UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GEORGE SASSOWER,

Plaintiff,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALLEN KROOS, ANTHONY WISNOSKI, and LEONARD J. PUGATCH,

Defendants.

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Index No.
77 C 1447

MEMORANDUM OF LAW BY THE ATTORNEY GENERAL IN OPPOSITION TO PLAINTIFF's APPLICATION

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GEORGE SASSOWER,

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Defendants.

MEMORANDUM OF LAW BY THE ATTORNEY GENERAL IN OPPOSITION TO PLAINTIFF'S APPLICATION.

Preliminary Statement

Plaintiff was issued letters testamentary as the executor of the Estate of Eugene Paul Kelly by the Surrogate's Court of Suffolk County, State of New York on June 10, 1972. By order of the Surrogate's Court dated March 9, 1976, the letters were revoked and plaintiff was removed as executor of the estate.

By order of the Surrogate's Court dated April 28, 1977 plaintiff was directed to transmit to the Public Administrator of Suffolk County all books, papers and property of the estate on or before May 5, 1977. The plaintiff failed to comply with the order.

On June 22, 1977 plaintiff was adjudged guilty of criminal contempt by reason of his failure to obey the order of the Surrogate's Court dated April 28, 1977 and was ordered imprisoned in the Suffolk County Jail for a period of thirty (30) days.

Plaintiff was taken into custody by representatives of the Sheriff of Suffolk County on June 23, 1977. Plaintiff thereafter procured a writ of habeas corpus in Supreme Court of the State of New York, County of Suffolk and was released from the Sheriff's custody. Bail was set at three hundred ($300.00) dollars. Proceedings on the return of the writ are pending before the Supreme Court. Bail has been continued pending the court's decision on the writ.

On June 24, 1977 plaintiff allegedly filed and served a notice of appeal from the contempt order of the Surrogate's Court dated June 22, 1977.

ARGUMENT

Plaintiff seeks federal court intervention "to stay execution of the Contempt Order and Warrant of Commitment dated June 22, 1977 until the determination of the appeal by the plaintiff from the contempt order of June 22, 1977 by the Appellate Division of the Supreme Court of the Second Judicial Department." This court lacks jurisdiction to grant this relief.

The relief requested in plaintiff's second cause of action and in the instant application, relating to the fact of plaintiff's confinement, falls squarely within the traditional scope of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973). Citing United States ex rel. Tuthill v. Sherwood, 399 F. Supp. 32 (S.D.N.Y., 1975) for the proposition that this court has jurisdiction in this matter, plaintiff explicitly acknowledges that the second cause of action, although embodied in a complaint under 42 U.S.C. § 1983, is tantamount to an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a).

The complaint, however inartfully drawn, and affidavit in support of the instant application reveal that plaintiff has sought no similar relief whatsoever in state court. 28 U.S.C. § 2254(b).

It also appears that plaintiff's assertion ". . . that under § 460.50 of the Criminal Procedure Act, an accused found guilty may apply for bail to specified judges dependent only on the court in which such conviction and sentence was rendered, but that no provision is made for convictions made in Surrogate's Court" constitutes plaintiff's showing that there is an absence of an available state corrective process. 28 U.S.C. § 2254(b). However, there are available state remedies and plaintiff has failed to exhaust them.

Plaintiff's contention that the cited provision of the New York Criminal Procedure Law is applicable is inapposite. Regardless of whether the process leading to the finding of contempt of court is labeled civil, quasi-criminal, or criminal in nature, the fact remains that plaintiff seeks to stay an order of the Surrogate's Court of Suffolk County, State of New York pending appeal of that order. Section 2701 of the New York Surrogate's Court Procedure Act provides, in pertinent part, that those provisions of the CPLR which govern appeals generally, including CPLR Article 55, shall be applicable to appeals from decrees and orders of the Surrogate's Court.

Section 5519(c) of the New York Civil Practice Law and Rules (CPLR) provides that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or orders appealed from pending an appeal. . ." Plaintiff has made no application to the Surrogate's Court or to the Appellate Division for such a stay.

The New York courts have never had an opportunity to consider the plaintiff's application for a stay. Cf. Picard v. Connor, 404 U.S. 270 (1971). Plaintiff should not be allowed to ignore available state court remedies and attempt to present his claim to the Federal District Court virtually in the first instance.

With respect to the second cause of action and the relief requested therein, plaintiff also fails to allege that he has been deprived, under color of State law, any right, privilege or immunity secured by the Constitution of the United States. See 42 U.S.C. § 1983. Nor does plaintiff seek to recover damages. Thus plaintiff has not invoked the jurisdiction of this court pursuant to 28 U.S.C. § 1343.

Were this claim otherwise within this court's jurisdiction denial of the relief requested is still mandated.

> ". . .[I]n a union where both the States and the Federal Governments are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts." Trainor v. Hernandez, _____ U.S. _____ (1977); 45 U.S.L.W. 4535, 4536 (May 31, 1977); cf. Younger v. Harris, 401 U.S. 37, 44 (1971).

This principle applies to a case in which the State's contempt process is involved. Juidice v. Vail, _____ U.S. _____ (1977); 45 U.S.L.W. 4269 (March 22, 1977).

> "The contempt power lies at the core of the administration of a State's judicial system, cf. Ketchum v. Edwards, 153 N.Y. 534, 539 (1897). Whether. . . the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we

> think the salient fact is that federal court interference with the State's contempt process is an offense to the State's interest. . . ." Juidice v. Vail, ____U.S.____, (1977); 45 U.S.L.W. 4269, 4272 (March 22, 1972); cf. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

And although plaintiff does not seek to invalidate the statute under which the pending state proceeding was brought, still plaintiff has an opportunity to present his federal claims, if any, in the pending state proceedings.

> "No more is required to invoke Younger abstention". Juidice v. Vail, supra at 4272.

The pendency of the state court action calls for restraint by this court; for dismissal of the plaintiff second cause of action, and for denial of the relief requested herein.

CONCLUSION

THE RELIEF REQUESTED BY PLAINTIFF CANNOT BE GRANTED AND MUST BE DENIED.

Dated: New York, New York
July 22, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant Signorelli

LEONARD J. PUGATCH
Deputy Assistant Attorney General
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