8/23/82

GEORGE SASSOWER, ESQ. - PLAINTIFF
IN OPPOSITION
[29 - 37]

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

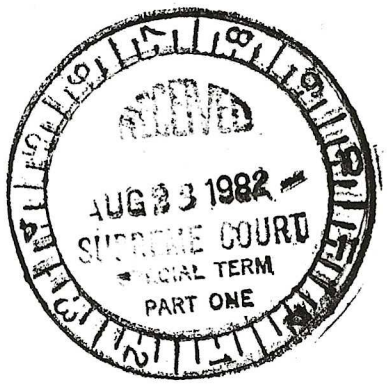
Plaintiff,

-against-

NEW YORK LAW PUBLISHING COMPANY,

Defendant.

Index No.
3608-1979



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

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

I am the plaintiff in the within action, submit this affidavit in opposition to defendant's motion dated August 13, 1982 and made returnable September 2, 1982.

1. Defendant's motion is based upon the grounds that (a) the answers to the interrogatories may be used in a related action by my wife [which is now moot] and (b) that the interrogatories:

> "would impose upon [defendant] an unreasonable burden of work and effort which is not, in any way, material or necessary to the prosecution of the plaintiff's case."

2. Plaintiff seeks to recover the sum of $1,000,000 for compensatory damages based upon (a) defamation (b) violation of plaintiff's statutory right of privacy (Judiciary Law §90[10]), and (c) the tort of outrage (Exhibit "1").

3. Defendant, in addition to its denials, has set forth as affirmative defenses (a) failure to set forth a cause of action, (b) privilege pursuant to Judiciary Law §91, (c) Civil Rights Law §74, (d) absolute privilege as a fair and report of a "judicial proceeding" (e) truth, (f) absence of malice, (g) the First Amendment of the Constitution of the United States, (h) Article 1, §8 of the Constitution of the State of New York (Exhibit "2").

4. Herbert v. Lando (441 U.S. 153, 99 S.Ct. 1635, 60 L. Ed 2d 115) is dispositive of defendant's motion.

Chief Judge Kaufman, in sustaining defendant's objections, noted (568 F.2d 974, 982-983 [2d Cir.]), that the deposition of only one defendant "required twenty-six sessions and lasted over a year". The transcript was "2903 pages and 240 exhibits" and:

> "In fact, our close examination of the twenty-six volumes of [defendant] Lando's testimony reveals a degree of helpfulness and cooperation between parties and counsel that is to be commended in a day when procedural skirmishing is the norm. (Defendant) Lando,

> however, balked when asked a small number of questions relating to his beliefs, opinions, intent and conclusions in preparing the program."

Mr. Justice White, speaking for the Supreme Court, reversed, stating (169-170, 1645, 129-130):

> " We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowledge or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as Herbert. The case for making this modification is by no means clear and convincing, and we decline to accept it."

5. Plaintiff has not had any Bill of Particulars, Examination before Trial, nor any other pre-trial discovery.

The mere fact that NELSON SEITEL, Esq. has submitted an affidavit in opposition to my wife's motion for summary judgment does not preclude discovery in my action.

Even if such affidavit by NELSON SEITEL, Esq. had been interposed in my action it would not preclude my service of Interrogatories.

In the affidavit of NELSON SEITEL, Esq. he gave the information that he wanted to give. My Interrogatories request information that I want, need and which apparently defendant does not desire to give.

There is no doubt that the information I requested in my Interrogatories bears "on the controversy and will assist in the preparation of trial" (Allen v. Cromwell, 21 N.Y.2d 403, 407, 288 N.Y.S.2d 449, 452-453). Absent a clear and convincing showing of harassment or attempt to abuse, the aforementioned statement by the Court of Appeals is the litmus test for disclosure.

Similar objections were rejected in similar cases (Kidansky v. Schweickart, 35 A.D.2d 658, 659, 314 N.Y.S.2d 308, 309 [1st Dept.]; Ruppert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 [4th Dept.]; North Carolina Electric v. Carolina Power, 666 F.2d 50 [4th Cir.]).

