SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GEORGE SASSOWER,

Plaintiff,

- against -

Index No.
21226-1979

APPELLATE DIVISION OF THE SUPREME COURT,
SECOND JUDICIAL DEPARTMENT,

Defendant.

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

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

1. I submit to this Court a copy of Plaintiff's Brief and Appendix to the Appellate Division and draw His Honor's attention to pages 3f, 4f-5m which makes reference to A15, A25, and A28. Included therein are admissions by John B. Garrity, Jr., Esq., that he knows nothing about this case and had no file regarding same.

It is the same John B. Garrity, Jr. Esq., who now improperly submits affirmations in support of defendant's motion for summary judgment to this Court.

In his latest affirmation of August 28, 1980, John B. Garrity, Jr., states:

> " 2. Plaintiff mistakenly avers that I have admitted a lack of knowledge of the facts herein. Such is not the case."

I believe the page references in plaintiff's Brief and Appendix will readily reveal that it is he, not I, who is mistaken.

2a. Plaintiff's documentary exhibits reveals that the summons was received by the Sheriff on November 5, 1979; there are the specious denials of every allegation of the complaint, except for the existence and status of defendant; all as further evidence that Mr. Garrity lacks the necessary factual knowledge to execute affirmations in support of defendant's motion for summary judgment.

2b. In any event, the publication date is the date of mass distribution, which, in this case occurred on or about December 20, 1978 [409 N.Y.S.2d 756] (Sorge v. Parade Publications, 20 A.D.2d 338, 343, 247 N.Y.S.2d 317, 322 [1st Dept.]). Therefore, the statute of limitations is patently a spurious defense.

3. Defendant makes no argument regarding the legal sufficiency of either cause of action, for he apparently can find no argument for same, particularly since this Court must accept, on this motion, the factual allegations of plaintiff's verified complaint as true.

4a. Unquestionably defendant has a privilege in an action for money damages, but that privilege does not exist

if the defamatory matter "lacked any and all relevance to the proceeding" (Martino v. Frost, 25 N.Y.2d 505, 308, 307 N.Y.S.2d 425, 427 - cited in defendant's affidavit).

The moving attorney does not even assert that the complained of material was relevant or pertinent.

b. Defendant knew that its unanimous decision of affirmance in plaintiff's favor was final. The opinion itself in the Appellate Division reveals the material was irrelevant. If the defendant in this suit contend that the material was pertinent or not needlessly defamatory is has the burden like any other litigant to come forth with proper papers (Gomez v. Toledo, U.S. , 100 S.Ct. 1920, 64 L.Ed2d 572).

c. The judicial privilege is not only for the bench, but extends to the bar and witnesses (Restatement of Torts - 2d §635, p. 362-363) and is not boundless (Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844 [2d Dept.]).

d. A liberal privilege for defendant does not extend to suits where equitable relief is sought (Supreme Court of Virginia v. Consumers Union, U.S. , 100 S.Ct. 1967, 1976, 64 L.Ed2d 641, 655-666; Prosser on Torts [4th Ed.] §114, p. 777 note 74).

e. Nor should it be overlooked that plaintiff has the right not to be placed in a false light before the public as

part of his legal right of privacy (Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert den. 400 U.S. 999, 91 S.Ct. 454, 27 L. Ed.2d 450; Doe v. McMillan 412 U.S. 306, 93 S.Ct. 2018, 36 L. Ed.2d 912) confirmed by statute (Judiciary Law §90[10].

5. The judicial immunity is not absolute as witness by Murray v. Blancato, 290 N.Y. 52; Dean v. Kochendorfer, 237 N.Y. 384; Yates v. Lansing, 5 Johns [N.Y.] 282, 291, 296-297; Zarcone v. Perry, 572 F.2d 52 [2d Cir.]; Gregory v. Thompson, 500 F.2d 59 [9th Cir.].

Rights and immunities are never absolute (Schermerhorn v. Rosenberg, 73 A.D.2d 276, 426 N.Y.S.2d 274 [2d Dept.]).

The opinions in the Court of Claims and on plaintiff's post-appeal motion before the Appellate Division, advances plaintiff's cause, rather than defeating same.

The Court of Claims held that the state is not liable for the acts of the judiciary when there is no immunity. Therefore this action against the defendant is appropriate.

Defendant's refusal to expunge all material in its decision, which it obtained ex parte and known to be false from defendant's own records is reprehensible and supports the legal malice that plaintiff may need to show. Prior to

publication defendant knew that it was improperly included in its decision and it was false, but nevertheless published same. Such improper material could have been striken from the opinion of the defendant without affecting the determination in any respect. In fact, the defendant affirmed despite the inclusion of the adverse impertinent material.

Defendant not only should have considered ex parte material, it was bound to reject it (Sacks v. Stewart, A.D.2d , 427 N.Y.S.2d 20 [1st Dept.]).

WHEREFORE, it is respectfully prayed that defendant's motion be denied and plaintiff's cross-motion granted in all respects.

GEORGE SASSOWER

Sworn to before me this
10th day of September, 1980

MURIEL GOLDBERG
Notary Public, State of New York
No. 60-4515474 Westchester County
Commission Expires March 30, 19[illegible]