PLAINTIFF'S - NOTICE OF MOTION

[A14-A16]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
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GEORGE SASSOWER,

Plaintiff,

Index No.
78-17671

-against-

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

Defendants.

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S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of GEORGE SASSOWER, Esq., duly sworn to on the 21st day of August, 1982, and all the proceedings had heretofore herein, the undersigned will move this Court at a Special Term Part I held at the Courthouse thereof, Griffing Avenue, Riverhead, Long Island, New York, 11901, on the 3rd day of Septembe, 1982, at 9:30 o'clock in the forenoon of that day or as soon thereafter as

Counsel may be heard for an Order (1) striking the Answer of defendant, NEW YORK NEWS, INC., in the event it does not interpose a verified Answer within such limited time as this Court may direct; (2) striking its "First Affirmative Defense", its "Second Affirmative Defense", its "Third, Partial, Affirmative Defense in Mitigation of Damages", and its "Fourth Affirmative Defense", all pursuant to CPLR 3211[b][c]; (3) requiring this defendant to disclose the last known address of ART PENNY; (4) permitting plaintiff to examine ART PENNY before trial or to compel him to respond to written Interrogatories; (5) requiring the clients of DAVID J. GILMARTIN, Esq., to respond to plaintiff's Interrogatories dated July 30, 1982, and striking their Answer if they fail to do so; (6) together with any other, further, and/or different relief as to this Court may seem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are to be served upon the undersigned at least five days before the return date of this motion,

with an additional three days added if such service is by mail.

Dated: August 21, 1982

Yours, etc.,

GEORGE SASSOWER, Esq.
Attorney for plaintiff
283 Soundview Avenue,
White Plains, N.Y. 10606
914-328-0440

To: Patterson, Belknap, Webb & Tyler, Esqs.
Robert Abrams, Esq.
David J. Gilmartin, Esq.
Vincent G. Berger, Jr., Esq.
New York News, Inc.

GEORGE SASSOWER, ESQ. - PLAINTIFF - IN SUPPORT

[17-A30]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------x

GEORGE SASSOWER,

Index No.
78-17671

Plaintiff,

-against-

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

Defendants.

----------x

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

GEORGE SASSOWER, Esq., first being duly sworn, deposes, and says:

This affidavit is in support of plaintiff's motion (1) to strike the Answer of defendant, NEW YORK NEWS, INC., in the event it does not interpose a verified Answer within such limited time as this Court may direct; (2) striking its "First Affirmative Defense", its "Second Affirmative Defense", its "Third, Partial, Affirmative Defense in Mitigation of Damages", and its "Fourth Affirmative Defense", all pursuant to

CPLR 3211[b][c]; (3) requiring this defendant to disclose the last known address of ART PENNY; (4) permitting plaintiff to examine ART PENNY before trial or to compel him to respond to written Interrogatories; (5) requiring the clients of DAVID J. GILMARTIN, Esq., to respond to plaintiff's Interrogatories dated July 30, 1982, and striking their Answer if they fail to do so; (6) together with any other, further, and/or different relief as to this Court may seem just and proper in the premises.

This is an action to recover compensatory and punitive damages against defendants for their tortious conduct (Exhibit "A").

1. Only the "Second Cause of Action" involves the defendant, New York News. Through error this defendant was not excluded as a named defendant in plaintiff's "Third Cause of Action".

On November 21, 1978, Mr. Justice JOHN C. MARBACH granted plaintiff's cross-motion for leave to serve an Amended Complaint after this defendant served upon plaintiff copies of the alleged libelous published articles.

On December 15, 1978, plaintiff served his verified Amended Complaint after this defendant complied with the aforesaid Order of the Court.

Defendant served its Answer to plaintiff's Amended Complaint on or about January 12, 1979, which merely contained pro forma denials.

On February 3, 1979, plaintiff received an unverified Amended Answer (Exhibit "B") to the Amended Complaint. Plaintiff rejected same upon receipt because of the absence of a proper verification (Exhibit "C").

Defendant's former attorneys contended that since the served copy of the verified Amended Complaint did not contain plaintiff's "signature nor that of a notary" they intended to treat it as an unverified Amended Complaint on the authority of Crimmins v Polhemus (189 Misc. Rep. 183, 68 N.Y.S.2d 819 [Municipal Court, Syracuse - 1947]). This issue has never been resolved.

a. From the time of the service of the verified Amended Complaint on December 15, 1978 until February 1, 1979 there was no objection made about any defective verification to the complaint by the attorneys for this defendant (CPLR 3022). In fact, the attorneys for the other defendants treated the verification proper and served verified answers.

b. The Crimmins decision has never been cited in any reported case since it was rendered 35 years ago and has been authoritatively criticized (7B McKinney's, Consolidated Laws of New York, Civil Practice Law and Rules, Practice Commentaries, David D. Siegel, C3022, p. 398).

c. In any event, a proper verified Amended Complaint is annexed hereto (Exhibit "A") and there is no reason for this defendant not now serving a proper verified Amended Answer (CPLR §2001).

