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 LAW PUBLISHING COMPANY,
Defendant-Respondent,

APPELLANT'S BRIEF

GEORGE SASSOWER
Attorney for Appellant
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 328-0440

Dick Bailey Printers 203 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

I N D E X

STATEMENT PURSUANT TO CPLR 5531

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

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GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

NEW YORK LAW PUBLISHING COMPANY,

Defendant-Respondent,

----------x

1. The Index Number of the court below is 3608-1979

2. The title of the original parties appears above and there has been no change.

3. The proceeding was commenced in Supreme Court, Westchester County.

4. Action commenced on February 28, 1979. Complaint served on or about April 23, 1979. Defendant's was served on or about May 18, 1979.

5. Action against defendant for statutory breach of confidentiality, defamation, and related torts.

6. Appeal is from an Order dated December 22, 1982and entered on December 23, 1982.

7. The Appeal is on the full record method.

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QUESTION PRESENTED

Did Special Term, per Hon. MATTHEW F. COPPOLA, err in granting defendant's motion for a protective order with respect to ten (10) of plaintiff's interrogatories?

No substantive issues are presented on this appeal.

STATEMENT

A. The Pleadings:

Defendant is being sued for compensatory and punitive damages arising out of its publication of the Signorelli sua sponte diatribe.

Plaintiff alleges that the publication (a) violated his statutory right of confidentiality [Judiciary Law §90[10], (b) was libelous, and (c) gave rise to the related torts of outrage and injurious falsehood [38-43].

Defendant affirmatively alleged: (a) failure to set forth a cause of action, (b) privileged publication pursuant to Judiciary Law §91, (c) Civil Rights Law §74, (d) privilege as a fair and true report of a "judicial proceeding", (e) neutral reportage, (f) absence of malice, (g) the First Amendment of the Constitution of the United States, and (h) Article 1, §8 of the Constitution of the State of New York [44-50].

B. Related Action:

There is pending a similar action by DORIS L. SASSOWER against defendant, wherein Mr. Justice MATTHEW F. COPPOLA, on voluminous submitted papers, stated:

> "Each of the defendants moves for summary judgment. These motions must be denied. As in the case with plaintiff's motion seeking similar relief, factual issues exist not susceptible of determination on the papers submitted." (Doris L. Sassower v. Ernest L. Signorelli * * * and The New York Law Journal Publishing Co., Supreme Court, Westchester County, Index No. 3607-1979, December 20, 1982).

In the aforesaid related action, Mr. Justice COPOLLA only struck defendant's "first affirmative defense" [failure to set forth a cause of action], letting defendant's other affirmative defenses stand.

For the purposes of this appeal, counsel for both parties herein have agreed that nisi prius would come to precisely the same conclusion were a similar motion made in the case at bar.

Consequently, the adjudicated pleadings serve, more or less, as guide lines for pre-trial disclosure in this action.

C. Defendant's Motion:

1a. Moot is defendant's blanket objection that answers to plaintiff's interrogatories could be used to aid the summary judgment motion made by DORIS L. SASSOWER in the related action, and it apparently was so treated by nisi prius.

b. Moot also is defendant's objection based on the erroneously stated publication date of 1979, instead of 1978.

The date of defendant's publication was March 3, 1978. Erroneously, the complaint alleges the published date to be March 3, 1979 [a date after service of the summons]. This inadvertent, typographic error was continued in plaintiff's interrogatories.

This non-prejudicial error is formally corrected in the Court's opinion, which states [3]:

> "As regards the remaining items, on consent, same will pertain to the years 1978 rather than 1979".

3. Defendant, as part of its moving papers, annexed a copy of an affidavit by Nelson Seitel, Esq. ["Mr. Law Journal"], Associate Publisher of defendant [A23-28], used on the DORIS L. SASSOWER action, stating:

> "Although I do not purport, on a daily basis, to read each and every decision received for publication by the Law Journal, it so happens that I did read the subject decision ... in its manuscript form before it was sent to the composition room. ... I am familiar with the provisions and requirements of Judiciary Law §90[10] ... " [at 26-27] (emphasis supplied).

Nelson Seitel, Esq., further stated:

> "As a matter of policy and regular procedure which has existed for many years, the Law Journal has published in full each decision and order received by it from the Clerk of the Surrogate's Court, Suffolk County, as well as each of the other eight Surrogate Courts included in the First Judicial Department and the Second, Tenth and Eleventh Judicial District of the Second Judicial Department." [at 25-26] (emphasis supplied).

4. As already stated, no substantive questions are involved in this appeal. The single issue before this Court revolves around the scope of disclosure as to plaintiff's "First Set of Interrogatories".

Nevertheless, it seems clear from the affidavit of Nelson Seitel, Esq. that the defendant's position is that the defamatory nature of the material, its lack of truthfulness or significance, and its failure to perform its duty to preserve the statutory right of confidentiality, are all irrelevant to a publication emanating from Surrogate's Court. If it comes from Surrogate's Court --- it is published!

