1/7/84

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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GEORGE SASSOWER,

Index No.
5774-1983

Plaintiff,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, ALAN CROCE, ANTHONY GRYMALSKI, HARRY E. SEIDELL, NEW YORK NEWS, INC., AND VIRGINIA MATHIAS,

Defendants.

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S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of GEORGE SASSOWER, duly sworn to on the 7th day of of January, 1984 and upon all the pleadings and proceedings had heretofore had herein, the undersigned will move this Court at a Special Term Part I of the Supreme Court of the State of New York, County of New York, held at the Courthouse thereof, 60 Center Street, in the Borough of Manhattan, City and State of New York, on the 24th day of January, 1984, at 9:30 o'clock in the forenoon of that day or as soon thereafter can be heard

for an Order granting plaintiff (1) leave to amend his complaint; (2) directing defendant, Ernest L. Signorelli to answer plaintiff's interrogatories for the purpose of further amending the complaint, in order to comply with CPLR 3016[a]; (3) together with any other, further, and/or different relief as to this court may seem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that opposing papers, if any, are to be served upon the undersigned at least five (5) days after the return date of this motion, with an additional five (5) days if such service is by mail.

Dated: January 9, 1984

Yours, etc.,

GEORGE SASSOWER, Esq.
Attorney for plaintiff
2125 Mill Avenue,
Brooklyn, New York, 11234
212-444-3403

To: Paterson, Belknapp, Webb & Tyler, Esqs.
Martin B. Ashare, Esq.
Robert Abrams, Esq.

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Defendants.

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STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF KINGS)

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

RELIEF REQUESTED

This affidavit is in support of plaintiff's motion for an Order granting plaintiff (1) leave to amend his complaint; (2) directing defendant, Ernest L. Signorelli (hereinafter "Signorelli") to answer plaintiff's interrogatories for the purpose of further amending the complaint, in order to comply with CPLR 3016[a]; (3) together with any other, further, and/or different relief as to this court may seem just and proper in the premises.

PRELIMINARY STATEMENT

Only plaintiff's second cause of action (defamation and constitutional tort), is sought to be amended at present; affects only defendants, "Signorelli" and Anthony Mastroianni (hereinafter "Mastroiani"); and no legal prejudice is perceived.

The grounds for this application is (1) to conform the complaint to the newly established, unanticipated pleading requirements, set down by the Appellate Division, Second Department; (2) newly discovered evidence; and (3) that the aforementioned decison of the Appellate Division, does not comport with constitutional due process, and thus not binding on this Court.

This application is being made without prejudice to any other proceeding or application now pending, or which may be brought on this or other causes of action herein.

CPLR 3025(b)

A. Assuming, arguendo, the validity to the holding of the Appellate Division, Second Department, a matter which plaintiff disputes under the peculiar circumstances existing at bar, plaintiff should be entitled to amend his second cause of action to conform to said decision of the Appellate Division (and at the same time improve the pleading of said cause in some other technical respects).

According to the Appellate Division, plaintiff needs to plead affirmative acts in order to hold the talemaker ("Signorelli") liable for the republication by the talebearer (New York News [hereinafter "News"]), although he need not show any such affirmative facts under a "Signorelli" CPLR 3211(a)[7] motion.

Nevertheless, in support of this motion, plaintiff will show that such evidence, in probative form, now exists.

Such probative evidence was received from Art Penny (hereinafter "Penny"), the reporter ("stringer") for the defendant, "News", at a court ordered examination before trial.

Thus, whether plaintiff, on a CPLR 3025(b) motion, need show the existence of such evidence, in order to obtain permission to replead, is immaterial, since, in fact, it does exist.

B. A short resume of the operative facts leading to the private press conference by "Signorelli" to this reporter for the defendant, "News", will aid in its understanding.

1. Until March 1977, plaintiff was unquestionably recognized by everyone, including "Signorelli", as the executor of the estate of Eugene Paul Kelly.

In March 1977, "Signorelli", sua sponte, declared plaintiff had been removed one year previously, and substituted him by his appointee, the Public Administrator, "Mastroianni".

One of the several acts showing that "Signorelli" recognized plaintiff, as executor, was his personal express authorization that plaintiff, after this contrived assertion of removal, sell a parcel of property. Under such express authorization, plaintiff entered into a contract of sale.

Thereafter, "Signorelli" directed plaintiff to turn over the books and papers of the estate to "Mastroianni", which plaintiff eventually, but reluctantly did, and he cancelled such contract of sale, as unauthorized.

Ironically, after cancelling this contract of sale as unauthorized, "Mastroianni", one year later, entered into a new contract, with the same person, for the same amount, the estate incurring the additional and needless expense for maintaining vacant property in the interim.

2. On Wednesday, June 22, 1978, (1) without any accusatory instrument, (2) without any notification of any trial, and all in absentia, plaintiff was (3) tried, (4) convicted, and (5) sentenced to 30 days incarceration for criminal contempt in the Suffolk County Jail.