2. Rather than wait for a disposition of the aforementioned, judicial economy is served by addressing directly the legal merit of the defendant's unverified Amended Answer.

A short review of the undisputed events is necessary for the proper disposition of this portion of plaintiff's motion.

On Wednesday, June 22, 1977 (a) without any accusatory instrument, (b) without being informed that a criminal contempt proceeding was to take place on that day, plaintiff was (c) tried, (d) convicted, and (e) sentenced to be incarcerated, all in absentia.

Early the following morning, Thursday, June 23, 1977, Deputy Sheriffs of Suffolk County (f) transgressed their bailiwick and arrested plaintiff in his home in Westchester County.

Plaintiff was denied (g) his right to petition for habeas corpus relief; (h) his pleas of Fifth Amendment rights were ignored, as were a (i) laundry list of plaintiff's other fundamental rights.

Eventually a Writ of Habeas Corpus ad subjiciendum was issued returnable in the forenoon of Monday, June 27, 1977, which called upon plaintiff's custodians to justify the legality of plaintiff's incarceration, not to adjudicate "whether he is guilty or innocent" (Black's Law Dictionary [5th Ed.] p. 638).

In the interim, and before plaintiff's first appearance, this defendant published and distributed its first libelous article (Exhibit "D").

Plaintiff's Writ was eventually sustained and the conviction nullified.

Thereafter, upon application of the Public Administrator, an Order to Show Cause was issued as the predicate of a new contempt proceeding against plaintiff.

Plaintiff submitted a cross-notice to vacate this Order to Show Cause which was ultimately granted, and this proceeding was dismissed.

Plaintiff did not personally appear on the return date of this motion, nor was there any legal requirement that he do so. Plaintiff merely served those papers which he believed appropriate at that stage of the proceeding.

The following morning, this defendant published its other libelous article (Exhibit "E").

This defendant was initially represented by the prestigous firm of TOWNLEY & UPDIKE, Esqs. and now is represented by the equally prestigous firm of PATTERSON, BELKNAP, WEBB & TYLER, Esqs. Both firms are recognized specialists in the field of defamation and the claimed deficiencies in their client's pleadings are deliberate and calculated.

With this background, defendant's affirmative defenses are examined in a logical, rather than numerical sequence.

Fourth Affirmative Defense

Defendant's sole allegation in support of this defense is:

> " The publication complained of dealt with matters arguably within the sphere of public concern, and reasonably related to matters warranting public exposition, and is therefore privileged."

Plaintiff, a private practicing attorney, is for constitutional defamation purposes a private person (Gertz v.Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 [June 25, 1974]). Defendant does not contend otherwise.

Resulting from the Gertz opinion, Chapadeau v. Utica Observer (38 N.Y.2d 196, 379 N.Y.S.2d 62 [Dec. 4, 1975] was rendered.

Thereafter rendered, were the pertinent opinions in Time v. Firestone (424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 [March 2, 1976]); Hutchinson v. Proxmire (443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 [June 26, 1979]); and Wolston v Reader's Digest (443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 [June 26, 1979]).

a. Defendant has the burden of pleading any privilege it wishes to assert (Gomez v. Toledo, 446 U.S.635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 [May 27, 1980]; Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190 [Nov. 11, 1980]; Ostrowe v. Lee, 256 N.Y. 36, 41 [Cardozo, Ch. J]).

Such pleading by defendant must contain the material elements of the defense and give notice (CPLR §3013).

Merely quoting from Chapadeau, as defendant does here, is clearly insufficient.

b. Authoritative holdings and statutes which mandate secrecy and circumspection, cannot be matters which warrant public exposition, as a matter of law (Crowley v. Pulsifer, 137 Mass 392, 50 Am. Rep. 318; Judiciary Law §90[10]).

The attempt by my accusers, with the cooperation of this defendant's reporter, to inflame a judicial tribunal with improper and irrelevant material is contemptuous and unprivileged (Crowley v. Pulsifer [supra]).

Second Affirmative Defense.

