actions has substantive merit in law or fact, or presents a reasonable argument for extension or modification of existing law (*see Intl. Shoppes v At the Airport*, 131 AD3d 926, 929, 16 NYS3d 72, 75 [2d Dept 2015]).

A lawsuit will not be classified as a prohibited SLAPP suit unless it materially relates to the defendant's efforts "to report on, comment on, challenge, or oppose an application by the plaintiff for a permit, license, or other authorization from a public body." (*Long Is. Ass'n for AIDS Care v Greene*, 269 AD2d 430, 430, 702 NYS2d 914 [2d Dept 2000]).

New York courts have further noted that since the anti-SLAPP statute is in derogation of common law rights and remedies, it is to be strictly construed (*Hariri v Amper*, 51 AD3d 146, 151, 854 NYS2d 126, 130 [1st Dept 2008]).

A. Does Plaintiffs' Complaint Run Afoul of the Anti-SLAPP Statute?

To determine whether plaintiffs' action is a SLAPP suit, the Court first must determine whether plaintiffs are public permittees or applicants. In their motion papers, plaintiffs urge denial of defendants' dismissal motion contending that because no present application exists, plaintiffs cannot be treated as present public permittees or applicants. Defendants oppose this argument noting that no authority is cited for that proposition in the motion record. That aside, this Court finds that argument nonsensical. Plaintiffs' entire action is premised on the notion that the defendants have in the past opposed, and presently continue, a campaign of opposition, to all of plaintiffs' endeavors to legalize their dock/marina nonconforming use. Put differently then, at its essence, plaintiffs complaint is that but for defendants' opposition to their zoning and land use applications and endeavors, they would have already legalized their nonconforming use and not sustained damages in the form of costs, aggravation and protracted proceedings before the courts and the local municipal land use and zoning agencies. Thus, in fact, when this action was commenced plaintiffs made explicit reference to this Court's now disposed, but then pending, Article 78 proceeding commenced by defendants seeking to undue land use and zoning determinations by Riverhead town officials. The complaint explicitly references all of the

litigations involving these parties as evidence of defendants' opposition, which plaintiffs' perceive as harassment.

However, now facing dismissal plaintiffs self-servingly seek to distinguish and separate past history from present action. This is wholly unpersuasive and unavailing. A *prima facie* case for judgment as a matter of law is made where defendants' sustain their burden of establishing that the action is brought by public permittees or applicants whose claims seek to chill or prohibit public participation or petition and materially relate to that statutorily protected public expressive conduct. The burden then shifts to the non-movant plaintiffs opposing defendants' dismissal motion to demonstrate that none of the anti-SLAPP statute prongs are met: i.e. that plaintiffs are not public permittees or applicants; that defendants opposition is not expressive conduct part of the public participation or petitioning process; that the claims and causes of action asserted in the complaint do not materially relate to defendants' public petitioning/participation; and/or that the lawsuit independently has substantive merit.

On the papers before this Court, it is clear that defendants have argued, without any persuasive rebuttal from the plaintiffs, that no final approvals have issued from the Town to the plaintiffs permitting them their requested relief, i.e. a legalize dock/marina. Thus, plaintiffs remain permittees or applicants engaged with the local municipal zoning and land use process. Defendants have met their burden of establishing that prong of the test.

Next, the Court finds that defendants' expressive conduct, their opposition to plaintiffs' land use and zoning plans, also meets fits within the "public petition and participation" definition of the statutory analysis. While plaintiffs do not plead defendants' opposition as defamation, the anti-SLAPP statutes clearly cover expressive conduct made within the public sphere in the manner before local municipal zoning officials as done by defendants here. Plaintiffs offer no persuasive argument disputing this. Instead, the complaint itself is replete with reference to defendants constant opposition before the various local municipal public venues comprising Riverhead Town's land use and zoning apparatus.

