UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT and THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Defendants.

82 Civ 4970 (MJL)

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PLAINTIFF'S MEMORANDUM

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PLAINTIFF'S MEMORANDUM

STATEMENT

Even in litigation, this continues to be a unique, incredible, and disturbing situation.

Plaintiff contends that defendants' attorney knows that her Rule 12(b)[1],[2], and [6] motion is meritless and frivolous, legally, as well as factually, and requests that this Court should require her to respond to plaintiff's serious ethical assertions, in affidavit form, giving her a brief, but sufficient time, to do so.

This is an action by a plaintiff, who thus far, has been completely and resoundingly vindicated.

Nevertheless, requests federal intervention to assure defendants due respect to the Constitution and Laws of the United States, for himself, and those who are or may be similarly situated in the future.

For himself, at the present time, plaintiff desires to be judged by a constitutional and detached tribunal so that he may receive the full benefits of his victory and eradicate the judicially published "badge of infamy".

POINT I

DEFENDANTS' ARGUMENTS ARE MERITLESS

Defendants have made it eminently clear that their motion is based exclusively on plaintiff's complaint and consequently no reference is substantively being made to the other documentation submitted.

Defendants' short "Memorandum of Law" sets forth meritless and frivolous (if not knowingly false) contentions in support of their dismissal motion.

A. Defendants' attorney states (p. 1):

> "The 66 page complaint is an incomprehensible rambling summary of some of those proceedings full of slanderous accusations against persons not before this Court. These would themselves be grounds to dismiss this action."

Defendants do not set forth any authority for dismissal on their aforementioned asserted grounds, nor is deponent aware of any such authority (Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206-2207, 45 L.Ed.2d 343, 356). In any event, plaintiff's complaint does set forth judicial recognizable grounds for relief.

B. Defendants "Memorandum" states (p.2-3):

> "because plaintiff sues only Courts acting in their judicial capacity, the precedents compel dismissal for lack of either subject-matter or personal jurisdiction and for failure to state a claim upon which relief can be granted."

a. Those precedents which "compel dismissal" are not cited by the Assistant Attorney General.

b. Significantly, research reveals that this Assistant Attorney General was involved in Morabito v. Blum (528 F. Supp. 252 [SDNY]), where Judge ROBERT J. WARD stated (p. 260):

> "Blum's [this Assistant Attorney General's client] subject-matter-jurisdiction argument [is] meritless. Equally meritless is defendant Blum's contention that plaintiffs' complaint must be dismissed under Rule 12(b)(1) for failure to state a federal claim. ... [I]t is well settled that such dismissals should be confined to cases where the complaint on its face, without resort to extraneous matter, is so plainly insubstantial as to be devoid of any merit, enabling the court to conclude that the claim asserted is patently frivolous or wholly insubstantial. Bell v. Hood, 327 U.S. 678, 681-82; Giulini v. Blessing, 654 F.2d 189, 192 [2d Cir.]."

In Giulini v. Blessing (supra), this Circuit stated (p. 192):

> "A complaint under 42 U.S.C. §1983 charging denial of constitutional rights by a state agency may not be dismissed for lack of jurisdiction unless it appears that the claim is patently frivolous or wholly unsubstantial (cases cited). For jurisdictional purposes the test is whether the complaint on its face, without resort to extraneous matter, is so plainly insubstantial as to be devoid of any merits and thus not presenting any issue worthy of adjudication.
>
> ... we are persuaded that the district court was obliged to entertain this action in which the complaint alleged the deprivation, under color of state law, of constitutional rights. Although success on the merits may be unlikely, appellants allege ... does not have any rational relationship to exercise by the state of its police power and was not enacted as part of any comprehensive land use plan. This is sufficient to confer jurisdiction.
>
> ... Heimbach v. Village of Lyons, 597 F.2d 344 [2d Cir.]) ..."

In Heimbach v. Village of Lyons (supra), this Circuit stated (p. 346-347):

> "Thus, while Justice Perry may have acted maliciously in signing a criminal warrant against appellant Heimbach ... the justice is nonetheless immune from suit for damages for his actions. The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action (cases cited)."

In Supreme Court of Va. v. Consumers Union (446 U.S. 719, 735, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641, 655), the Court stated:

> "... we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts."

The Court then reveals that such relief is given in this and a few other circuits (n. 13) and took note of precedent and reason for such relief being granted (n. 14).

Clearly, this Assistant Attorney General has asserted a claim which she has been told by Judge WARD is "meritless".

Defendants' assertion that plaintiff sues defendants "only" in "their judicial capacity" is, nevertheless, a baseless, conclusory statement refuted by the mere reading of the complaint (Supreme Court of Va. v. Consumer's Union, supra).

C. Defendants then assert they are not suable because they are not "persons" under §1983.

a. If that argument had any merit the Supreme Court could not have granted any relief in Supreme Court of Virginia v. Consumers Union (supra, on remand 505 F. Supp. 822, app. dis. 451 U.S. 1012, 101 S.Ct. 2998, 69 L.Ed.2d 484).

b. Are the defendants arguing that the entire federal judicial hierarchy did not recognize that they did not have subject matter jurisdiction in Middlesex County Ethics Committee, etc, v. Garden State Bar Association, U.S. (102 S.Ct. 2515, 73 L.Ed.2d 116), whose more complete title appears at 643 F.2d 119 [3d Cir.] and reads "Middlesex County Ethics Committee, an agency established by the Supreme Court of New Jersey"? The Supreme Court knew that if the federal courts did not have jurisdiction they should have dismissed the claim (Nixon v. Fitzgerald, U.S. n. 23, 102 S.Ct. 2690, 2698, 73 L.Ed.2d 349, 359).

