SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DEBRA MULÉ and SCOTT DAVIS,

Plaintiffs,

– against –

COUNTY OF NASSAU, BRUCE BLAKEMAN, in his official capacity as Nassau County Executive, and ANTHONY J. LaROCCO, in his capacity as Nassau County Sheriff,

Defendants.

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Index No. 602642/2025

Hon. GARY M. CARLTON
IAS/Trial Part 26

DECISION AND ORDER

Motion Seq. 003

The following papers were read on this motion:

Notice of Motion/Affirmation/Memo of Law/Supporting Exhibits.....	X
Affirmation in Opposition/Memo of Law/Supporting Exhibits.....	X
Reply/Memo of Law/Supporting Exhibits.....	X

Upon the foregoing papers, plaintiffs Debra Mulé and Scott Davis (collectively "plaintiffs") move for an order, pursuant to CPLR 3211 (a) (7), dismissing the counterclaim of defendants County of Nassau ("the County"), Bruce Blakeman, in his official capacity as Nassau County Executive ("Blakeman"), and Anthony J. LaRocco, in his capacity as Nassau County Sheriff ("LaRocco") (collectively "defendants"). Defendants oppose the motion. For the reasons set forth herein, the motion is granted.

BACKGROUND

The facts of this case are set forth in greater detail in the Court's decision and order dated October 7, 2025. Briefly, on March 17, 2024, defendants announced the creation of a program for the appointment of provisional emergency special deputy sheriffs ("the Program"). The Program is allegedly taxpayer funded.

On February 4, 2025, plaintiffs, members of the Nassau County Legislature, commenced this action pursuant to General Municipal Law § 51 and CPLR 3001 ("*Mulé I*"), challenging the Program as unlawful and a waste of public funds. Defendants subsequently interposed an answer denying the material allegations of the complaint and asserting various affirmative defenses, including that defendants had lawful authority under the pertinent statutes to implement the Program as an emergency response measure. The answer also contained a counterclaim under the anti-SLAPP law, alleging that *Mulé I* is a strategic lawsuit against public participation ("SLAPP").

Plaintiffs later served an amended complaint removing a previously asserted FOIL claim but leaving the remaining allegations unchanged. They also commenced a separate action against

defendants and against Blakeman and LaRocco in their individual capacities (Sup Ct, Nassau County, index No. 609900/25) ("*Mulé II*"), asserting claims under the anti-SLAPP law and 42 USC § 1983. In that action, plaintiffs allege that defendants' counterclaim is itself a SLAPP suit that violates their constitutional rights. Thereafter, defendants served an answer to the amended complaint in *Mulé I*, reasserting their anti-SLAPP counterclaim and incorporating allegations relating to *Mulé II* ("the Counterclaim").

In August 2025, plaintiffs filed the instant motion, arguing that the Counterclaim fails to state a cause of action because neither *Mulé I* nor *Mulé II* qualifies as an "action involving public petition and participation" within the meaning of Civil Rights Law § 76-a (1) (a), and that both actions have a substantial basis in fact and law. They also argue that the anti-SLAPP law does not protect governmental entities or public officials.

The determination of this motion was temporarily stayed pending resolution of defendants' motion to dismiss *Mulé I* pursuant to CPLR 3211 (a) (7) and (g), which was denied by the October 7, 2025 order. In that order, the Court held that *Mulé I* does not qualify as an action involving public petition and participation because it was not "based upon" defendants' communications or speech (Civil Rights Law § 76-a [1] [a]).

DISCUSSION

" 'On a motion to dismiss a counterclaim pursuant to CPLR 3211 (a) (7), a court must accept as true the facts as alleged in the pleading, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Burton v Porcelain*, 223 AD3d 775, 776 [2d Dept 2024], quoting *Wand, Powers & Goody, LLP v Yuliano,* 144 AD3d 1017, 1018 [2d Dept 2016]). However, where evidentiary material is considered on a motion pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, "the criterion is whether the [nonmoving party] has a cause of action, not whether he or she has stated one" (*Angeli v Barket*, 211 AD3d 896, 898 [2d Dept 2022] [internal quotation marks omitted]; *see Burke v Newburgh Enlarged City Sch. Dist.*, 195 AD3d 674, 676 [2d Dept 2021]).