Lastly, the Court is not persuaded by plaintiffs' efforts to distinguish Andes' earlier legal representation as breach of fiduciary duty from his and others later opposition to plaintiffs' desired land use activity. Here a brief examination of the merits of the claim and its requisite elements sheds light. Settled law holds that "[a] cause of action to recover damages for breach of fiduciary duty must be pleaded with particularity. The elements of that cause of action are (1) the existence of a fiduciary duty, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Dineen v Wilkens*, 155 AD3d 607, 609, 64 NYS3d 56, 58 [2d Dept 2017]).

To be clear, the Appellate Division has recently expounded on the fiduciary nature of an attorney's obligation vis-à-vis his client:

[t]he relationship of client and attorney is one of 'unique fiduciary reliance' which imposes on the attorney '[t]he duty to deal fairly, honestly and with undivided loyalty ... including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's. [Only in the case of] ... rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting

interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship. Thus, any act of disloyalty by counsel will ... comprise a breach of the fiduciary duty owed to the client. Further, an attorney who engages in misconduct by violating the rule against representing clients with conflicting interests

(*St. Annes Dev. Co. v Batista*, 165 AD3d 997, 997-98, 85 NYS3d 145, 146-47 [2d Dept 2018])[internal citations and quotations omitted])

To recover damages for aiding and abetting a breach of fiduciary duty, a plaintiff must plead and prove that a fiduciary duty owed to plaintiff was breached, that the defendant “knowingly induced or participated in the breach,” and that the plaintiff sustained damages as a result of the breach. “A person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator” (*Baron v Galasso*, 83 AD3d 626, 629, 921 NYS2d 100, 104 [2d Dept 2011]).

However, before weighing the substantive merits of plaintiffs’ claim, the Court first must wrestle with its timeliness. To properly maintain such a claim in timely fashion, plaintiff must commence an action seeking recovery for breach of fiduciary duty within 3 or 6 years, depending on the ultimate relief sought (*see e.g. Weiss v TD Waterhouse*, 45 AD3d 763, 764, 847 NYS2d 94, 95 [2d Dept 2007])[observing that a cause of action for breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature or by a three-year statute of limitations where the only relief sought is money damages]. Here, the legal remedies, monetary damages, predominate over the final injunctive relief plaintiffs seek in their complaint. Thus, this Court finds that plaintiffs’ breach of fiduciary duty claims are properly subject to a 3 year statute of limitations.

1. Dismissal Based Upon the Statute of Limitations

In resolving a motion to dismiss pursuant to CPLR 3211(a)(5), this Court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference (*Elia v Perla*, 150 AD3d 962, 963, 55 NYS3d 305, 307 [2d Dept 2017]). On such an application, defendant-movant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period. To make a *prima facie* showing, the defendant must establish, *inter alia*, when the plaintiff’s cause of action accrued (*Campane v Panos*, 142 AD3d 1126, 1127, 38 NYS3d 226, 227 [2d Dept 2016]; *Loiodice v BMW of N. Am., LLC*, 125 AD3d 723, 724–25, 4 NYS3d 102, 103–04 [2d Dept 2015]). “In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff” (*Cataldo v Herrmann*, 154 AD3d 641, 642, 62 NYS3d 130, 131 [2d Dept 2017]).

Here, the parties dispute whether the statute of limitations defense is properly plead before the Court, or more accurately, could properly form the basis of dismissal of plaintiffs’ claim. The motion record, which includes all of the parties’ pleadings, indicates as noted above, that defendants preserved as a defense to the action the statute of limitation barring prosecution

