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NEW YORK CITY OFFICE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
GEORGE SASSOWER,

Plaintiff,

-against-

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

Defendants.

File No.
77 C 1447.

-----x
PLAINTIFF'S MEMORANDUM OF LAW
(BERGER MOTION)

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pro se.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GEORGE SASSOWER,

Plaintiff,

File No.
77 C 1447

-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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PLAINTIFF'S MEMORANDUM
OF LAW.

STATEMENT.

This memorandum is submitted with respect to the untimely "Memorandum of Law" of the defendant VICENT G. BERGER, JR., which plaintiff formerly rejected.

This memorandum is submitted without prejudice to plaintiff's contention, as set forth in his cross-motion, that defendants' motions be dismissed with prejudice and with sanctions.

This memorandum is submitted in the event that this Court decides that defendant's motion be considered on its merits notwithstanding the aforesaid.

This defendant moves pursuant to "Rule 12(b)(?)... dismissing this action on the grounds that the complaint fails to state a claim against him (Berger) upon which relief can be granted and upon the further ground that this court lacks jurisdiction of the matter." (p.1-2).

RESPONDING TO DEFENDANT'S
POINT I.

This defendant contends that "all of the allegations ... relate to his action as an individual attorney" (p.2).

Based upon this erroneous assumption, this defendant argues that if he obeys the Code of Professional Responsibility and the Surrogate's Court Act of the State of New York, this Court does not have jurisdiction over him under 42 USC §1983.

1. This defendant does not contend that plaintiff does not have a good, proper, and meritorious "First Cause of Action", but only that he should not be included as a party defendant. Since the granting of this defendant's motion in this respect will not dispose of plaintiff's cause of action herein, same should not be granted unless this defendant was improperly included beyond any doubt whatsoever.

2. This defendant states that the Surrogate appoints the Public Administrator (who has defaulted) and he is appointed by the Public Administrator and therefore he is independent of the Surrogate. Such illogic falls of its own weight and cannot find support in human experience or in Grimm's Fairy Tales.

3. Certainly the complaint fairly or liberally read, does not allege that this defendant is a mere "private attorney".

4. Liability under 42 USC §1983 is not dependent on the title of the actor but on the character of the act

(Hampton v. City of Chicago, 484 F2d 602, 608-9th Cir., per Stevens, J. cert. den. 415 U.S. 917).

5. There are instances where private attorneys have been held liable under 42 USC §1983 (Timson v. Weiner, 395 F. Supp. 1344, 1347-Ohio; Johnson v. Crumlich, 224 F. Supp. 22-Pa.), but assuming arguendo that a private attorney acting solely as such is not a state functionary under the statute, the alleged transgressions in this Complaint, which must be accepted as true on defendant's Rule 12 motion, are not the acts of a private attorney (Fine v. New York, 529 F 2d 90-2nd Cir).

6. Even assuming that this defendant acted or does act properly under State law, such compliance may not immunize him against a claim under 42 USC §1983 (McNesse v. Board of Education, 373 U.S. 668). If it were otherwise, the state would have the power by the mere passage of a statute to nullify this Statute of the United States.

7. The fact that the actions may be reviewed (on a limited basis) by the Appellate Division is unimportant since a litigant is entitled to impartial adjudication in the first instance (Ward v. Monroeville, 409 U.S. 57).

8. A litigant is entitled not only to a tribunal which is impartial but also one which satisfy the appearance of impartiality (Offutt v. United States, 348 U.S. 11, 14).

9. Even if the statutory scheme does not show an intolerably high risk of inconsistent obligations by the Surrogate, ^(which is not conceded) if in fact it does exist then the procedures

of the defendants are unconstitutional (Withdraw v. Larkin, 421 U.S. 35,58). Since the procedures employed by the defendants are peculiarly within their knowledge and records under their control summary relief in favor of this defendant would be unwarranted at this time.

10. Because this is a Rule 12(b) motion, plaintiff has not submitted evidence to show the nexus between the defendants. If this Court desires to treat this motion under Rule 56, then plaintiff respectfully requests an opportunity to set forth some of his evidence in support of this complaint.

RESPONDING TO DEFENDANT'S
POINT II.

This defendant incorrectly assumes that plaintiff's "Third Cause of Action" is based solely on "conspiracy.

While plaintiff does not disclaim his contention of a conspiracy, the complaint is not limited to such assertion. Paragraph ¶35 alleges "joint activity" of the defendants as well as the individual activity of this defendant acting under "color of State law, statute ordinance, regulation, custom, and usage" (Fine v. New York, 529 F 2d 90-2d Cir).

Although on this motion this Court is limited to the face of the complaint, it is obvious from the other motions before this Court wherein evidentiary matter is set

forth, that this defendant is a prime defendant and that plaintiff has a valid prima facie cause of action against him.

RESPONDING TO DEFENDANT'S
POINT III.

This defendant seems to contend that plaintiff has failed to set forth a "statement of the grounds upon which the court's jurisdiction depends" (p. 8).

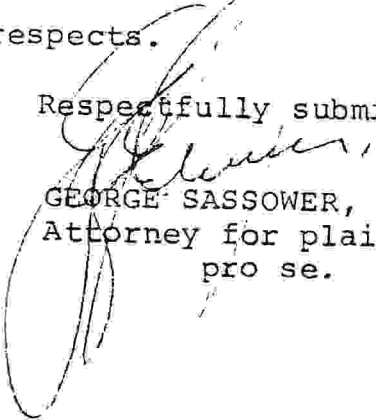
Plaintiff submits that sufficient has been shown and alleged that reveals federal jurisdiction.

Defendant erroneously contends that plaintiff must show "state action". Plaintiff submits that in order to recover he does not have to show "state action" only the "color" of such or similar action. The defendants may be liable even if they act in excess of their authority or contrary to statute. Nevertheless plaintiff submits that the complaint sufficiently reveals non-federal governmental action on the part of the defendants.

The facts amply reveal a good cause of action by the plaintiff against this defendant (Dombrowski v. Pfister, 380 U.S. 479; Alexanian v. N.Y. State Dev. 554 F 2d 15, 17-2d Cir; Carrasco v. Klein, 381 F. Supp. 782-E.D.N.Y.) and his motion should be denied in all respects.

Dated: August 31, 1977.

Respectfully submitted,


GEORGE SASSOWER, Esq.
Attorney for plaintiff-
pro se.