3. That same day, "Signorelli" dispatched Deputy Sheriffs from Suffolk County to Westchester County in order to arrest plaintiff, which they did the following morning (Thursday, June 23, 1978).

Plaintiff, until his arrest, was completely unaware of this "mock trial" that had taken place the preceding day.

4. Plaintiff, upon arrest was denied all his constitutional, legal, and civilized rights, including his right to present his quickly prepared Writ of Habeas Corpus, communication with counsel and others [except to cancel an engagement in another court].

Instead of taking plaintiff to the Suffolk County Jail, as specified in the Warrant of Committment, plaintiff was taken to "Signorelli".

5. Here plaintiff was held incommunicado, again denied all his legal rights, including his rights under the 5th Amendment of the Constituion of the United States, which "Signorelli" refused to recognize.

6. Later that day, Thursday, June 23, 1978, from the County Jail, plaintiff was able to secure a Writ of Habeas Corpus, which was made returnable Monday, June 27, 1978 in Supreme Court, Suffolk County.

7. The following Monday morning (the return date of the Writ of Habeas Corpus), there was published in the "News", the first of two articles, under the byline of "Penny", which from its contents, had to have been secured and written after the Writ of Habeas Corpus was signed (Thursday) and before the return date of such Writ (Monday).

The above facts have been judicially determined at full and fair hearings [thus subject to collateral estoppel], conceded, or undisputed.

C1. Plaintiff not having in his possession the two articles published in the "News" [another having been published about two months later], obtained an Order directing their production, resulting in 1978, in the service of plaintiff's amended complaint [which plaintiff now seeks to further amend].

2. From the contents of the publication of Monday, June 27, 1977 in the "News", it was apparent that the remarks attributed to "Signorelli" were either (a) wholly contrived by "Penny" and/or the "News", or (b) made "out-of-court" (since there had been no judicial proceedings between the issuance of the Writ of Habeas Corpus [Thursday] and the publication in the "News" [Monday]).

There were and are no possible other alternatives!

The examination before trial of "Penny" confirms the later to have been the origin to this publication in the "News", and places such private press interview by "Signorelli" as having occurred on Friday, June 24, 1978.

3. Although a "code of silence" had been implemented by the Suffolk County officialdom and others involved, plaintiff was nevertheless able to learn that the statements made to "Penny", in this out-of-court press conference, included defamatory material that was not published.

At the time of the service of plaintiff's amended complaint in 1978 he did not know nor could he reveal (without disclosing his confidential sources) the words of "Signorelli" to "Penny", which were not published in the "News", without jeopardizing deponent's opportunity for further information from such source, and possibly being confronted with denials on information already given. Consequently, for defamatory information given by "Signorelli" and his sycophants to "Penny", which was not published in the "News", in order to minimize the possibility of a dismissal motion (CPLR 3016[a]), plaintiff included same as part and parcel with the material thereafter published by the "News".

Thus, to his second cause of action (Exhibit "A"), plaintiff included in one cause of action, the defamation by "Signorelli" and his sycophants (1) to "Penny", published and unpublished in the "News", and (2) the republication of some of the defmatory material in the "News" (Exhibit "A", ¶24).

4. Plaintiff also alleged that the false statements:

> "were also imparted with the intent to deprive plaintiff of a fair and constitutional trial, which it did." (Exhibit "A", ¶25).

D1. "Signorelli" moved for dismissal of the complaint based on CPLR 3211(a)[5][7], which "Signorelli's" colleague, Hon. James A. Gowan granted, after being sub judice for one year. Judge Gowan, in his decision stated:

> "A complaint purporting to state a cause of action for libel or slander must set forth the actual words complained of (CPLR 3016(a) [case cited], and mere conclusory allegations such as those comprising plaintiff's complaint are legally insufficient to state a cause of action for libel and slander [case cited]."

Since the two articles published by the "News" was annexed to the complaint (CPLR 3014), to make any legal sense out of such words, one is compelled to conclude that Judge Gowan only considered the alleged defamation by "Signorelli" to "Penny", and not the subsequent republication by the "News".