of an untimely claim. Defendants' original notice of motion and its amended version however do not state CPLR 3211(a)(5) as a defense or form or relief, as plaintiffs have noted. Nevertheless, this hyper technical form defect need not prevent this Court from considering the defendants' argument. It is true that "[t]he statute of limitations is an affirmative defense which is waived by a party unless it is raised either in a responsive pleading, or by motion prior to the submission of a responsive pleading" and further that the motion court "may not take 'judicial notice,' sua sponte, of the applicability of a statute of limitations if that defense has not been raised" (*352 Legion Funding Assoc. v 348 Riverdale, LLC*, 164 AD3d 551, 552-53, 83 NYS3d 270, 272 [2d Dept 2018]). That however does not apply here because defendants explicitly referenced that defense and invoked it in their answer. Moreover, even where defendant neglects to list a defense in its notice of motion, so long as that defense is thoroughly briefed and plaintiff has had sufficient notice of it such to avoid substantial prejudice, a court may consider it with its discretion (*see e.g. Kreamer v Town of Oxford*, 96 AD3d 1130, 1132, 946 NYS2d 284, 287 [3d Dept 2012])[denying plaintiff's action for declaratory relief as untimely reasoning that while defendants did not list the statute of limitations defense on their notice of motion, they did include a sufficiently general demand in the wherefore clause seeking dismissal on untimeliness grounds, coupled by corroborative arguments in the moving papers, affirmation and memorandum of law, advocating that plaintiff's claim was not timely. Accordingly, the appellate division affirmed the motion court ruling proper its consideration of defendants' request to dismiss based in part on the statute of limitations raised and argued in the motion papers, such that plaintiffs were not prejudiced by its omission in the notice of motion]; *accord Llano v Leading Ins. Services, Inc.*, 45 Misc3d 131(A), 3 NYS3d 285 [App Term, 1st Dept 2014][ruling that although defendants did not specifically list CPLR 3211(a)(7) on their notice of cross motion to dismiss, which was based on other subdivisions of CPLR 3211(a), the general relief clause in the notice of cross motion **permitted** the court to consider this alternative ground for granting defendants' cross motion][emphasis added]; *but note Abizadeh v Abizadeh*, 159 AD3d 856, 857, 72 NYS3d 566, 568 [2d Dept 2018][holding that a motion court's decision to ignore defendant's failure under CPLR 2214 to specify all of the relief sought or grounds/defenses of a dismissal motion is discretionary and not mandatory]).

Thus, considering defendants' arguments that plaintiff's breach of fiduciary duty claims lack substantive merit, at least in part because they are untimely, plaintiff must come forward with explanation that the statute was tolled or that defendants' measurement of accrual of their claim is faulty or flawed. Here, plaintiffs essentially ignore defendants arguments and claim, absent any corroborative proof before this Court, that actionable opposition occurred within 3 years of the commencement of the action. As defendants correctly observe, their motion for dismissal falls under CPLR 3211(g) which shifts the burden of persuasion and proof onto the plaintiffs to demonstrate by clear and convincing evidence the substantive merit of their action. While defendants have made sufficient arguments establishing and fixing the appropriate limitations period, plaintiffs have not made any persuasive responsive argument to the contrary. To the extent that plaintiffs seek to ground their claim for breach of fiduciary duty in Andes' representation of them which concluded in 2007, those claims reasonably had to be commenced in 2010 at the latest, absent tolling or extension, neither of which plaintiffs have seek to apply here.

More important, plaintiffs have offered little proof beyond the affidavit of John Reeve in opposition to defendants' motion. Plaintiffs have not credibly explained how defendants' opposition taking place approximately 11 years after Andes' legal representation of the plaintiffs concluded somehow is actionable on a breach of fiduciary duty theory now. In his affidavit, Reeve states that Andes was his family's attorney who was hired to prepare lot line modifications and related deeds concerning the subject premises as early as 2006, continuing into 2007. He notes that the deeds were understood by all parties to be prepared and filed with the appropriate local authorities in accordance with the Town Planning Board's resolution providing for the lot line modification.

In response, defendant William Andes has offered two affidavits, the latter of which on reply, annexes legal services invoices which explicitly reference the preparation of deeds in accord with the lot line modification. However, Andes has also testified that he was generally unaware at that time that the lot line modification was in preparation for expansion or continuation of a nonconforming dock/marina use. He acknowledged he had previously done legal work for the plaintiffs on other unrelated matters, and that starting in 2006 and concluding in 2007, he prepared and filed the deeds and related tax returns and filings. But Andes also explicitly denied having appeared at any municipal land use or zoning board, entity or agency on plaintiffs' behalf related to the scope of his representation in 2006/2007. Moreover, he noted that from then to now, that the plaintiffs had hired a number of attorneys during their crusade to legalize their dock/marina with the Town. In face of the documentary evidence supportive of his position, plaintiffs offer nothing more than their counsel's affirmation, which alone is not evidence and thus is insufficient to raise a triable question of fact.

