

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

3M COMPANY,

Plaintiff/Appellee,

-v-

LANNY DAVIS, et al.,

Defendants/Appellants.

C.A. No. 12-7012

**MOTION OF APPELLANTS LANNY DAVIS,
LANNY J. DAVIS & ASSOCIATES, PLLC AND DAVIS-BLOCK LLC
TO CONSOLIDATE THIS APPEAL WITH *SHERROD V. BREITBART***

Appellants Lanny Davis, Lanny J. Davis & Associates, PLLC and Davis-Block LLC (“Davis”) move, pursuant to Fed. R. App. P. 27 and the Court’s Internal Operating Procedures, to consolidate this appeal with the case currently pending before this Court styled *Sherrod v. Breirbart*, No. 11-7088 (D.C. Cir.) (“*Breitbart*”), as that appeal and Davis’s appeal present the same or closely related issues. The grounds for this motion are as follows.

1. In this appeal, Mr. Davis, a Washington D.C. attorney best known for his service as counsel to President Clinton, seeks review of that portion of the District Court’s February 2, 2012 Memorandum and Opinion denying Davis’

special motion to dismiss under the District of Columbia's Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.* (the "Act"). In denying Davis' special motion to dismiss, the District Court held that the Act conflicts with the Federal Rules of Civil Procedure, and does not apply in federal court under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). This determination is contrary to the weight of authority from federal courts in other circuits, an overwhelming number of which have held that various state anti-SLAPP laws apply in federal court actions.

2. In *Breitbart*, the appellants are Andrew Breitbart, deceased, who at the time of the events at issue was a journalist and well-known conservative political commentator who operated several websites, and Larry O'Connor, who edits and publishes news content on several Breitbart websites. They seek review of the District Court's denial of their special motion to dismiss, under the Act, an action filed by appellee Shirley Sherrod, a former official with the U.S. Department of Agriculture. Last month, pursuant to an order issued by a panel of this Court, the District Court issued a "Statement of Reasons" that explained as the reasons for the denial of the *Breitbart* appellants' special motion to dismiss that (1) the Act did not apply to cases that were filed before the Act's March 31, 2011 effective date; (2) the Act did not apply in federal court under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and (3) even if the Act applied, the *Breitbart* appellants' special motion to dismiss was untimely.

3. In addition, currently pending before the panel in *Breitbart* is appellee Sherrod's motion to dismiss the appeal of lack of jurisdiction. Appellee Sherrod contends that the Court lacks jurisdiction over the appeal in *Breitbart* because the District Court's denial of appellants' special motion to dismiss is not a final order appealable pursuant to 28 U.S.C. § 1291, and there is no other jurisdictional basis for the appeal. The *Breitbart* appellants contend that the Court has jurisdiction over the appeal because the District Court's denial of the special motion to dismiss is a final collateral order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny.

4. The Court's Handbook of Practice and Internal Procedures provides (at p. 23) that "cases involving essentially the same parties or *the same, similar, or related issues*, may be consolidated." (emphasis added) Here, Davis' appeal and *Breitbart* present "the same, similar, or related issues" such that consolidation is appropriate.

5. First, Davis' appeal presents the pure legal issue of whether the Act applies in federal court actions pursuant to the *Erie* doctrine, as the District Court based its denial of Davis' special motion to dismiss on the Act's inapplicability to federal court cases.

6. Appellee in *Breitbart* argued as a ground for denying the *Breitbart* appellants' special motion to dismiss in the District Court that application of the


Act in federal court would violate the *Erie* doctrine. See Plaintiff Shirley Sherrod's Memorandum of Points and Authorities in Opposition to Defendants' Special Motion to Dismiss Complaint under the District of Columbia Anti-SLAPP Act of 2010 (Dkt. Item 28 in 11-cv-477 (D.D.C.)) at 10. The District Court agreed, specifically adopting this as one of the reasons it denied the Breitbart appellants' special motion. And appellee in *Breitbart* has taken this same position in this Court. See Plaintiff-Appellee's Motion to Dismiss or, in the Alternative, for Summary Affirmance (Dkt. Item 1337116 in No. 11-7088 (D.C. Cir.)) at 3 n.1. If the Court disagrees with the District Court's holding that the Act does not apply to cases filed before the Act's effective date, it will be faced with the same issue presented in Davis' appeal: whether the Act applies in federal court pursuant to the *Erie* doctrine.

7. Further, as noted, there is already pending before a panel of the Court a motion to dismiss for lack of jurisdiction in *Breitbart*. The deadline for filing dispositive motions in Davis' appeal is April 9. Although Davis, like the *Breitbart* appellants, believes that the District Court's denial of his special motion to dismiss is appealable as a collateral final order under the *Cohen* doctrine, Davis anticipates that 3M will file a motion to dismiss arguing, like the appellee in *Breitbart*, that the Court lacks jurisdiction over the appeal.

8. Given the identity of issues in this appeal and the *Breitbart* appeal, consolidation is not only permitted under the Court's Internal Procedures, but would also provide the most efficient use of the Court's resources.

9. Counsel for the District of Columbia (appellant in No. 12-7017, already consolidated with Davis' appeal) and for Larry O'Connor have authorized the undersigned to represent that the District of Columbia and O'Connor do not oppose this motion.

Dated: March 23, 2012



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ADDENDUMS

CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), appellants Lanny Davis, Lanny J. Davis & Associates, PLLC and Davis-Block LLC certify the following:

1. Appellants

Lanny Davis

Lanny J. Davis & Associates, PLLC

Davis-Block LLC

2. Appellee

3M Company

Appellants further note that the District of Columbia intervened as a defendant in the District Court, and has filed an appeal arising from the same order involved in this appeal. The District's appeal has been docketed as case no. 12-7017, and has been consolidated with the case.

Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 27(a)(4), appellants Lanny J. Davis & Associates, PLLC and Davis-Block LLC state that they have no parent company, and no public company has a 10% or greater ownership interest in either of them. Appellant Lanny J. Davis and Associates, PLLC is a law firm organized as a professional limited liability company. Appellant Davis-Block LLC is a public relations firm organized as a limited liability company.

CERTIFICATE OF SERVICE

I certify that on March 23, 2012, a copy of the foregoing document was filed with the Clerk's office. Notice of this filing has been served on parties of record by first class mail and also electronic mail.

