To be argued by:
GEORGE SASSOWER
30 minutes

Supreme Court of the State of New York
Appellate Division — Second Department

GEORGE SASSOWER,
Petitioner-Appellant,

-against-

JOHN P. FINNERTY, Sheriff of Suffolk County,
Respondent-Respondent.

PEOPLE OF THE STATE OF NEW YORK, EX. REL. GEORGE SASSOWER,
Petitioner-Appellant,

-against-

SHERIFF OF SUFFOLK COUNTY,
Respondent-Respondent.

GEORGE SASSOWER,
Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, HARRY E. SEIDELL, NEW YORK NEWS, INC., and VIRGINIA D. MATHIAS,
Defendants-Respondents.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT UNDER CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
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GEORGE SASSOWER, Petitioner-Appellant,

against

JOHN P. FINNERTY, Sheriff of Suffolk County, Respondent-Respondent.

PEOPLE OF THE STATE OF NEW YORK, EX. REL. GEORGE SASSOWER, Petitioner-Appellant,

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SHERIFF OF SUFFOLK COUNTY, Respondent-Respondent.

GEORGE SASSOWER, Plaintiff-Appellant,

against

ERNEST L. SIGNORELLI, et al., Defendants-Respondents.

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1. Index Nos. 77-11984; 78-17671.

2. The full names of the original parties are listed above; there has been no change.

3. Action commenced in Supreme Court, Suffolk County.

4. Verified Complaint served on or about December 15, 1978.

5. Habeas Corpus relief, defamation, and other tortious conduct.

6. Appeal from Judgment and Order of Supreme Court, Suffolk county dated Feb. 10, 1981 and entered Feb. 23, 1981.

7. The appendix method (reproduced) is being used.

QUESTIONS PRESENTED

1. May a private party initiate and prosecute a criminal contempt proceeding after the District Attorney refused to do so?

The Court below impliedly held in the affirmative.

2. Could appellant be constitutionally and legally tried, convicted, and sentenced for criminal contempt, all in his absence, the first time the matter was on for a hearing, and while he was legally engaged in the midst of a trial in a higher court?

The Court below held in the affirmative.

3. Was appellant's legal engagement in a higher court a conscious, voluntary, and deliberate waiver of his constitutional and legal right to be present at a trial, conviction, and sentence for criminal contempt, as a matter of law, so as to dispense completely with the necessity of a habeas corpus hearing?

Special Term impliedly held in the affirmative.

4. Could appellant be legally sentenced immediately upon conviction without affording him his right to allocution and without inquiry whether an adjournment was desired before sentencing?

The Court below impliedly held in the affirmative.

5. Was appellant supposed to risk contempt in Supreme Court, Bronx County by abandoning a pending trial in its midst and prejudice his client's cause in order to appear in Surrogate's Court?

The Court below impliedly held in the affirmative.

6. Is even a single valid cause of action sufficient to cause the complete denial of respondents' omnibus CPLR 3211(a) motion?

The Court below did not answer this question.

7. Did the publications annexed to plaintiff's complaint sufficiently set forth the defamation so as to comply with CPLR 3016(a)?

The Court below held in the negative.

8. Is outright dismissal appropriate, on an otherwise meritorious cause of action, where the precise language is peculiarly within the knowledge of the defendants?

The Court below impliedly held in the affirmative.

9. Was the deliberate publication by the respondent, Signorelli, of his professional complaints against plaintiff-attorney and his attorney-wife in his Court as well as elsewhere and recommending disciplinary proceedings a violation of statute so as to render him accountable in an action for damages?

The Court below impliedly held in the negative.

10. Are the judicial respondents immune from an action in damages where they have actual knowledge that they lack jurisdiction; where there is a clear absence of all jurisdiction; where the actions or omissions are essentially ministerial; and/or the actions are not judicial in nature, and do the allegations of the complaint, liberally construed, allege such facts?

The Court below partially responded in the negative.

STATEMENT

1. When the District Attorney refused to initiate criminal contempt proceedings against appellant-attorney, Anthony Mastroianni, by motion, commenced such proceedings in Surrogate's Court.

Appellant entered a plea of "not guilty" and requested a plenary trial (A50).