c. Even before Monell v. Department of Social Services (436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611), this circuit impliedly held in Person v. Association of the Bar (554 F.2d 534 [2d Cir.], cert. den. 434 U.S. 924, 98 S.Ct. 403, 54 L.Ed.2d 282), that the state courts and The Association of the Bar of the City of New York were "persons" within the purview of §1983.

d. There are other reported decisions which hold explicitly or implicitly that state courts, disciplinary agencies, and bar associations are "persons" within the meaning of §1983 (e.g. Fruchtman v. New York State Board of Law Examiners, 534 F. Supp. 692 [S.D.N.Y. - per Motley, J.]; Verner v. State of Colorado, 533 F. Supp. 1109 [Col.]; Rapp v. Committee on Professional Ethics, 504 F. Supp. 1092, [Iowa]).

e. In the pre-Monell case of Zuckerman v. Appellate Division (421 F.2d 625 [2d Cir.]), the Court stated:

> "In Monroe v. Pape ... it was held that a municipal corporation was not a 'person' within the meaning of that word in §1983. Since a municipal corporation is but a political subdivision of a state, it has been held that the state itself is also not subject to suit under §1983 (case cited). It follows that the Appellate Division, as part of the judicial arm of the State of New York, must also not be a 'person' within the purview of the section of the Civil Rights Act."

The authority for the Zuckerman holding was eroded by Person v. Association of the Bar (supra); Monell v. Dept. of Social Services (supra); and Turpin v. Mailet (579 F2d 152 [2d Cir.]); cf. N.A.A.C.P. v. State of Cal. (511 F. Supp. 1244, 1257 n. 10 [Cal.]).

f. The only post-Monell case cited by defendant is Louis v. Supreme Court of Nevada (490 F. Supp. 1174 [Nev.]), wherein the Court held that there was subject matter jurisdiction over the individual justices of the court, but not the court itself since it was not a "person". The court did not cite nor attempt to reconcile its holding with Monell v. Dept. of Social Services (supra).

D. Defendants contend that they have immunity and cite:

a. Zuckerman v. Appellate Division (supra). As above noted, that case merely held that the defendants were not suable since they were not "persons", but significantly acknowledged that a bar association was an agency of the state (at p. 626).

b. Erdmann v. Stevens (458 F.2d 1205 [2d Cir.] holds contrary to defendants' claim, since it states (1208, 1210):

> " ... no sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their judicial capacity. Accordingly, we conclude that jurisdiction exists and proceed to the merits. ... 'the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights' ".

Any possible jurisdictional question was resolved in Person v. Association of the Bar (supra) wherein the Court stated (p. 537):

> "We hold further that this suit for declaratory relief is maintainable against defendants-appellants under 42 U.S.C. §1983. ... the immunity of judges has been held in a number of cases not to extend to actions for injunctive relief."

The Person decision was approvingly cited by the Supreme Court in Supreme Court of Va. v. Consumers Union (supra at n. 15, 736, 1977, 656).

c. Since this is not an action for money damages, defendants reference to Stump v. Sparkman (435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331) and Pierson v. Ray (386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288) is clearly inappropriate.

d. As heretofore noted, the court in Louis v. Supreme Court of Nevada (supra) held that it had subject matter jurisdiction.

e. Although relief on the merits was denied in Pettit v. Gingerich (427 F. Supp. 282 [Md]), the Court did not deny that it had jurisdiction to decide the controversy.

f. In a post-Monell, Second Circuit situation, defendants' citation of pre-Monell Moity v. Louisiana State Bar (414 F. Supp. 180 [La]), aff'd without opinion, 537 F.2d 1141 is unpersuasive and unauthoratative . It should further be noted that this was one of the cases in which the Louis tribunal relied on in its definition of "person".

g. County of Lancaster v. Philadelphia Electric (386 F. Supp. 934 [Pa]) is another pre-Monell decision relied upon by the Louis tribunal for its definition of "person" under §1983.

E. As their final argument, the defendants contend that (p. 6) "Rooker (or Tang) and its (their) progeny" compel dismissal.

a. In Friarton v. City of New York (525 F. Supp. 1250 [S.D.N.Y], Judge BRIEANT stated (p. 1258):

> "However, by its terms, Rooker applies only if 'the judgment was responsive to the issues' ... . Accordingly, Rooker does not bar district court actions brought on issues not previously determined on the merits by the state court."

b. Similarly in Gresham Park v. Howell (652 F.2d 1227, 1234 [5th Cir.]), the Court, discussing the Rooker-Tang doctrine, stated:

> " If, instead, the plaintiffs had prayed for an injunction enjoining enforcement of the judgment, then under this theory, Rooker would not have relied on the district court's lack of appellate jurisdiction. The difference, obviously, is that in the former situation, but not the latter, the district court was asked to vacate the state judgment, an exclusive appellate act."

Examination of plaintiff's complaint reveals that Tang v. Appellate Division (487 F.2d 138 [2d Cir], cert. den. 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111) does not present an obstacle to relief.

The issue on defendants motion is not whether this Court should grant relief to plaintiff, but whether it has the jurisdiction to do so. It is a question of power, rather than propriety.

Whether the federal judiciary should abstain in this case, is a possible issue for another day.

CONCLUSION

DEFENDANTS' MOTION SHOULD BE DENIED WITH MAXIMUM SANCTIONS IMPOSED

November 4, 1982

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for plaintiff
Pro se.