SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GEORGE SASSOWER, individually and on behalf of others similarly situated,

Index No. 20987-1982

Plaintiff,

-against-

ERNEST L. SIGNORELLI, SURROGATE'S COURT OF THE STATE OF NEW YORK, COUNTY OF SUFFOLK, and NEW YORK LAW PUBLISHING COMPANY,

Defendants.

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

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

This affidavit is submitted in opposition to (1) the Attorney General's Notice of Motion supported by the affirmation of PAUL C. AHRENS, Esq., both dated September 16, 1982 (with three exhibits), and (2) the Notice of Motion of ABRAMS & SHEIDLOWER, Esqs. and "Memorandum" both dated September 17, 1982, all returnable October 4, 1982.

A. Limited factual material is set forth herein merely to controvert or place in proper perspective the movants' statements and assertions. Specifically, deponent's factual material is not intended as any sub silentio consent for CPLR 3211(c) treatment [which movants have not even requested], since there exists a great deal of relevant information which has not been incorporated into this affidavit.

1. Attorney General's Exhibit "1" is a complaint in an action by Doris L. Sassower and Carey A. Sassower, pending in Supreme Court, Westchester County, for money damages.

George Sassower, the plaintiff in this action, is not a party in that Westchester County action.

Pending sub judice in that Westchester County action is, inter alia, plaintiffs' motion to strike out all defendants' affirmative defenses and for summary judgment.

2. Attorney General's Exhibit "2" is his "Memorandum" submitted in the aforesaid Westchester County action on the aforesaid motions, in which George Sassower -- to repeat -- is not a party.

a. Almost all the factual material contained in the Attorney General's "Memorandum" (Exhibit #2) was without any probative support in the Westchester action. Consequently, its mere reproduction in this proceeding does not elevate its value or make it admissible or probative.

b. On the authority of Moore v. Manufacturers National Bank (123 N.Y. 420); Wels v. Rubin (280 N.Y. 233); and Battu v. Smoot (211 App. Div. 101, 206 N.Y. Supp. 780 [1st Dept.]), your deponent filed, on September 7, 1982, his Notice of Claim (No. 67058) against the State of New York, Robert Abrams, Esq., and Stephen M. Jacoby, Esq.

c. The Attorney General in this action will, at another time and forum, have to show its pertinency to escape liability for its republication herein (Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844 [2d Dept.]), and its probative value in this matter (Egleston v. Kalamarides, A.D.2d , 453 N.Y.S.2d 489, 491 [4th Dept.]). Thus far the moving papers have failed to show either pertinency or admissibility.

Since defendants' motions are pursuant to CPLR 3211(a) and CPLR 7804(f), without any CPLR 3211(c) request, the conclusion is inescapable that Exhibit "2" was incorporated merely to inflame and prejudice.

Since deponent strongly contends the factual information in Exhibit "2" is false, misleading, and deceptive, such material may not be considered by this Court in arriving at its decision.

Annexed is a copy of deponent's affidavit of September 21, 1982 (Exhibit "A"), and suggestion is made that the Attorney General reconsider his intended submission of such "Memorandum" (Exhibit "2") in this case or show its pertinency and support it by an affidavit of ERNEST L. SIGNORELLI (which the Attorney General knows he cannot secure).

The attorneys for the Law Journal should also consider whether they desire to qualify their adoption of "all the statements ... made on behalf of the Suffolk Defendants" (Memorandum p. 2).

d. Extremely disturbing is the outright contempt by the Assistant Attorney General (and by adoption, the attorneys for the Law Journal) for accepted judicial procedures, and in particular to Hon. MATTHEW F. COPPOLA and the Supreme Court, Westchester County.

Pending, sub judice, before Hon. MATTHEW F. COPPOLA in Westchester County, inter alia, is deponent's application, as a third party, to seal the file with the defamatory republications of the Signorelli diatribe by the Attorney General. Obviously, while Mr. Justice COPPOLA is deliberating on the complex multiple submission, the file is in chambers and not available to the public. A request for sealing pending determination, would under those circumstances have been meaningless. It did not occur to deponent, and I assume not to Mr. Justice COPPOLA either, that the Attorney General's Office would, in the interim, sabatoge the issue of sealing, by reproducing that very same material for inclusion in a public file in this Court.