On February 22, 1978, a hearing date was set for March 7, 1978 (A50).

On March 7, 1978, the first time this matter was on the calendar for a hearing, appellant was in the midst of a trial in Supreme Court, Bronx County before Mr. Justice JOSEPH DiFEDE (Green v. Green).

By affidavit, appellant advised the Surrogate's Court of his actual engagement.

In Appellant's absence, Acting Surrogate, Mr. Justice HARRY E. SEIDELL, tried, convicted and sentenced appellant to be incarcerated for 30 days (A51).

By virtue of a Writ of Habeas Corpus, appellant was eventually released and the matter set down for a hearing on the Writ for March 27, 1979 (A22).

No hearing was ever held.

In the interim, appellant moved for summary judgment on his Writ claiming that a criminal trial, conviction and sentence all in his absence was plainly unconstitutional and illegal (A19-A21).

The Court, per Hon. JAMES A. GOWAN, summarily held that, albeit appellant's actual engagement in a higher court, his failure to be present the first time the matter was on for a hearing, was a conscious, deliberate, voluntary, and intelligently made waiver of his constiutional and legal right to be present (A55).

2. Solely based on an omnibus Notice of Motion, counsel for the judicial defendants requested that (A43-A44)

> "pursuant to CPLR 3211(a)(5)(7) ... the amended complaint against Ernest L. Signorelli and Harry E. Seidell [be dismissed] for failure to state a cause of action ...

The complaint, insofar as it concerns the two judicial defendants, alleges in brief as follows: (These allegations must, on this CPLR 3211(a) motion, be liberally construed and deemed true).

a. First Cause of Action (A23): On March 7-8, 1978, these judicial defendants had actual knowledge that they had no jurisdiction to try, convict, and sentence plaintiff for criminal contempt in absentia, and that in clear absence of all jurisdiction they nonetheless did so.

These judicial defendants knew the Sheriff of Suffolk County had no jurisdiction outside Suffolk county, but they nevertheless sent his deputies to Westchester County to, and they did, abduct, assault, imprison and deny plaintiff his constitutional rights, including the right to obtain a Writ of Habeas Corpus, access to an attorney and access to local police authorities.

These judicial defendants further refused to allow plaintiff to have visitors or counsel, refused to obey a Writ of Habeas Corpus mandating his release, and permitted him to be the subject of continuous assaults and abusive language.

b. Second Cause of Action (A26): Defendant, Signorelli made false and defamatory "out-of-court" statements to, and which were thereafter published by, the New York Daily News*.

c. Third Cause of Action (A29): By reason of the intervention of these judicial defendants, stenographic minutes which plaintiff paid for were wilfully and deliberately delayed until the plaintiff's need for them had expired.

d. Fourth Cause of Action (A30): On June 22-23, 1977, the judicial defendant, Signorelli, knowingly held a "mock trial" of plaintiff, executed papers which contained false and contrived jurisdictional facts, sent deputy sheriffs outside their jurisdiction, caused plaintiff's arrest, diverted plaintiff from the County Jail so that plaintiff would be unable to obtain a Writ of Habeas Corpus, held him incommunicado, and permitted plaintiff to be the subject of assaults while in such custody. Further, this defendant knew he had no jurisdiction and acted in clear absence of all jurisdiction.

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* Significantly the defendant, New York News, does not plead any complete or partial defense to such defamation action. Had this false and defamatory information been obtained as part of a judicial proceeding, it would have certainly so been pleaded.

e. Fifth Cause of Action (A32): Incorporating the prior allegations, a cause of action for malicious prosecution.

f. Sixth Cause of Action (A32): A violation of Judiciary Law §90(10) by defendant Signorelli by causing publication in the New York Law Journal of his professional complaints concerning plaintiff and recommending disciplinary action against plaintiff for his alleged misconduct in the Surrogate's Court as well as elsewhere, rather than confidentially forwarding same to the Grievance Committee*.

g. Seventh Cause of Action (A34): Defamation action against the defendant Signorelli for sua sponte causing publication of a farrago of specified untrue, distorted, and misleading statements against plaintiff on matters not before him and on which he knowingly and clearly had no jurisdiction, including the clearly false statement that plaintiff made application for a Writ of Habeas Corpus from the Appellate Division (which he did not). Defendant Signorelli further falsely stated that after the Appellate Division had denied plaintiff's release pending a hearing, he made application to a Supreme Court justice and obtained such release without revealing his prior application.