"SLAPP suits . . . 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" (*Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d 26, 28 [1st Dept 2022], quoting *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 n 1 [1992], *cert denied* 508 US 910 [1993]; *see VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d 78, 80 [2d Dept 2024]). Pursuant to Civil Rights Law § 70-a (1), "[a] defendant in an action involving public petition and participation … may maintain an action … or counterclaim to recover damages … from any person who commenced or continued such action." Attorneys' fees and costs are recoverable "upon a demonstration … that the action … 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" (Civil Rights Law § 70-a [1] [a]; *see Moonbeam Gateway Mar., LLC v Tai Chan*, 239 AD3d 965, 966 [2d Dept 2025]). Compensatory and punitive damages are available upon additional showings (*see* Civil Rights Law § 70-a [1] [b], [c]).

Under the amended version of the statute applicable to this case, an "action involving public petition and participation" is defined as a "claim" based upon "(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition" (*id.* § 76-a [1] [a]). A "claim" includes "any lawsuit, cause of action, cross-claim, [or] counterclaim" (*id.* § 76-a [1] [b]).

Whether Defendants are Entitled to Invoke the Anti-SLAPP Law

Before reaching the merits, it is necessary to determine whether defendants, as a municipality and public officials, are entitled to invoke the protections of the anti-SLAPP law. Plaintiffs argue that the statute was not intended to cover municipalities or public officials, and that government speech is not constitutionally protected. Defendants counter that the statute's broad text makes no distinction between private and governmental defendants, and that persuasive precedent interpreting a nearly identical statute supports their position.

The statutory text favors defendants' position. Civil Rights Law § 70-a applies to "[a] defendant" without qualification and § 76-a covers "any communication" in a public forum. Nothing in the statutory language excludes public officials or municipalities. The recent history of amendment to the statute bolsters this conclusion, indicating that the statute should be interpreted broadly and not in a manner that arbitrarily restricts its scope (*see Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 18 [1st Dept 2024] ["Simply put, the 2020 amendments expanded the scope of anti-SLAPP protections to encompass all public communications on any nonprivate matter"]; *VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d at 84). Whether or not government speech is directly protected by any constitutional right is immaterial so long as the activity in question fits within one of the statutory criteria for an action involving public petition and participation.

Further, California courts, interpreting a similar statute, have held that governmental entities and public officials may invoke anti-SLAPP protections. In *Vargas v City of Salinas* (46 Cal 4th 1, 17, 205 P3d 207, 216 [2009]), the California Supreme Court concluded that the statute "extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if made by a private individual or entity." New York courts have recognized California decisions as persuasive in construing the anti-SLAPP law (*see Nelson v Ardrey*, 231 AD3d 179, 184 [2d Dept 2024]).

Accordingly, the Court concludes that public officials and municipalities are not categorically excluded from the protections of the anti-SLAPP law when the activity at issue would fall within the statute's scope if undertaken by a private individual or entity. The portions of the Counterclaim premised on *Mulé I* and *Mulé II* are addressed separately below.

Mulé I

As set forth above, the Court previously determined that *Mulé I* is not an action involving public petition and participation because it is not "based upon" defendants' speech or

communications (Civil Rights Law § 76-a [1] [a]). Contrary to defendants' contentions, *Mulé I* does not seek to impose liability based on their public statements and advocacy in support of the Program but instead challenges the lawfulness of the Program and the alleged wrongful expenditure of public funds associated therewith.

Accordingly, to the extent that the Counterclaim is premised on *Mulé I*, it must be dismissed.

Mulé II

In *Mulé II*, plaintiffs allege that the Counterclaim is a frivolous claim filed in retaliation for their exercise of constitutional and statutory rights. This allegation forms the basis of the three causes of action asserted in the *Mulé II* complaint: (1) recovery of costs and attorneys' fees pursuant to Civil Rights Law § 70-a against all defendants; (2) a claim pursuant to 42 USC § 1983 for First Amendment retaliation against Blakeman and LaRocco in their individual capacities; and (3) a claim pursuant to 42 USC § 1983 for First Amendment retaliation against the County.

