

Timing is Everything -- Breitbart Case Highlights

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Last week, we made our first foray into *Sherrod v. Breitbart and O'Connor*, which was argued in the D.C. Circuit several weeks ago and which will, hopefully, address the question whether the District of Columbia's new anti-SLAPP statute should be applied by a federal court sitting in diversity.

In that post, we noted that the case also presented an interesting timeliness question. In denying the defendants' motion to dismiss brought pursuant to the D.C. anti-SLAPP statute, the district court held that the motion was not timely filed. It is important to understand the unique timeline of this case to understand the court's ruling.

The complaint was filed on February 11, 2011. D.C.'s anti-SLAPP statute, which had been passed three months earlier, did not go into effect until March 31, 2011, after a mandatory review period by Congress.

Under typical circumstances, the rules require the defendants to either answer or move to dismiss the complaint within 21 days of being served. Of course, most defendants seek, and are granted, additional time to respond to the complaint. In this case, the defendants sought two extensions of their deadline to respond. Both were granted by the court, with the consent of the plaintiff, pushing the defendants' deadline to respond until April 18, 2011.

Importantly, the anti-SLAPP statute requires a defendant moving under the statute to file their motion within 45 days of service of the complaint. In this case, 45 days fell on March 29, 2011, two days before the anti-SLAPP statute was in effect. Thus, when the defendants did file their motion to dismiss on April 18, 2011, it was several weeks past the statutory deadline. In denying the anti-SLAPP motion, the district court held that this was untimely, though the court did not address the fact that it had entered two orders granting the defendants extensions of their deadline to "answer, move or otherwise plead in response to Plaintiff's Complaint."

In their opening brief to the D.C. Circuit, the defendants argue that by granting these extensions, the court was, in effect, extending the deadline set out in the anti-SLAPP statute in addition to the deadline to respond under the Rules of Civil Procedure. In any event, the defendants argue, the legislative history of the D.C. statute and case law from other courts indicate that litigants with pending cases can move pursuant to anti-SLAPP statutes that become effective during the course of the litigation.

Timing is Everything -- Breitbart Case Highlights Deadline Issue

In her responsive brief, the plaintiff notes that in seeking the extensions, the defendants did not notify either the plaintiff or the Court that it was seeking to extend the anti-SLAPP deadline, not just the deadline under the Rules of Civil Procedure. Thus, the plaintiff asserts, the orders granting the extensions were not intended to extend the anti-SLAPP deadline. This seems to be the view of the district court, as well.

No matter how the D.C. Circuit comes out on this question, this very unique case does raise an interesting practice point. It would seem that, if you are a litigant planning to take advantage of the protections of an anti-SLAPP statute, you would be well-advised to either respond within the deadlines set out in the statute or, when moving for an extension of time, specifically reference the anti-SLAPP statute to opposing counsel and the court.