The true facts are that the Supreme Court application preceded that to the Appellate Division. The Appellate Division application had been made not by plaintiff but a colleague of his who became aware of plaintiff's predicament and who was unaware of plaintiff's prior application made to the Supreme Court and his ordered release by virtue of same.

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* An application is contemplated to make public the file of the Grievance Committee which will reveal the falsity of the charges made by this published complaint by Signorelli.

h. Eighth Cause of Action (A36): Harassment of plaintiff's wife and family in order to intimidate plaintiff into submission.

These included the issuance of a trial subpoena for plaintiff's wife, when no such trial was scheduled; causing the publication of professionally defamatory material concerning plaintiff's attorney-wife and recommending disciplinary action against her (she was subsequently completely vindicated); causing the incarceration of plaintiff's wife and daughter when they served a Writ of Habeas Corpus on plaintiff's behalf; and not permitting them to visit plaintiff while he was wrongfully incarcerated.

i. Ninth Cause of Action (A38): Causing to be made a false criminal complaint of assault second degree against plaintiff which was dismissed on a probable cause hearing, and committing other egregious acts against plaintiff.

3. The issues before this Court are questions of law, to wit., whether plaintiff's Writ of Habeas Corpus should have been sustained and whether plaintiff's complaint sets forth a valid cause of action. Consequently, in order not to obscure the issues, no attempt is made herein to correct the many contrived factual assertions contained in the opinion below.

POINT I

THE PLAINTIFF'S WRIT OF HABEAS CORPUS SHOULD HAVE BEEN SUSTAINED AS A MATTER OF LAW

1. "[C]riminal contempt is a crime in every fundamental respect" (Bloom v. Illinois, 391 U.S. 194, 201; State University v. Denton, 35 A.D.2d 176, 181 [3rd Dept.]). It is therefore constitutionally required that the accused appellant have the right to be present at all important stages (United States Constitution, Amendments 6 and 14; New York State Constitution, Article 1, Sec. 6; Pointer v. Texas, 380 U.S. 400; People v. Saccomanno, 25 A.D.2d 528, 529 [2nd Dept]).

Only extreme voluntary and deliberate conduct by the accused may create a waiver of such required presence (Illinois v. Allen, 397 U.S. 337; People v. Epps, 37 N.Y.2d 343; People v. Byrnes, 33 N.Y.2d 343; People v. Crown, 51 A.D.2d 588 [2nd Dept.]) -- clearly inapplicable to the case at bar.

Was appellant supposed to risk contempt in Supreme Court, Bronx County by abandoning a pending trial in its midst and prejudice his client's cause in order to appear in Surrogate's Court?

The finding -- without a hearing -- that appellant deliberately, voluntarily, and intelligently waived his right to be present in a criminal proceeding in Surrogate's Court the first time the matter appeared on the calendar for such purpose under the established facts herein is ludicrous.

2a. At the time of sentencing, the accused has a constitutional and statutory right to be present and afforded allocution (Groppi v. Leslie, 404 U.S. 496, 501; People ex rel Miller v. Martin, 1 N.Y.2d 406; Criminal Procedure Law §380.40, §380.50).

b. Sentence may not be imposed immediately after verdict without the mandatory inquiry of the accused "as to whether an adjournment is desired" (Criminal Procedure Law §380.30[b]).

In the case at bar, the Court immediately after rendering its guilty verdict -- and still in appellant's absence -- imposed sentence.

3. The right to prosecute for an alleged criminal act belongs exclusively to the sovereign, and not to any individual (County Law §700).

This criminal prosecution by a private individual is a usurpation of the prerogatives of the District Attorney.

The vindication of a private right, if there be any herein, is by a civil, not criminal, contempt proceeding (Gompers v. Bucks Stove, 221 U.S. 418) and this incredible travesty of law against appellant should be terminated by dismissal of this proceeding.

POINT II

A HEARING WAS REQUIRED TO SUPPORT A FINDING OF A CONSCIOUS AND DELIBERATE WAIVER OF CONSTITUTIONAL RIGHTS

The only evidence before the Court in explanation of appellant's absence in Surrogate's Court on March 7, 1978 was his engagement on trial in another court.