As to the anti-SLAPP claim, plaintiffs allege that the commencement of *Mulé I* constituted protected activity under Civil Rights Law § 76-a, either as a "communication" or as conduct in furtherance of their constitutional right of petition. They further allege that the Counterclaim was commenced and continued without a substantial basis in fact or law. As to the § 1983 claims, plaintiffs assert that their filing of *Mulé I* represented constitutionally protected petitioning activity and that the Counterclaim was undertaken in direct response to, and substantially motivated by, that activity. According to plaintiffs, the Counterclaim was intended to intimidate, punish, or otherwise inhibit their rights of free speech and petition. Plaintiffs further allege that defendants, acting under color of state law, forced them to expend resources defending a frivolous Counterclaim, and that such conduct would deter a person of ordinary firmness from continuing to engage in protected expression. They also allege that the violation of their constitutional rights resulted from a policy or custom of the County, thereby rendering the municipality liable under *Monell v New York City Dept of Social Servs.* (436 US 658, 690 [1978]).

Defendants deny these allegations and contend that the Counterclaim was properly asserted under the anti-SLAPP law and supported by a good faith basis in fact and law. They argue that *Mulé II* is a SLAPP suit, brought to retaliate against them for invoking the protections of the anti-SLAPP law in this action. According to defendants, *Mulé II* was brought for partisan reasons and to deter them from advocating for the Program, which plaintiffs oppose as legislators. Defendants thus maintain that the Counterclaim satisfies the requirements of the anti-SLAPP law and is meritorious.

Under Civil Rights Law § 76-a (1) (c), a "communication" is defined as "any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" (*see Sweetpea Ventures Inc. v Belmamoun*, 231 AD3d 460, 461 [1st Dept 2024]). Conduct in furtherance of the constitutional right of petition includes litigation (*see Black v Ganieva,* 236 AD3d 427, 427 [1st Dept 2025]; *Sweetpea Ventures Inc. v Belmamoun*, 231 AD3d at 461). Here, since the interposition of a counterclaim meets the statutory criteria as either a communication or conduct in furtherance of the right of petition, and it is undisputed that *Mulé II*

is based on the counterclaim asserted in defendants' original answer, *Mulé II* qualifies as an action involving public petition and participation. Accordingly, the Court must examine whether the claims asserted in *Mulé II* have "a substantial basis in fact and law or [are] supported by a substantial argument for an extension, modification or reversal of existing law" (*GLD3, LLC v Albra*, – AD3d –, 2025 NY Slip Op 04881, *3 [2d Dept 2025] [internal quotation marks omitted]; *see* Civil Rights Law § 70-a [1] [a]; *Moonbeam Gateway Mar., LLC v Tai Chan*, 239 AD3d 965, 967-968 [2d Dept 2025]).[1]

Although "substantial basis" is not defined in the statute, courts have construed the term to mean "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Reeves v Associated Newspapers*, Ltd., 232 AD3d at 27 [internal quotations omitted]). It has also been equated with the summary judgment standard (i.e., whether the allegations and evidence presented would warrant submission to a jury as a question of fact) (*see Black v Ganieva*, 236 AD3d 427, 428 [1st Dept 2025]; *Reeves v Associated Newspapers*, Ltd., 232 AD3d at 23). A claim that fails to state a cause of action under CPLR 3211 (a) (7) necessarily lacks a substantial basis (*see 215 W. 84th St Owner LLC v Bailey*, 217 AD3d 488, 488-489 [1st Dept 2023]).

Applying these principles, the Court finds that plaintiffs have established that the claims asserted in *Mulé II* have a substantial basis for the purposes of the anti-SLAPP law.

The anti-SLAPP cause of action in *Mulé II* satisfies both prongs of the anti-SLAPP law. The Counterclaim qualifies as an "action involving public petition and participation" under either subdivision of Civil Rights Law § 76-a (1) (a) (*see Sweetpea Ventures Inc. v Belmamoun*, 231 AD3d at 461). As to the second prong, since the portion of the Counterclaim premised on *Mulé I* was dismissed pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, it lacks merit and does not have a substantial basis for the purposes of the statute (*see 215 W. 84th St Owner LLC v Bailey*, 217 AD3d at 488-489).