Deponent has no intention of disturbing any calm judicial deliberations of Mr. Justice COPPOLA by disclosing this reprehensible caper by the Attorney General's Office. Nevertheless, as soon as His Honor's decision is rendered, appropriate punitive measures will then be seriously considered.

3. Attorney General's Exhibit "3" is the Judgment of nisi prius presently sub judice at the Appellate Division (mentioned in deponent's cross-motion to change venue), wherein no one has defended that portion of the judgment which denied, without a hearing, habeas corpus relief.

The pertinency of that proceeding on defendants' behalf is not revealed in their moving papers, nor should plaintiff or this Court have to speculate about its intended significance.

4. Law Journal, in its Memorandum, at times intimates that it is mandated by law to publish, as an "official reporter", pursuant to Judiciary Law 91(2). It should be made eminently clear that the Law Journal is not mandated by law, contract, or rule to publish any particular or all statements by the Surrogate's Court, Suffolk County.

The letter of Hon. IRVING N. SELKIN, Clerk of the Appellate Division, Second Judicial Department, dated August 30, 1982 (Exhibit "B") torpedos any such impression conveyed by the New York Law Journal. The letter reads partially as follows:

> " ... please be advised that this Court is without power to determine what the Law Journal prints or does not print."

The attorneys for the Law Journal unwittingly confirm this statement from the Appellate Division as to its unbriddled discretion in publishing, by stating (Memorandum, p. 5):

> "If the position of defendant Law Publishing is in error [in printing disciplinary complaints], and should it be ultimately determined that judges should not use such words in their decisions and the the Law Journal should not republish such words, then this Court logically should assume that the current practice [by Law Journal] will cease."

In short, while Law Journal does not deny the applicability of Judiciary Law 90(10), it desires an Order or Judgment of the court before it ceases its unlawful practice. Was Dillinger entitled to an order of the court that he should not rob banks?

B. CPLR 3211(a)(7)

1. CPLR 3211(a)(7) and CPLR 7804(f) are procedural equivalents subject to the same criteria (Gabriel v. Turner, 50 A.D.2d 889, 377 N.Y.S.2d 527 [2d Dept.]), and treated inseparately herein.

2. In view of CPLR 103(c), the sole question is whether plaintiff is entitled to any relief, irrespective of its form. Whether plaintiff's complaint is or should be an action, a declaratory judgment proceeding (CPLR 3001), or a petition in an Article 78 proceeding, is unimportant.

3. An immunity or a privilege is a pleaded affirmative defense requiring a showing of entitlement (Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190; Gomez v. Toledo, 446 U.S. 636, 640, 100 S.Ct. 1920, 1924, 64 L. Ed.2d 572, 578; LaBelle v. County, 85 A.D.2d 759, 761, 445 N.Y.S.2d 275, 278 [3d Dept.]; Pitt v. City, 111 Misc. 2d 569, 571, 444 N.Y.S.2d 522, 524 [Sup. N.Y.]) necessitating "notice" and setting forth the "material elements" of such defense (Jerry v. Borden, 45 A.D.2d 344, 346-347, 358 N.Y.S.2d 426, 430 [2d Dept.]). Where not pleaded, it is waived (Boyd v. Carroll, 624 F.2d 730, 732-733 [5th Cir.]).

Therefore, many, if not all, of the issues raised by movants under CPLR 3211(a)(7) may only be considered under CPLR 3211(a)(1) which requires "documentary evidence" in support of their motions, of which, they have produced none.