There is absolutely no evidence of any intent or desire by the appellant to waive his constitutional or statutory right to be present so that he could cross-examine and give evidence. The contrary finding, without a hearing, is a mockery.

In People v. Epps (supra), Mr. Justice Wachtler, speaking for the Court stated that the "issue of voluntariness (of the right to be present) is a question of fact...". Such issue cannot be disposed of adversely to appellant without a hearing and certainly not without a scintilla of evidence by the respondent contradicting appellant's assertion of actual engagement.

POINT III

ONE VALID CAUSE OF ACTION IS SUFFICIENT TO DEFEAT DEFENDANTS' SIGNORELLI'S AND SEIDELL'S OMNIBUS MOTION. VALID CAUSES OF ACTION WERE SET FORTH

1. Even one valid cause of action mandates the complete denial of defendants' Signorelli and Seidell's omnibus CPLR 3211(a) motion (Kaplan v. Simone, 77 A.D.2d 863, 864 [2nd Dept]).

The allegations in the complaint are to be liberally construed and assumed true for the purpose of evaluating defendants' motion (Barr v. Wachman, 36 N.Y.2d 371, 375).

2. The Court erroneously dismissed the defamation causes of action for non-compliance with CPLR 3016(6) [A47].

a. The "out-of-court" defamatory material as given by defendant Signorelli in a press interview to and printed by the New York Daily News was annexed as an exhibit to the complaint.

As printed by the New York Daily News, it represents the statements of defendant Signorelli in haec verba. If pre-trial disclosure or a trial reveal that this defendant was not precisely quoted, then plaintiff can move to amend his complaint or conform the pleadings to the proof (McKinney's, Siegel's Commentaries C 3016:2 p.71). Outright dismissal is only appropriate when it is certain a sufficient cause of action in defamation does not exist (Weinstein-Korn-Miller ¶3016.02).

CPLR 3016 was not intended to defeat an otherwise meritorious action because the information or particulars are, as here, peculiarly within the knowledge of the defendants (Jered v. N.Y.C.T.A., 22 N.Y.2d 187).

b. The sua sponte defamatory material given to and published by the New York Law Journal in haec verba was annexed as an exhibit to the complaint. Such transmission by the defendant Signorelli is not privileged (Murray v. Brancato, 290 N.Y. 52).

The matters contained in such publication were not pertinent to any issue before the Surrogate's Court and was a false commentary on matters in other courts wherein defendant Signorelli knowingly acted in clear absence of jurisdiction.

In this published diatribe, the defendant Signorelli falsely stated (A42):

> "he (plaintiff) procured a writ of habeas corpus from a justice of the Appellate Division ... (which) denied his application for bail. Later, that same day, he applied for and received another writ from a Suffolk County Supreme Court Justice which contained a provision for bail. In both habeas corpus applications he alleged that no previous applications had been made for the relief requested."

If plaintiff violated professional rules or ethics in other courts or places by making false or misleading assertions, which he did not, then it was certainly not a matter over which the Surrogate could rule or decide. Matters involving plaintiff in other courts were clearly not pertinent to any issue before the Surrogate and over which he knew he clearly was devoid of jurisdiction.

c. In his published diatribe therein defendant Signorelli set forth the alleged professional misconduct of plaintiff in the Surrogate's Court and elsewhere and then he stated (A43):

> "Mr. Sassower, a member of the bar, ...I would be derelict in my duty if I failed to report his actions to the appropriate tribunal for disciplinary action.

> Doris Sassower, his wife, ... should be similarly called upon to explain her extraordinary behavior ....
> I am accordingly directing the Chief Clerk to forward ... this ... to the Presiding Justice of the Appellate Division ... "

Signorelli knew that the appropriate tribunal to forward any professional complaints was the Grievance Committee.

This defendant knew that by law any and all professional complaints were to be confidential (Judiciary Law §90[10]).

The legislature has the authority to impose penalties against the judiciary in favor of the injured, even for judicial acts (see e.g. CPLR §7003[c]).