Defendant's asserts in conclusory fashion that:

> " The articles complained of were fair and true reports of judicial proceedings were therefore privileged."

a. This pleading does not comply with CPLR §3013 in any respect.

b. Since the first published article (Exhibit "D") was before plaintiff's first court appearance on this matter, it could not have been a true report of a live judicial proceeding.

The only legal document that could have been before the Court when the defendant's article was written was the Writ of Habeas Corpus and the petition upon which it was based. If those are the documents upon which defendant claims a "true report of a judicial proceeding", defendant should so allege so that the court can determine if the defense has any merit.

Obviously plaintiff's Writ of Habeas Corpus called upon plaintiff's accusers to legally justify "Signorelli's Code of Star Chamber Procedures" and the headline "Lawyer to Answer Charges on Estate" was patently false, as was the article itself.

c. Defendant cannot base a defense on "true reports of judicial proceedings" when in response to plaintiff's Interrogatories, it refuses to answer, contending that Civil Rights Law §79-h is applicable. As defendant's attorneys know Greenberg v. CBS (69 A.D.2d 693, 708-709, 419 N.Y.S.2d 988, 997 [2d Dept.]) was clear on this point.

First Affirmative Defense

a. Defendant alleges that:

> " Plaintiff was ordered to appear in Supreme Court, Suffolk County on June 27, 1977, to explain why he should not be jailed for contempt of court."

Defendant's attorneys should know that a Writ of Habeas Corpus orders the custodian, not the prisoner, to appear, and that the justification must be given by the custodian, not the prisoner.

b. Continuing defendant further alleges:

> " The article of June 27, 1977 was true in substance and in fact."

The article of June 27, 1977 (as well as the other article) contains statements from various persons. Defendant's allegation could mean what those persons said was true or the reporter quoted the persons correctly. The former would be a proper defense, the latter would not (Cianci v. New Times, 639 F.2d 54 [2d Cir.]).

The defense of justification (truth) must be properly pleaded (Crane v NY World Telegram, 308 N.Y. 470;. Obviously if defendant relies on justification and there is a failure of proof it assumes the legal consequences of increased damages (PJI §3:38 p. 102-103 [1981 Supplement]).

Similar arguments are applicable to that portion of defendant's affirmative defense which relate to the second published article (¶10, ¶11).

Third, Partial, Affirmative Defense.

Defendant alleges that it received the material from "reliable sources".

a. Defendant's defense should comply with CPLR §3013.

b. Defendant cannot employ such defense and then refuse to divulge such sources by employing Civil Rights Law §79-h in response to plaintiff's interrogatories.

Plaintiff has attempted to remedy defendant's insufficient pleading by interrogatories, but has been stonewalled by evasive answers, assertions of untenable legal privileges, and outright falsehoods.

There is presently pending sub judice plaintiff's motion to strike because of defendant's responses.

The answers given by defendant makes it apparent that the affirmative defenses are specious and contrived.

Permission to replead should not be given defendant unless it sets forth a proper proposed verified answer, factually supportable.

3. The author of these two published defamations was Art Penny. When requested to supply his last known address, defendant gave a residence in 1978, although defendant's attorney admits she knows his present address.

When certain documentation is requested, defendant responds that it keeps such documents only for a period of thirteen (13) months. Since this action was started before the expiration of one year, such destruction, if true, while suit was pending is self-incriminating.

4. Under such circumstances, plaintiff requests an Order compelling defendant to disclose the present residence and business address of Art Penny (or agreeing to accept service on his behalf), and permitting pre-trial disclosure of such author.

5. Interrogatories have been served upon DAVID J. GILMARTIN, Esq. (Exhibit "F") and answers have not been received.

No motion has been made to vacate or modify such demand, nor has his time been extended by plaintiff or the court.

In view of the tactics of the office of DAVID J. GILMARTIN, Esq., in attempting to stonewall disclosure, it seems that the best, if not only, practical pre-trial disclosure procedures available to plaintiff are interrogatories.

As with the New York News, it is obvious that an examination before trial will produce constant specious technical objections requiring judicial attendance.

6. Plaintiff has extended many courtesies to defendants' attorneys, with little appreciation, cooperation, or good faith.

Absent manifest necessity there will be no more adjournments consented to by plaintiff and answering papers must be timely served or request will be made that they be rejected.

This case will be expedited to a proper and just conclusion.

WHEREFORE, it is respectfully prayed that this motion be granted in all respects.

GEORGE SASSOWER

Sworn to before me this
21st day of August, 1982

DORIS L. SASSOWER
Notary Public, State of New York
No. 60-3457772
Qualified in Westchester County
Term Expires March 30, 1983