Assuming *arguendo* that plaintiffs' claims were timely, substantively speaking they still fall within the ambit of the anti-SLAPP statute. Plaintiffs readily concede in their pleadings that they brought this action to stop defendants' continuing opposition to their land use plans. This is significant for at least two reasons. First, it is tacit recognition that plaintiffs' efforts at legalization of the nonconforming use exists as an ongoing process, supportive of defendants' contention that 1. plaintiffs are indeed public permittees and applicants and 2. defendants' opposition was statutorily protected expressive conduct tied up in the public petitioning and participation process.

Further, defendants' opposition, which plaintiff has not plead as defamatory, is only significant to the extent it has resulted in delays in plaintiffs' land use plans. Plaintiffs have unpersuasively argued that Andes' alleged betrayal of his duty of loyalty to them in trying to undo the lot line modification and subsequent legalization of the nonconforming use is its own actionable conduct divorced from the overarching context of the public petitioning and participation process before the local land use regime. This is not logical. Rather, a more sensical and objective assessment of the presented record is that defendants' opposition only matters because its existence has thwarted plaintiffs' plans to the present day. It is the *sine qua non* of a SLAPP suit because plaintiffs seek to chill, and indeed here, stop altogether that very public participation.

The Court says of all this to emphasize the following. Defendants have clearly met their burden of establishing entitlement to judgment as a matter of law for dismissal of the pleadings

as a meritless SLAPP suit under CPLR 3211(g) and Civ. Rights L. §§ 70-a & 76-a. In opposition, plaintiffs have failed to raise a triable question of fact that their action has substantial merit or exists to extend or modify existing law. Nor have plaintiffs sustained their burden to raise a triable question of fact to a clear and convincing standard on any of these issues. This determination is further buttressed by the fact that plaintiffs' breach of fiduciary duty claims are time-barred violating the 3 year statute of limitations. The conduct attributed to defendants is not independently actionable, but instead is the very essence of a SLAPP lawsuit the Legislature has sought to prohibit. The motion record leads this Court to conclude that defendants' conduct materially related to the public petitioning and participation process implicated by plaintiffs' anticipated zoning activity and applications process. Therefore, for all of these foregoing reasons, defendants' motion for dismissal pursuant to CPLR 3211(g) is **granted**. As a result, plaintiff's complaint against the defendants and this action should be dismissed as a matter of law for defendants' against plaintiff's complaint as an illegal SLAPP lawsuit.

As a separate matter for its own independent reasons, that branch of defendants' motion to dismiss plaintiffs' motion to dismiss plaintiffs' claim for punitive damages is also **granted** to the extent it has not been rendered moot or surplusage at this point. Plaintiffs' claim for punitive damages as asserted in the now dismissed complaint is not recoverable because "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Williams v Williams*, 149 AD3d 1145, 1146, 53 NYS3d 152, 153 [2d Dept 2017]). Here, since the complaint is dismissed and plaintiffs' claims for relief have been denied, so too is the claim for punitive damages.

A. Should Defendants' Recover on their Counterclaims against the Plaintiffs?

Separate and apart of whether plaintiffs' complaint is viable is the question of whether defendants should recover damages, fees, costs and disbursements chargeable to the plaintiffs for having maintained and required defendants to defend a SLAPP suit.

Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]). When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law." "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Bank of New York v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825, 826 [2d Dept 2015]). When moving to dismiss in such a fashion, the plaintiff bears the burden of demonstrating that the affirmative defenses "are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (*Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913, 74 NYS3d 321, 322-23 [2d Dept 2018]).