6. Nothing in the moving affidavit of BURTON M. ABRAMS, Esq., dated August 13, 1982, shows that the information requested in my Interrogatories are irrelevant to the issues presented by defendant's affirmative defenses. If defendant deletes some of his defenses, I will delete Interrogatories related thereto.

a. I have spoken to Mr. Abrams and he is aware of the reason for going back 45 years. The relevant action of Murray v. Brancato (290 N.Y. 52) was based upon events that took place on December 11-13, 1940. The changes in policy with respect to the matters in controversy, if any, in the past 45 years probably can be answered in a few words.

b. The Interrogatories attempt to disclose, what the defendant is trying to conceal or obscure. I have been given to believe that the Appellate Division has not directed the defendant to print all the opinions of Surrogate's Court (contrary to the impression attempted to be given by the defendant). It is my understanding that the choice to print all opinion of Surrogate's Court, Suffolk County is a choice made by the defendant alone. If the defendant contends that the Appellate Division has directed it to print all the opinions of the Surrogate's Court, Suffolk County, and to print opinions which violate Judiciary Law §90[10], let defendant set forth such documents.

c. I have on several occasions read in the New York Law Journal where judges made professional and disciplinary complaints against attorneys, and this seems to be the policy of the defendant.

There is no way that I or anyone else, unassociated with defendant can conclude whether this is or is not the policy of defendant unless the defendant shows that they have received professional complaints against attorneys and have not printed them.

No amount of research in the New York Law Journal will reveal to me, what disciplinary complaints made by judges against lawyers were not printed.

This is a subject peculiarly within defendant's knowledge.

There being no reasonable alternative for plaintiff to learn which of these judicial complaints against attorneys were not printed by the Law Journal becomes the legal death knell to defendant's objections.

I assume that defendant, like most newspapers, has a private index system or a morgue wherein such information is available without undue hardship. This is 1982 where computers retrieve desired information in seconds.

Claims of unreasonable burden require the client, not the attorney, to set forth in detail what is involved and alternative means for securing the information (Matter of Roach, 448 U.S. 1312, 1316, 101 S.Ct. 4, 6, 65 L.Ed.2d 1103, 1107 [Brennan, J. -Chambers opinion]).

d. Defendant's attorney is correct, there was a typographical error and the date should be 1978 and not 1979.

e. In the recently reported case of Tavoulareas v. Piro & Washington Post (93 FRD 35 [Dec. 17, 1981]), the defendants also claimed that the pre-trial procedures were burdensome, particularly since the "lawsuit was frivolous" (p. 37-38). The verdict of more than $2,000,000 rebutted that claim. Certainly in this case, where such claim of frivolousness is not made by the defendant, full pre-trial disclosure should be granted.

7. The fact that this information, if helpful may be employed by my wife, is not a legal or logical ground for objecting. My wife is moving for summary judgment, I am not. In her motion the defendant should make a full disclosure of the facts, including the material requested in these Interrogatories.

Obviously defendant has opted not to make a full voluntary disclosure. The reason seems obvious.

If defendant feared that the information supplied me would aid my wife's action, all it had to do is request that its Answers to my Interrogatories be delayed until after the submission of her motion. The point is now moot since obviously, by reason of defendant's instant motion, I will not receive such answers until after submission of her motion.

8. There are some factual errors in the moving affidavit, not essential to this motion, which I do not believe warrants correction at this time, except possibly one. The publication which is the basis of this action was on March 3, 1978 and the moving affidavit (¶4) asserts that this action was commenced in April 1979 (or more than one year later). This would time bar this action if the assertion was correct. In fact the summons was served on February 28, 1979 and defendant served its Notice of Appearance on March 6, 1979, therefore it is not time barred, nor is any such claim of Statute of Limitations made in defendant's answer.

WHEREFORE, it is respectfully prayed that defendant's motion be denied in all respects.

GEORGE SASSOWER

Sworn to before me this
23rd day of August, 1982

MURIEL GOLDBERG
Notary Public, State of New York
No. 60-4516474 Westchester County
Commission Expires March 30, 19 83.