Assuming, arguendo, the applicability of CPLR 3211(a)[7] (cf. Syrang v. Foremost, 54 A.D.2d 1095, 1095-1096, 388 N.Y.S.2d 739, 740 [4th Dept.]), movants arguments are specious for the following reasons:

a. Law Journal erroneously assumes that in printing a statement, emenating from the court, such statement, ipso facto, carries a press or judicial immunity. This argument was reputed in Doe v. McMillan (412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912); Hutchinson v. Proxmire (443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411); Murray v. Brancato (290 N.Y. 52). Constitutional "free press" standards are not applicable to those who merely reprint "government hand-outs", any more than the New York Telephone Company or Sears-Roebuch have immunity for printing a telephone directory or a catalogue. The constitutional right of "free speech" and "free press" was to prevent any inhibition to the robust discussion of public issues or persons, not the republication of private defamatory material.

As Mr. Chief Justice Warren stated in Curtis Publishing Company v. Butts (388 U.S. 130, 170, 87 S.Ct. 1975, 1999, 18 L.Ed.2d 1094, 1120):

> Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers."

Incorrectly, the Law Journal assumes, because a "press" is physically employed in its operation, in and of itself, it is entitled to "free press" constitutional guarantees, including that aspect wherein it merely automatically reprints everything that emenates from Surrogate's Court, Suffolk County (as it admitted it was doing in the pending Westchester actions). The doctrine of neutral reportage is inapplicable since plaintiff is not a public figure (Cianci v. New Times, 639 F.2d 54, 67 [2d Cir.]; Dixson v. Newsweek, 562 F.2d 626, 631 [10th Cir.]), and the doctrine itself has been considered and rejected in this state (Hogan v. Hearald, 84 A.D.2d 470, 478, 446 N.Y.S.2d 836, 842 [4th Dept.]).

b. Rejected decisively in Hutchinson v. Proxmire (supra at 121 n. 10, 2681, 422) is the notion that an immunity to the initial publication, attaches to a republication. It does not!

c. Law Journal contends that it may print (a) anything involving a judicial proceeding, and/or (b) without prior restraint but subject to possible liability.

These arguments have been repeatedly rejected by the Attorney General and the courts, even when public figures were involved, when the information was not legitimately in the public domain.

In Nichols v. Gamso (35 N.Y.2d 35, 358 N.Y.S.2d 712), the Court of Appeals in a constitutionally more compelling case, since it involved a government figure (a judge), stated (38-39, 713-714):

> "... judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggests otherwise. ... Certainly, so much of the record and proceedings which do not relate to the charges sustained need not be disclosed."

Annexed (Exhibit "C") is the Attorney General's impressive Brief in the Court of Appeal in Nichols v. Gamso (supra).

In Leff v. State Commission on Judicial Conduct (Exhibit "D"), the judge himself, joined by the intervening press, requested that the proceedings be made public, and the Court refused to grant the petition.

Historically, the concept of a "free press" applied only to criminal prosecutions, with the Supreme Court consistently rejecting the argument that defamation actions called for First Amendment protection. In New York Times v. Sullivan (376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686), the Court recognized that the "free press" was more endangered by huge defamation awards than it was with nominal fines that were usually imposed in criminal proceedings.

The progeny of New York Times v. Sullivan (supra) have clearly distinguished public issues and figures from private persons and matters. The applicable law applicable to these categories in the law of defamation and privacy is distinct and pronounced. The difficulty lies in attempting to classify border line events or persons as either public or private which process has been described as an attempt sometimes to "nail a jellyfish to the wall".

This problem does not exist at bar since attorneys, per se, are considered private persons in the law of defamation and in their right to privacy (Gertz v. Robert Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789).

Since the first time the issue was raised, the courts, even without a confidentiality statute, have considered disciplinary proceedings private, punishable by contempt of court and actionable in a money damage suit (Mr. Justice O.W. Holmes, Jr. in Cowley v. Puslifer, 137 Mass 392, 50 Am Rep 318).

The Law Journal does not contend Judiciary Law 90(10) is unconstitutional, nor has it given the Attorney General his statutory notice. Therefore, for the purpose of these motions the privacy and confidentiality provision of Judiciary Law 90(10) must be deemed effective, controlling, and binding on this Court.

d. The Law Journal, when it speaks of "free press" rights and prohibition of governmental restraints, has reference only to public issues (Near v. Minnesota, 238 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357) and to some extent to public figures, not private matters nor private persons.

