To be argued by:
GEORGE SASSOWER
30 MINUTES

Supreme Court of the State of New York

Appellate Division — Second Department

GEORGE SASSOWER,
Plaintiff-Appellant,

-against-

NEW YORK NEWS, INC.,
Defendant-Respondent,

-and-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, HARRY E. SEIDELL, and VIRGINIA MATHIAS,
Defendants.

APPELLANT'S BRIEF AND APPENDIX

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I N D E X

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

NEW YORK NEWS, INC.,

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ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, HARRY E. SEIDELL, and VIRGINIA MATHIAS,

Defendants.

QUESTIONS PRESENTED

1. On plaintiff's motion to impose sanctions for respondent's failure to properly respond to an interrogatory (#7), should Special Term have stated and held [A5]?

> "Although the [respondent] has not made this point, the information required does not appear to be relevant to the issues herein and defendant will not be required to respond to it (CPLR §3103[a])."

2. On the same motion, should Special Term have refused plaintiff relief on interrogatory #4 when respondent referred plaintiff to the "New York Public Library" for the information sought [A16]?

3. Should respondent's verification to its answers to plaintiff's interrogatories have been rejected when it provided [A16]:

> " ...the News reserves the right to make any changes in these answers if it appears at any time that omissions or errors have been made therein, or more accurate information is available."?

STATEMENT

1. This action seeks compensatory and punitive damages for two libelous articles published by respondent on June 27, 1977 and August 27, 1977, written by a "stringer" (Art Penny). According to respondent, Art Penny was employed by it for the seventeen (17) month period from December 1976 to April 1978 and was paid only for articles accepted and published.

2. As affirmative defenses, respondent pleads (a) truth, (b) fair and true reports of judicial proceedings [Civil Rights Law §74], (c) publication in good faith and without malice [Civil Rights Law §78], and (d) Chapadeau v. Utica-Observer (38 N.Y.2d 196, 379 N.Y.S.2d 61).

3. Respondent failed to move or respond to plaintiff's "First Set of Interrogatories", causing plaintiff to apply for sanctions. Motion papers were served upon respondent's and all defendants' attorneys.

Although plaintiff's motion was unopposed, Special Term, per Hon. MORTON WEISSMAN, denied plaintiff's motion without prejudice to renewal, upon notice served upon the respondent, New York News, as well as its attorneys [A6].

4. While this motion was pending, respondent unsatisfactorily responded to plaintiff's interrogatories by "patently false and evasive" answers [A11].

Neither Civil Rights Law §79h, attorney-client nor any other privileges were pleaded in respondent's answers to plaintiff's interrogatories [A12].

5. Plaintiff served a "Second Set of Interrogatories". After "numerous extensions", plaintiff finally received his answers from respondent [A11]. Respondent refused attempts to amicably resolve the alleged deficiencies in its answers, compelling plaintiff to move again for sanctions [A11].

In respondent's answers to the "Second Set of Interrogatories", Civil Rights Law §79h and attorney-client privileges were asserted for the first time.

6. Special Term, per JOSEPH JASPAN, generally granted plaintiff's motion [A4-A5]. On this appeal, plaintiff urges this Court to modify the Order of nisi prius, insofar as the Court denied him relief with respect to Interrogatories numbered 4 and 7, and with respect to respondent's reservation in its verification [A16-A19].

Special Term, in its decision, made the general observation [A4]:

> "The [respondent] News does not claim that the items sought by this method of discovery [interrogatories] are not relevant (Allen v. Cromwell-Collier Publishing Co., 21 N.Y.2d 403) or even that they are not 'material and necessary' in the prosecution of the action, regardless of burden of proof (CPLR §3101[a])."

7. The Answers to the Interrogatories, subject of plaintiff's appeal, are as follows [A16-A18]:

> a. "4. Set forth all articles by Art Penny which were published by the [respondent], New York News, Inc., prior to August 17, 1977 and the amount of compensation received by Art Penny for each one of them."
>
> "ANSWER TO INTERROGATORY 4: With respect to any articles other than the two articles which were published in the News on June 27, 1977 and August 17, 1977, respectively, (the "June and August articles"), the News objects

to Interrogatory 4 on the grounds that the information requested therein is irrelevant and the process of going through back issues of the News to find every article written by Art Penny is overly burdensome for the News. The News does not have a file containing articles by Art Penny. Copies of these stories, if any, may be obtained by examining back issues of the Daily News for the period from December, 1976 to April, 1978 which are available at the New York Public Library. Plaintiff can obtain the information requested through his own efforts.

With respect to the June and August articles: 1) the News refers to Exhibit A to the "Answers of Defendant New York News Inc. to Plaintiff's Interrogatories" dated February 5, 1982; 2) according to the News' records, during the period from June 13, 1977, to August 31, 1977 the News paid Art Penny amount as follows: 6/13-17/77 -- $100, 6/22/77 --$25, 8/12-14/77 -- $75, 8/16-19/77 -- $125, 8/23-26/77 -- $75, 8/31/77 - 9/2/77 -- $60. The News is unable to determine from its records what these amounts represent."

Plaintiff's moving papers, states [A13]:

"This [respondent], having failed to move to vacate or modify, may not now claim the information sought is 'irrelevant', 'burdensome' .... (Interrogatory 4, 5, 6, 7, and 19).

This [respondent] expecially, having failed to move to vacate or modify, may not direct plaintiff to the New York Public Library for the information requested in Interrogatory 4 (Seiden v. Allen, 135 NJ Super 253, 343 A2d 125, 126-127; Lurus v. Bristol, 89 Wash.2d 632, 574 P2d 391; 96 ALR2d 598)."