D. Plaintiff's Opposition:

Plaintiff opposed defendant's motion for a protective order on the following grounds:

1. Defendant made no showing that any of plaintiff's interrogatories are "irrelevant" to the issues presented. Plaintiff stated:

> "If defendant deletes some of its defenses, I will delete Interrogatories related thereto." [32].

2. Herbert v. Lando (441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115) -- discussed hereinafter.

3. Allen v. Crowell (21 N.Y.2d 403, 288 N.Y.S.2d 449).

4. Other appellate cases cited by plaintiff allowed disclosure of similar material.

5. Plaintiff has no feasible alternative to secure the relevant and needed information.

6. Defendant failed to show, as distinguished from its attorney's conclusory statements, that the information requested imposed an "unreasonable burden".

Plaintiff's arguments as to the improperly stricken interrogatories can be categorized as follows:

POINT I

SPECIAL TERM SHOULD NOT, SUA SPONTE, HAVE STRICKEN ANY INTERROGATORY

Special Term, sua sponte, struck Interrogatories 11, 16, 17, and 18 [omitted is mention of any objection because of mootness resulting from the fact that (a) the then pending motion for summary judgment by DORIS L. SASSOWER, Esq. was simultaneously submitted and decided and, (b) the minor misstatement of the defendant's publication as 1979, instead of 1978 was corrected by the Court's decision, on consent of the parties.

1. Litigants, within the confines of public policy, may chart their own procedural course (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). In violation of this well-settled rule, nisi prius improperly interfered on its own sua sponte objection.

2. Under defendant's pleading, plaintiff's defamation cause of action must show "fault" (Gertz v. Robert Welch, Inc. (418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789); consequently, the interrogatories that Special Term, sua sponte, struck are essential to plaintiff's case-in-chief.

The refusal of Special Term to strike defendant's "First Amendment" and "neutral reportage" defenses implies that plaintiff is a public figure (Gertz v. Welch [supra]; Cianci v. New Times, 639 F2d 54 [2d Cir.], and constitutes the "law of the case". Unless such holding is appealed and reversed, plaintiff will be compelled to show "constitutional malice" on defendant's alleged defenses, and "common law malice" to support punitive damages.

3. The interrogatories struck by Special Term, sua sponte, are set forth in full [with the stipulated date correction] as follows:

> "11. Set forth the names and position of those persons who generally reviewed judicial 'decisions' or 'opinions' to be published, as of February and March 1978".
>
> "16. Set forth whether those persons who saw such 'decision' by Surrogate Ernest L. Signorelli were familiar at the time with (a) Matter of Haas, 33 A.D.2d 1, 304 N.Y.S.2d 930; (b) Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104; (c) Williams v. Williams, 23 N.Y.2d 592, 298 N.Y.S.2d 473; (d) Murray v. Brancato, 290 N.Y. 52; and (e) Judiciary Law §90[10]."
>
> "17. Set forth whether any person who examined the aforesaid 'decision' of Surrogate Ernest L. Signorelli raised the question as to whether the aforesaid cases or statute were applicable."
>
> "18. Set forth the length of time that elapsed between the receipt of the aforementioned 'decision' of Surrogate Ernest L. Signorelli and the time it was sent to the composing room."

4a. The similarity between the irresponsible tirade by Surrogate Schwerzmann, underlying the legal disposition of same by the Appellate Division in Haas, supra, and Surrogate Signorelli's diatribe, needs no discussion.

b. Obviously, defendant should have known that the publication of confidential material is actionable (Cowley v. Pulsifer, 137 Mass 392, 50 Am Rep 318 [Holmes, J]; Shiles v. News Syndicate [supra]).

c. Defendant should have also known that Signorelli could not secure immunity for his defamation by cloaking it in a judicial proceeding (Williams v. Williams [supra]) or by excessive publication in the Law Journal (Stukuls v. State, 42 N.Y.2d 272, 281, 288, 397 N.Y.S.2d 740, 746, 751).

5. Assuming, arguendo, defendant had objected to the aforesaid interrogatories, its objection should have been denied, since the interrogatories in question go to the heart of the essential issues of constitutional and common law malice.

POINT II

SPECIAL TERM SHOULD NOT HAVE STRICKEN ANY INTERROGATORY WHERE NO REASON THEREFOR WAS SHOWN BY DEFENDANT.

1. Defendant objected to Interrogatories 19, 20, and 21 based on the argument that such interrogatories set forth the dates of 1979. This was corrected by agreement between counsel, which Special Term expressly acknowledged. Consequently, there was no extant objection remaining.

In effect, once again, Special Term struck these three (3) interrogatories, sua sponte.

2. These interrogatories read as follows:

> "19. Set forth the procedure of the [New York Law] 'Journal' [defendant] in February and March 1978 with respect to reviewing material intended to be published that might be defamatory, violate a right of privacy, or in any other respect contravene law or gave rise to actionable liability."
>
> "20. Set forth the legal background of Nelson Seitel, Esq. and his qualifications for reviewing the legality of publishing material which might be violative of law or actionable."
>
> "21. Set forth the circumstances under which Nelson Seitel, Esq. read the February 24, 1978 'decision' of Surrogate Ernest L. Signorelli prior to it being sent to the composing room."