The courts have never denied its inherent power to prohibit publication of certain judicial or governmental proceedings. It has only refused to prohibit publication of material "lawfully obtained" in the public domain (Smith v. Daily Mail, 443 U.S. 97, 104, 99 S.Ct. 2667,, 61 L.Ed.2d 399, 405; Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1).

In Nixon v. Warner (435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 580), the Court stated:

> "... the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of the 'painful and sometimes disgusting details of a divorce case (cases cited). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption (cases cited, including Cowley v. Pulsifer, 137 Mass. 392 and Munzer v. Blaisdell, 268 App. Div. 9, 11, 48 N.Y.S.2d 355, 356), or as sources of business information that might harm a litigant's competitive standing ..."

Recently, in U.S. v. Criden (681 F.2d 919 [3rd Cir.]) the Court ordered video and audio tapes of a trial proceeding to be edited, in order to remove portions which made reference to and might inflict unnecessary and intensified pain on third parties.

In 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), liability was imposed for publication when the information was received from one of the litigants.

Disclosure was also recerntly refused in People v. Christopher (109 Misc.2d 767, 443 N.Y.S.2d 544 [Sup. -Erie]).

e. On this motion, this Court must assume the truthfullness of the complaint, including the allegation that the statement of Ernest L. Signorelli did not determine any issue nor was it intended to determine any issue, consequently there was no lawful authority for its issuance. In a legally controlling situation (Matter of Haas, 33 A.D.2d 1, 304 N.Y.S.2d 930 [4th Dept.], app. dis. 26 N.Y.2d 646, 307 N.Y.S.2d 671), another Surrogate went on a similar rampage. A Writ of Prohibition could only be justified on the grounds that jurisdiction did not exist for its issuance, whcih the Appellate Division issued. Significantly, the Law Journal now describes the Signorelli diatribe as (p. 3) "what appears as a decision and order".

f. Law Journal wishes this Court to take "judicial notice" of the fact that it does publish such disciplinary complaints from judges "from time to time" (Memorandum, p. 4-5). Plaintiff joins in such request.

In requesting that Law Journal be prohibited from publishing material prohibited by statute, and specifically complaints requesting disciplinary proceedings against lawyers by judges, plaintiff was careful to exclude any restraint from publication any information which came from "other than judicial employees or their agents".

This limited restriction conforms and complies with judicial interpretation of the "inner limits" of the First Amendment, as routinely practiced by all the courts, and sanctioned by the explicit words of the Supreme Court (Smith v. Daily Mail [supra]; Landmark v. Virginia [supra]).

g. The Assistant Attorney General lacking material for an intelligent attach on the complaint makes the following general objections: (1) The complaint "fails to state a claim upon which relief can be granted" (15). No reason or authority is set forth for this assertion. (2) "[A]s a whole ... no right to relief ... can be granted" (¶16). Once more the Attorney General does not set forth any reason or authority for this statement. (3) The "decision" that plaintiff finds objectionable is not even identified. I refer the Assistant Attorney General to ¶32 of the Complaint. (4) The nature of the proceeding "pending in the Appellate Division" referred to in the complaint is not identified (¶17). There are several references to the Appellate Division, his office represents a party in every Appellate Division proceeding or is sufficiently involved in every proceeding so that papers are served on his office with respect to same. Consequently, even if such lack of specificity in this respect exists (which it does not), the Attorney General has exact and precise information and documentation of each and every proceeding in the Appellate Division.

Case or Controversy

The attorneys for the Law Journal claim that the complaint does not set forth a "case or controversy". They obviously are in the wrong church.

The "case or controversy" requirement is purusant to Article III of the United States Constitution governing federal, not state, courts. The laws of the State of New York do not have such a requirement. In any event, the issue at bar, like pregnancy, is "capable of repetition, yet evading reiview" (Roe v. Wade, 400 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147, 161), thereby nullifying any argument concerning "mootness" or lack of "case or controversy".

