Geer v. Phoebe Putney Health System, 849 S.E. 2d 660 (Ga. 2020)

In the 2020 case of *Geer v. Phoebe Putney Health System*, the Georgia Supreme Court decided that Georgia's "anti-SLAPP" law did not prevent defendant Phoebe Putney from counter-suing for attorneys' fees under the Georgia Open Records Act (ORA or the Act) when plaintiff Geer sued Phoebe Putney to force it to produce documents in response to his ORA request.[1] The Court ruled that even when an attorneys' fees claim is "premature[ly]" filed before the merits of the underlying ORA dispute have been resolved, it does not create a chilling effect that would subject it to an anti-SLAPP motion to strike.

"SLAPP" is shorthand for "strategic lawsuit against public participation." Georgia's anti-SLAPP law, codified at O.C.G.A. § 9-11-11.1, allows parties to challenge "abusive litigation that seeks to chill exercise of constitutional rights to free speech and petition." *Geer*, 849 S.E.2d at 662 (citing *EarthResources, LLC v. Morgan County*, 281 Ga. 396, 401 (2006)). In other words, when civil defendants are sued in an attempt to prevent their protected speech or petition activity, the anti-SLAPP statute allows them to file a motion to strike the complaint against them early in litigation. In this case, plaintiff Geer argued that defendant Phoebe Putney's counterclaim against him for attorneys' fees was a SLAPP action intended to chill his exercise of his First Amendment right to seek documents from Phoebe Putney pursuant to the ORA. Accordingly, Geer moved to strike. Ultimately, the Georgia Supreme Court disagreed that the counterclaim constituted a SLAPP action and denied the motion.

[1] The decision was unanimous among justices who participated, but Justices Blackwell and Warren did not participate in the decision.

The Court began its analysis by pointing out that a primary purpose of the ORA is to foster confidence in government through openness to the public, and stipulated that "issues regarding the protection of requesters' constitutional rights to free speech and petition may arise any time a request for records is denied." *Id*. at 662. The ORA is thus intended to grant the public broad access to government documents. However, in a lawsuit to enforce compliance with the ORA, the Act allows either party to recover their attorneys' fees if their opponent's position – either in seeking the records or in refusing to produce the records – was not substantially justified. *Id.* Specifically, the ORA states:

> [When] the court determines that either party acted without substantial justification either in not complying with this chapter or in instituting the litigation, the court shall, unless it finds that special circumstances exist, assess in favor of the complaining party reasonable attorney's fees and other litigation costs reasonably incurred. Whether the position of the complaining party was substantially justified shall be determined on the basis of the record as a whole which is made in the proceeding for which fees and other expenses are sought.

O.C.G.A. § 50-18-73(b).

The Court then considered the procedural history of plaintiff Geer's motion to strike defendant Phoebe Putney's attorneys' fee counterclaim. To begin, Geer had submitted an ORA request seeking access to the minutes of Phoebe Putney's board meetings held between 2008 and 2017. *Geer*, 849 S.E. 2d at 661. Phoebe Putney denied the request. *Id.* Geer then sued in superior court for access to the records. *Id.* Phoebe Putney asserted defenses and also counterclaimed for attorneys' fees under the ORA. *Id.* Geer moved to strike Phoebe Putney's counterclaim under Georgia's anti-SLAPP statute. *Id*. He argued that the counterclaim was "nothing more than an effort to chill his rights to petition the government and free speech," which he was exercising by suing Phoebe Putney to force it to comply with the ORA. *Id.*

The trial court denied Geer's motion to strike the counterclaim for fees and Geer appealed. *Id.* at 662. The Georgia Court of Appeals affirmed the trial court's judgment. *Id.* It concluded that the anti-SLAPP statute did not preclude a defendant from seeking attorneys' fees and costs when the outcome of an ORA lawsuit includes a determination that the lawsuit lacked substantial justification. *Geer v. Phoebe Putney Health System, Inc.*, 350 Ga. App. 127, 128 (2019). It noted that the anti-SLAPP statute was not meant to "immunize parties from the consequences of [their own] abusive litigation." *Id.*

The Georgia Supreme Court then affirmed the Court of Appeals' decision. *Geer*, 849 S.E.2d at 662. The Court acknowledged that a counterclaim against a plaintiff who is seeking information under the ORA may chill the constitutional rights of free speech and petition when the counterclaim is intended to burden the requesting party with the costs of a legal defense.[2] *Id.* at 663. However, the Court went on to find that even when brought near the beginning of litigation, the ORA's limitations on when attorneys' fee may be awarded distinguish such an attorneys' fee claim from other claims which may chill plaintiff's speech or petition activity. *Id.* at 665. This is because the claim for fees cannot be adjudicated "without an evaluation of the merits of the underlying [ORA] dispute," *id.*, which is necessary to determine if the position of the ORA party against whom fees are sought was "substantially justified . . . on the basis of the record as a whole." *Id.* at 662 (quoting O.C.G.A. § 50-18-73(b)).

The Court concluded that Phoebe Putney's attorneys' fees counterclaim was "not yet ripe for consideration by the trial court because [the trial court was] not yet in possession of 'the record

[2] These concerns are reflected in the mandate of the anti-SLAPP statute: "the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process." O.C.G.A. § 9-11-11.1(a).

as a whole.'" *Id.* Since the counterclaim could only be litigated after full adjudication of Geer's underlying ORA lawsuit, the claim could not burden Geer *during* the adjudication. Thus, the Court held that the trial court was not required to apply the anti-SLAPP statute to strike the fees' claim. *Id.* at 666.

The implications of this holding are unlikely to limit the effectiveness of the ORA, the anti-SLAPP statute, or the exercise of First Amendment rights. While the Court did not strike Phoebe Putnam's claim for attorneys' fees, it ultimately reiterates the importance of avoiding chilling effects in holding that such a claim was premature. Moreover, ORA plaintiffs are already generally on notice that, under the ORA, defendants have the right to bring a claim for attorneys' fees if they win, even if such a claim can only be successful if the plaintiff's suit was "substantially unjustified." When attorneys' fees claims are brought prematurely and left pending until the ORA lawsuit is resolved, they do not create a chilling effect beyond that which already existed by virtue of the terms of the ORA itself. If they did, the Georgia Supreme Court's decision in *Geer* provides no reason to believe that the Court would not approve striking them. The practical result of the *Geer* decision is that defendants in ORA lawsuits are now on notice that it is premature to bring a claim for attorneys' fees early in the litigation.

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