The Court ignored plaintiff's objection to the aforementioned answer to plaintiff's interrogatory, and thereby denied him relief.

b. "7. Set forth all articles by Art Penny (the stringer) which were received by defendant, New York News, Inc., prior to August 17, 1977, which were not published by New York News, Inc., and the reason, if any, for such non-publication."

"ANSWER TO INTERROGATORY 7: The News objects to Interrogatory 7 on the grounds that the information requested therein is irrelevant and is absolutely privileged under New York Civil Rights Law §79-h."

9. Special Term rejected all privilege pleas by respondent, and after setting forth this interrogatory in haec verba, Special Term stated [A5]:

> "Although the [respondent] has not made this point, the information required does not appear to be relevant to the issues herein and defendant will not be required to respond to it (CPLR §3103]a])."

Litigants, within the parameter of public policy, are permitted to chart their own procedural course without interference by the courts (Nishman v. DeMarco, 76 A.D.2d 360, 430 N.Y.S.2d 339 [2d Dept.], app. dis. 53 N.Y.2d 642, 438 N.Y.S.2d 787), and nisi prius improperly interfered by its own sua sponte objection.

10. In verifying the answers to plaintiff's interrogatories, respondent included the following [A19]:

> " ...the News reserves the right to make any changes in these answers if it appears at any time that omissions or errors have been made therein, or more accurate information is available."

11. Plaintiff's motion for leave to reargue was denied.

12. On respondent's application on its cross-appeal, enforcement has been stayed [November 9, 1982 #8097].

POINT I

SPECIAL TERM ERRED IN DENYING PLAINTIFF THE RELIEF REQUESTED ON HIS APPEAL HEREIN.

1. Respondent, having failed to move pursuant to CPLR §3133, foreclosed later question as to the propriety of plaintiff's interrogatories. The only proper inquiry is the sufficiency of respondent's answers (Blessin v. Greenberg, 89 A.D.2d 862, 453 N.Y.S.2d 249 [2d Dept.]; 9H v. Zurich, 89 A.D.2d 584, 452 N.Y.S.2d 245; Mangiaracina v. Abatemarco, 87 A.D.2d 585, 447 N.Y.S.2d 770 [2d Dept.]; Silva v. County of Nassau, 86 A.D.2d 864, 447 N.Y.S.2d 314 [2d Dept.]; Hassell v. Nassau County, 86 A.D.2d 859, 447 N.Y.S.2d

322 [2d Dept.]; Galvan v. County of Nassau, 85 A.D.2d 620, 449 N.Y.S.2d 638 [2d Dept.]; Caveney v. Sorrano, 84 A.D.2d 557, 443 N.Y.S.2d 275 [2d Dept.]; Leissner v. Ford, 79 A.D.2d 700, 434 N.Y.S.2d 268 [2d Dept.]; Lane v. Ziv, 76 A.D.2d 902, 429 N.Y.S.2d 246 [2d Dept.]).

Respondent tendered no excuse for not having moved by appropriate application to modify or vacate; on the contrary, respondent is represented by a adequately staffed, knowlegable, and prestigious law firm, amply able to follow proper and orderly procedures required by law.

Respondent's answers to the aforesaid interrogatories are plainly insufficient as a matter of law, and compliance should be mandated by this Court.

2. Respondent has pleaded Chapadeau (supra), placing difficult obstacles in the way of establishing liability.

The hurdles imposed by the adversary mark additional areas subject to disclosure. State of mind and editorial process are discoverable when they are relevant to establish liability (Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115). Statutory privileges give way when critical to plaintiff's cause of action (Greenberg v. CBS, 69 A.D.2d 693, 708-709, 419 N.Y.S.2d 988, 997 [2d Dept.]).

At bar, where plaintiff also seeks punitive damages, prior articles submitted by Art Penny are clearly relevant since they may have brought home to respondent, Penny's irresponsible reporting, lack of research and proper investigation (cf. Karaduman v. Newsday, 51 N.Y.2d 531, 541-546, 435 N.Y.S.2d 556, 560-563), as well as respondent's internal policing policy.

The fact that Art Penny was paid only for published articles would encourage sensationalism. His relatively short connection with respondent (seventeen [17] months) might reflect respondent's lack of acceptance of his work product. Art Penny's renumeration from respondent, averaging about twenty five dollars ($25) per week, substantiates a lack of established professionalism or, at best, low level journalism.

Clearly, search by plaintiff in the New York Public Library would not turn up copy submitted by Art Penny which respondent chose not to publish.

3. The admission by respondent that it destroyed the "copy" submitted by Art Penny, and all changes made prior to publication, although as a "general practice" it keeps "copy" for "thirteen months" [A18], mandates liberal disclosure. Respondent should not be permitted to defeat a showing of "gross negligence" (Chapadeau v. Utica-Observer [supra], a heavy enough burden for plaintiff to sustain in and of itself, by post-litigation destruction of evidence.

4. The procedural trail from Hickman v. Taylor (329 U.S. 495, 67 S.Ct. 495, 91 L.Ed. 451) on has been one of full disclosure. Respondent has shown nothing in its opposing papers to warrant retreat. Special Term, sua sponte, should not have refused to compel respondent to answer the requested interrogatories, the subject of plaintiff's instant appeal.

5. Respondent's reservation of right in its responses to make revisions in futuro was improper (Public Service v. Flatow, 64 A.D.2d 514, 515, 406 N.Y.S.2d 476, 477 [1st Dept.]; Brady v. Benedictine Hospital, 74 A.D.2d 937, 938, 426 N.Y.S.2d 143, 145 [3d Dept.]).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE MODIFIED, WITH COSTS.

Dated: White Plains, N.Y.
December 28, 1982

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for appellant.