Standing

The attorneys for the Law Journal eventually stumble into the correct church, when they raise the issue of "standing", but now read the wrong scripture (Boryszewski v. Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623). Here again, issues evading review, or public matters, are not considered "moot" and provide the necessary requirement for standing (Hearst v. Clyne, 50 N.Y.2d 707, 431 N.Y.S.2d 400; 4 NY Jur2d, Appellate Review, 327, p. 421, 422).

CPLR 3211(a)(4)

Movants (Law Journal by adoption) claim the because "at least one other action pending against defendant Signorelli based on the same facts ... " the action must be dismissed.

The are playing "fast and loose" with words in an attempt to mislead this Court. They obviously refer to Exhibit "1", an action by Doris L. Sassower and Carey A. Sassower. They do not state that there is another action by plaintiff against Signorelli, merely another action against Signorelli. Since that other action does not involve plaintiff, the objection is frivolous.

CPLR 3211(a)(5)

1. Res Judicata and collateral estoppel is not an inflexible doctrine, rigidly or mechanically applied. They require a realistic appraisal of the events leading to the judgment relied upon (Gilberg v. Barbieri, 53 N.Y.2d 285, 292, 441 N.Y.S.2d 49, 51). Except for one judgment, presently sub judice at the Appellate Division, Second Department, movants make absolutely no showing whatsover to support any contention of claim or

issue preclusion. The mere assertion that there exists a tort action against Signorelli in Supreme Court, Suffolk County is patently insufficient to rest any preclusive assertion.

Obviously, the action by Doris L. Sassower and Carey A. Sassower, wherein they have moved for summary judgment does not support movants' arguments.

Plaintiff's alleged Article 78 proceeding against Suffolk County Sheriff does not support movants' argument.

Plaintiff's alleged habeas corpus proceeding against the Suffolk County Sheriff does not support movants' argument.

2. The Statute of Limitations is not an appropriate defense to this action or proceeding.

a. The relief is mostly declaratory in nature (DeLuca v. Kirby, 83 A.D.2d 621, 441 N.Y.S.2d 1005, 1006 [2d Dept.]; Kadragic v. State University, 73 A.D.2d 638, 422 N.Y.S.2d 753, 754 [2d Dept.]; Lutheran Church v. City of New York, 27 A.D.2d 237, 239, 278 N.Y.S.2d 1, 3 [1st Dept.]).

b. CPLR 217 provides that the limitation commences to run from the time "the determination to be reviewed becomes final and binding upon the petitioner".

Paragraph 60 of the complaint alleges (without contradiction) that plaintiff has never been served with a copy thereof "with Notice of Entry". CPLR 5513(a) requires such service before it becomes binding and final on plaintiff.

c. The relief requested includes events that occurred after the publication of the Signorelli diatribe, e.g., destruction and suppression of official records. There should be a showing by Signorelli of the time such destruction took place and when plaintiff had reason to know of such event, before it can be determined when the period of limitations commences, or whether the doctrine of estoppel is applicable.

d. Movants also claim that the Signorelli diatribe can be adequately reviewed on appeal by the Appellate Division (¶21).

Since this diatribe decided nothing (Matter of Haas, supra), there is nothing to review by an appellate court, nor is plaintiff legally aggrieved by any disposition made in said order (CPLR 5511). An appellate tribunal reviews determinations made in the "ordering" or dispositive paragraphs of a judgment or order, not the words of a decision. This objection is, like the others, frivolous.

Class Action

Obviously the class action assertion pertains only to the defendant, New York Law Journal, with its "angel of death" publications of disciplinary complaints against attorneys. The uncertainty of the identity of the attorney and when he will be struck down by such publication makes class action relief appropriate.

WHEREFORE, it is respectfully prayed that the venue of this matter be changed for all purposes and after such removal the defendants' motions be denied in all respects.

GEORGE SASSOWER

Sworn to before me this
28th day of September, 1982

Barbara Tatesure

BARBARA TATESURE
Notary Public State of New York
No. 24-4760746
Qualified in Kings County
Commission Expires March 30, 19 84