42 USC § 1983 provides a cause of action against government officials who, acting under color of state law, deprive individuals of "rights, privileges, or immunities secured by the Constitution and laws" of the United States (*see Johnson v Newburgh Enlarged Sch. Dist.*, 239 F3d 246, 250 [2d Cir 2001]). To establish a section 1983 claim, a plaintiff must demonstrate: "(1) the conduct complained of was committed by a person acting under color of state law; and (2) this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States" (*Greenwich Citizens Comm. v. Counties of Warren Indus. Dev. Agency*, 77 F3d 26, 29-30 [2d Cir 1996] [internal quotation marks omitted]). Where a plaintiff alleges that their constitutional rights were violated by the filing of a lawsuit or counterclaim, the plaintiff is required to show that the defendant acted with retaliatory intent (*see id.* at 30).

A municipality may not be held vicariously liable pursuant to 42 USC § 1983 based on a theory of respondeat superior (*see Monell v New York City Dept. of Social Servs.*, 436 US at 691).

[1] The Court does not address the public interest requirement because it is undisputed that these actions concern a matter of public interest, which is broadly construed to cover "matters of political, social, or other concern to the community" (*Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d at 29; *see* Civil Rights Law § 76-a [1] [d]).

"To prevail on a cause of action to recover damages pursuant to 42 USC § 1983 against a municipality, the plaintiff must specifically plead and prove (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right" (*Nasca v Sgro*, 101 AD3d 963, 964 [2d Dept 2012] [internal quotation marks omitted]; *see Jackson v Police Dept. of City of N.Y.*, 192 AD2d 641, 642 [1993]). For a cause of action against a municipality, "the action that is alleged to be unconstitutional must 'implement [ ] or execute[ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' " (*Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007], quoting *Monell v New York City Dept. of Social Servs.*, 436 US at 690). However, "if the challenged action is directed by an official with final policymaking authority, the municipality may be liable even in the absence of a broader policy" (*Mandell v County of Suffolk*, 316 F3d 368, 385 [2d Cir 2003]; *see Basset v City of Rye*, 104 AD3d 889, 891 [2d Dept 2013]).

Here, plaintiffs' commencement of *Mulé II* is constitutionally protected under the First Amendment (*see Bill Johnson's Restaurants, Inc. v N.L.R.B.*, 461 US 731, 741 [1983]). Contrary to defendants' contention, *Mulé II* cannot fairly be described as "sham litigation," which refers to suits "based on intentional falsehoods or on knowingly frivolous claims" (*id.* at 743). The timing and circumstances surrounding the filing of the Counterclaim are sufficient to support an inference by a reasonable jury of retaliatory motive. As to the requirement of an official policy or custom, defendants' amended answer admits that Blakeman "authorized and directed the institution of the counterclaim" (NYSCEF Doc No. 41 ¶ 92).

For the sake of clarity, this determination should not be construed as a final adjudication of the merits of the causes of action asserted in *Mulé II*. Defendants may ultimately disprove plaintiffs' allegations or establish other defenses. For the purposes of the anti-SLAPP law, however, the Court finds that *Mulé II* possesses a substantial basis and therefore does not constitute a SLAPP suit. Accordingly, the portion of the Counterclaim premised on *Mulé II* must also be dismissed.

Public Policy

Policy considerations likewise support dismissal. While certain forms of advocacy by public officials may warrant protection under the anti-SLAPP statute, this case presents no such situation. Here, plaintiffs challenge government conduct for which there is no private analogue. Moreover, none of the conduct at issue can reasonably be characterized as expressive activity. Extending anti-SLAPP protections to these circumstances would be inconsistent with the Legislature's intent, which was to protect citizens from retaliation for exercising their rights of speech and petition, not to shield municipalities or public officials from actions challenging the legality of government action. Citizens must remain free to question the legality of governmental action without the deterrent effect of retaliatory claims for damages under the anti-SLAPP law. The allegations regarding plaintiffs' alleged partisan motives and rhetoric do not provide any valid legal basis for the Counterclaim.

Accordingly, it is

ORDERED that plaintiffs' motion is granted, and defendants' counterclaim is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 10 days of the date of entry of this order, plaintiffs shall serve a copy of this order with notice of entry on defendants.

This constitutes the Decision and Order of the Court.

Dated: October 17, 2025
Mineola, N.Y.

Hon. Gary M. Carlton, J.S.C.