3. Obviously, plaintiff is attempting to show the case at bar is dissimilar from New York Times v. Sullivan (376 U.S. 254, 84 S.Ct. 710, 11 L.Ed2d 686), where an advertising manager in good faith accepted a paid advertisement from an agency for publication (at 260-261, 715-716, 694-695).

At bar, "Mr. Law Journal" himself "legal advisor" to the defendant, admitted it was he who reviewed and approved the Signorelli diatribe for publication.

4. Obviously, also plaintiff is attempting to show that the publication of the Signorelli diatribe is not and was not treated as "hot news' (Wolston v. Reader's Digest [443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450]

5. Applicable arguments in Point I are incorporated herein by reference.

POINT III

INTERROGATORIES 2 AND 3 SHOULD NOT HAVE BEEN STRICKEN

1. Plaintiff's interrogatories 2 and 3, were served prior to receipt of a letter from IRVING N. SELKIN, Esq. Clerk of the Appellate Division, Second Judicial Department, submitted on the related DORIS L. SASSOWER motion.

Defendant did not controvert the correctness of such letter, the body of which reads as follows:

> "In answer to your letter of August 25, please be advised that this Court is without power to determine what the Law Journal prints or does not print."

2a. The Interrogatories stricken read as follows:

> "2. Set forth all changes in the requirements of publication of judicial 'decisions' and 'opinions', if any, during the past 45 years as compared with previous contracts."

> "3. Set forth any and all agreements or requests made by the Appellate Division, First or Second Department, in the past 45 years, as to those judicial 'decisions' or 'opinions' that they desired or requested to be printed in full, as a matter of rule or routine, rather than any particular isolated case."

b. Prior to receipt of the letter of IRVING N. SELKIN, Esq., defendant's attorney [6-7, 9-11] and Nelson Seitel, Esq. [24-25] attempted to convey the impression that defendant's publication of the Signorelli diatribe was pursuant to statutory and contractual mandate [Judiciary Law §91, §430 et seq.].

3. The letter by IRVING N. SELKIN, Esq., if explicitly and judicially admitted as correct by defendant, partially, but not fully, satisfies the aforementioned interrogatories.

Plaintiff's opposing affidavit states:

> " I have spoken to Mr. Abrams (defendant's attorney) and he is aware of the reason for going back 45 years. The relevant action of Murray v. Brancato (supra) 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." [at 33].

In Murray v. Brancato (supra), the Court defined the legal status of the New York Law Journal [at 57-58].

4. Significantly, there is no showing by defendant, through a person having knowledge, of the labor involved in setting forth this information. It can, as above stated, be answered in a few words, notwithstanding the erroneous impression, given by defendant's attorney that it would be unduly burdensome simply because of the number of years involved.

5. Applicable arguments set forth by appellant in prior "points" are incorporated herein by reference.

POINT IV

INTERROGATORY 8 SHOULD NOT HAVE BEEN STRICKEN

1. Interrogatory 8 reads:

> "8. Set forth the policy of defendant, if any, as it existed in February and March, 1978 and to date with respect to the publication of professional complaints against attorneys by judges. Annex copies of all cases published by defendant making reference to professional complaints against attorneys by judges within the past ten years."

2. Plaintiff's statement in his opposing affidavit responding to defendant's conclusory statement that this is burdensome is as follows [33-35]:

> "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. (emphasis in original).

This is a subject peculiarly within defendant's knowledge.

There is no reasonable alternative for plaintiff to learn which of these judicial complaints against attorneys were not printed by the Law Journal. That simple, unalterable fact becomes the legal death knell to defendant's objections. (emphasis in original).

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])."

3. Applicable arguments made by appellant in previous "points" are incorporated herein by reference.

POINT V

DEFENDANT'S OBJECTIONS SHOULD ALL BE REJECTED OUT OF HAND

Plaintiff stated in his opposing affidavit [30-31]:

"Herbert v. Lando (supra) 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.'" [at 30-31].

2. Defendant may not raise defenses and then refuse to disclose information necessary to defeat such defenses, particularly when they may impose upon plaintiff both the burden of proof and burden of coming forward (Greenberg v. CBS, 69 A.D.2d 693, 708-709, 419 N.Y.S.2d 988, 997 [2d Dept.]).

3. The procedural trail from Hickman v. Taylor (329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451) and Allen v. Crowell, supra, on has been one toward full and complete disclosure. Respondent has shown nothing in its opposing papers to warrant retreat.

4. Even prior to Herbert v. Lando (supra) and Greenberg v. CBS (supra), judicial precedents sustained disclosure in similar situations (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.]).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE MODIFIED BY DIRECTING RESPONDENT TO ANSWER ALL PLAINTIFF'S INTERROGATORIES, WITH COSTS.

Dated: December 30, 1982

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for appellant