The legislature has the authority to declare professional complaints and certain proceedings confidential and an infringment of one's right of privacy (Shiles v. News Syndicate, 27 N.Y.2d 9, cert. den. 400 U.S. 999).

Signorelli having wilfully violated the plain mandate of the statute should be called upon to respond in damages for the injury he inflicted on plaintiff.

3. There is no judicial immunity against an action for damages when any one of the following conditions exists: (a) actual knowledge by the judge that he lacks jurisdiction (Bradley v. Fisher, 80 U.S. 335, 352); (b) a clear absence of all jurisdiction (Stump v. Sparkman, 435 U.S. 349); (c) the action or omission is essentially ministerial (Kendell v. Stokes, 44 U.S. 87, 98; Yates v. Lansing, 5 Johns [N.Y.] 282, 291, 296-297); (d) or the actions are not considered judicial in nature (Harper v. Merckle, 638 F.2d 848, 858 [5th Cir.]).

a. In Bradley v. Fisher (supra), the Court stated (352):

"when the want of jurisdiction is known to the judge, no excuse is permissible"

This quotation was approvingly repeated in Stump v. Sparkman (supra, at p. 356 n.6).

Almost all the conduct alleged against the judicial defendants of a jurisdictional nature contain the allegation that he/they knew that he/they had no jurisdiction in the matter. On a CPLR 3211(a) motion, as here, such allegation of knowledge must be accepted as true.

b. Many of the allegations against the defendant Signorelli show a clear absence of all jurisdiction. These allegations include conduct after recusal; preventing the plaintiff from obtaining a Writ of Habeas Corpus; holding plaintiff incommunicado; holding an "out-of-court" press conference; comments on plaintiff's actions in other courts; preventing plaintiff from securing expeditious delivery of a transcript (N.Y. Post v. Leibowitz, 2 N.Y.2d 677, 683); harassing and incarcerating members of plaintiff's family; refusing to obey a Writ of Habeas Corpus mandating plaintiff's release (Reimer v. Short, 578 F.2d 621, 628-629 [5 Cir.]); and causing others to file false criminal charges against plaintiff in another court (Dean v. Kochendorfer, 237 N.Y. 384; Zarcone v. Perry, 572 F.2d 52 [2nd Cir.]).

c. Liability for ministerial misconduct is independent of any question of jurisdiction. Consequently, the fact that the acts are committed within the judicial role does not preclude liability (Prosser on Torts, 4th Ed. p. 989-91; 48 CJS, Judges §64, p. 1032; 46 Am. Jur.2d., Judges §82 p. 151).

"The allowance of a Writ [of habeas corpus] is not a judicial act". (Mr. Justice Kent in Yates v. Lansing, supra at 296-297). A surrogate does not have judicial discretion to prevent a litigant going to the federal courts; or in determining whether an arrested person may communicate with counsel or family; or to direct deputy sheriffs to arrest beyond their bailiwick; or to deny a party access to stenographic court minutes.

d. Immunity is determined by the quality of the act and not the title of the actor (Hampton v. Chicago, 484 F.2d 602 [7th Cir.], cert. den. 415 U.S. 917).

Obviously, taking the allegations of plaintiff's complaint as true, the judicial defendants, and Signorelli in particular, assumed the rules of prosecuting attorney, sheriff, jailor, publisher and some lay roles. The protean nature of the acts of the judicial defendants must, therefore, be examined in order to determine whether a judicial immunity defense is available.

What are some of these acts? Holding an "out-of-court" press conference and making false and defamatory remarks about plaintiff; publishing false statements about plaintiff's professional conduct in other courts; refusing to obey the mandate of a Writ of Habeas Corpus directing plaintiff's release; holding appellant incommunicado; directing the deputy sheriff as to how and where to perform his duties; causing false criminal charges to be filed in other courts; and other similar acts committed by the judicial defendants. By no contortion of reasoning can they be deemed judicial acts for which there is immunity as a matter of law.

CONCLUSION

THE JUDGMENT AND ORDER APPEALED FROM SHOULD BE MODIFIED, PLAINTIFF'S WRIT OF HABEAS CORPUS SHOULD BE SUSTAINED AND RESPONDENTS' 3211 MOTION TO DISMISS DENIED

Respectfully submitted,

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