Here, plaintiffs' cross-motion seeking dismissal of the counterclaim is **denied** as unsupported. As thoroughly referenced above, defendants' assertion that plaintiffs' action was an illegal SLAPP suit has been sustained. As a consequence of that determination, defendants' defense that the suit was meritless from the moment and instance of its filing has carried the day as meritorious. Under the anti-SLAPP statutes, it is discretionary with the Court to award costs, fees and damages. The Second Department has made this clear over 20 years ago stating that

“while it is clear that ‘New York State public policy strongly disfavors SLAPP suits designed to chill the exercise of a citizen’s right to petition the government or appropriate administrative agency for redress of a perceived wrong’, it is also clear that the unambiguous use of the term ‘may’ in the statute makes the decision to award attorneys’ fees and costs discretionary rather than mandatory” (*W. Branch Conservation Ass’n, Inc. v Planning Bd. of Town of Clarkstown*, 222 AD2d 513, 514, 636 NYS2d 61, 63 [2d Dept 1995]; *cited with approval by Southampton Day Camp Realty, LLC v Gorman*, 118 AD3d 976, 978, 990 NYS2d 30, 33 [2d Dept 2014])[affirming motion court’s grant of dismissal to defendant dismissing plaintiff’s SLAPP lawsuit and summary judgment on defendant’s counterclaim for attorney’s fees, but also affirming motion court’s denial of defendant’s counterclaim for punitive damages absent sufficient proof that action was commenced with sole purpose of harassment, intimidation, punishment, or otherwise with malice to interfere with defendants’ rights to free speech or public participation/petitioning]).

As noted above, Supreme Court, Suffolk County served as venue to all of the parties’ prior disputes, with at least 2 of those actions having reached the Appellate Division, Second Department with ongoing appeals. This Court alone has now presided over 2 of those matters. This Court is not so naïve to believe that the conclusion of a litigation involving parties with such a history, involving bad blood and entrenched feelings as described, will suddenly resolve all disputes and settle all accounts. Nonetheless, as with all things, in litigation there comes a time for an end. In the present dispute, the Court is mindful of the preceding history and the likelihood of continued hostilities. However, an overriding and important consideration is that New York’s anti-SLAPP statute will be rendered a dead letter if its remedial and enforcement provisions are not given force and effect.

For all of these reasons therefore, defendants’ corresponding motion for summary judgment as to liability on the counterclaim is **granted in part** as defendants for the foregoing reasons have sustained their burden of establishing an illegal SLAPP lawsuit. In opposition, plaintiffs failed to sustain their burden of demonstrating that the action was not a SLAPP lawsuit, or that it was an action commenced with substantive merit or upon reasonable grounds of extension or modification of existing law.

Thus, concerning defendants’ counterclaim, it is

ORDERED that defendants by counsel are hereby directed on notice to the plaintiffs via electronic filing via NYSCEF, email to plaintiffs’ counsel and certified first class mail, return receipt requested a to file note of issue for an inquest on damages, both compensatory and punitive, costs, fees or disbursements concerning their counterclaim and request for a hearing before this Court on said inquest to be submitted no later than 30 days from the entry of this decision and order.

CONCLUSION

In sum, defendants’ motion to dismiss plaintiff’s complaint and action as an illegal SLAPP suit pursuant to CPLR 3211(g) is **granted** and the complaint is hereby **dismissed**. Plaintiffs’ cross-motion to dismiss defendants’ counterclaim for damages, costs, fees and disbursements seeking to recoup defense costs incurred defending a SLAPP suit is **denied**. Defendants’ corresponding motion for summary judgment on liability of its counterclaim as

against the plaintiffs is **granted** and therefore defendants are directed to, on notice to plaintiffs as described above, file note of issue and place this matter on this Court's inquest calendar to try by inquest the question of reasonable attorney's fees, costs, disbursement and/or compensatory and punitive damages.

Further, defendants are further hereby directed to settlement judgment on notice consistent with all of the findings and determinations rendered above.

To the extent that any of the parties' other contentions or arguments have not been explicitly referenced or discussed above, they have been found to lack merit by this Court and have been accordingly denied or rejected.

The foregoing constitutes the decision and order of this Court.

Dated: February 25, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 X **FINAL DISPOSITION**

 NON-FINAL DISPOSITION