2. On plaintiff's appeal to the Appellate Division, Second Department (George Sassower v. Signorelli, 98 A.D.2d 585, 465 N.Y.S.2d 543 [2d Dept.]), this was affirmed (on other grounds), after being sub judice for thirteen months. The Appellate Division stated:

> "The second ... causes of action sound in defamation. The second cause of action alleges that on June 27, 1977 and August 17, 1977, the New York News published two articles by Art Penny, containing defamatory material about [plaintiff] which was acquired, from among other sources, defendant Surrogate SIGNORELLI's out-of-court statements.
>
> Initially we note that attaching the articles containing the allegedly defamatory material to the amended complaint as an exhibit is suffient to satisfy the pleading with particularity requirement of subdivision (a) of CPLR 3016 [cases cited]. '[I]n the absence of proof of affirmative acts causing a publication to be made, a slanderous statement uttered in the presence of third persons is not the proximate cause of an injury alleged to have been sustained by its subsequent publication in newspapers by such persons [case cited], even though made with intent that such slanderous statement should be widely circulated [case cited]' (Bradford v. Pette, 104 Misc 308, 318, mot. to dismiss app. granted, 285 App Div 960, 139 N.Y.S.2d 907.]. Although [plaintiff] does not have to proffer proof of affirmative acts to defeat a motion

under paragraph 7 of subdivision (a) of CPLR 3211, absent an allegation that Surrogate SIGNORELLI procured the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against him." (at 587, 547) [emphasis in original].

3. While the matter was sub judice at the Appellate Division, this action was (1) transferred to New York County from Suffolk County and (2) "Penny" was directed to submit to an examination before trial.

E1. Plaintiff now desires to amend his complaint so as to plead affirmative acts of "Signorelli" causing said republication by the "News" in order to conform to the newly established pleading requirements by the Appellate Division.

Furthermore, plaintiff will show this Court that the testimony of "Penny", at his examination before trial, reveals such affirmative acts and supports the proposed pleading.

Addionally it will be shown that all the cases and authorities reveal that such testimony warrants, if not mandates, the imposition of liability upon "Signorelli's" for the "News'" republication, as a matter of law.

2. On April 8, 1983, "Penny", the reporter for the "News" testified at a Court ordered examination before trial (on notice to all attorneys), that:

> " '[He presently] is Assistant to the District Attorney, Suffolk County' (SM7), '[and starting] in 1971 ... wrote all sorts of stories, criminal stories, court stories, investigative stories, indictments, convictions, homicides, plus [did] some investigative work' (SM10).
>
> '[S]ome of [the] people who gave me this education on libel [were] judges ... they gave me some advice .. be careful, be accurate. That was basically it' (SM-21), 'be accurate ... be accurate' (SM22). '[I knew] all the judges in Riverhead on a pretty personal basis. Four or five were very close friends, golfing, husbands and wives dating, going out together, boating ... Appellate Division Justice Lawrence Bracken, Appellate Division Justice Leon Lazer ... I can go on and on' (SM101). '[I] strived for accuracy .. [to be] very careful ... strive for honesty' (SM48), '[in libel law] the best defense [is] being accurate' (SM120), 'I would say fair and accurate reporting were the best defenses' (SM124).
>
> ' [I know Judge Signorelli] eighteen, twenty years' (SM46), 'I knew him [Signorelli] as Assistant District Attorney' (SM47), 'I knew him [Signorelli] when he was a County Judge. I watched him in court, I covered his court' (SM48). 'I know Vincent G. Berger, Esq. [Signorelli's campaign manager and attorney for Public Administrator

Mastroianni, a Signorelli appointee] for fifteen years ... [we are] on freindly terms' (SM95). [I know] Anthony Mastroianni ... [for] ten, twelve, fifteen years' (SM100], '[on a] first name basis' (SM101). '[I was] certainly on on a friendly basis [with Mervin Woodward, Chief Clerk of Surrogate's Court] ... we were good friends for many years' (SM106).

'[My] office [is] in the Court Building ... Suffolk County paid for the phones. It was a courtesy ... the phone bill used to be picked up by the County [of Suffolk]' (SM17-18), '[I got the story] from somebody [I] knew ... I had three or four calls on this story, I think some of the people had given me leads before ... [the telephone calls were] made to my office ... [to] the press room in the Criminal Courts Building ... my best estimate is I got the calls the Friday [June 24], probably in the morning' (SM37-SM38], 'I believe several of the calls came from friends that I had dealt with before. I think one of the calls came from a complete stranger who I never met before' (SM39), '[the messages were] get over here to the Surrogate's Court, we have a great story for you' (SM40), 'they said we got a good one [story] for you ... we have got a good story for you' (SM50) 'I undoubtedly [went to Surrogate's Court], very obvious [I] spoke to certain people' (SM41), 'I remember two of [the people who I got calls from (but the witness invoked the shield law, which is now subject to judicial review)]' (SM42), 'I believe I met ... the people that made the calls to [me] at Surrogate's Court' (SM42), 'I don't think I was in the courtroom at all ... I might have been in chambers ... or outer office' (SM43), 'I don't remember ... who was present when Judge Signorelli gave that

explanation ['The Judge explained that he allowed Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate'] ... I think it was an indication that $90,000 was never accounted for' (SM51), 'it should have been he would allow or is allowing Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate' (SM54), [my understanding was plaintiff] was held in contempt of court because [he] failed to give a complete accounting as directed by [Signorelli]' (SM57), 'I don't believe ... [I received] any photostatic copies of any of the documents from Surrogate's Court or any other court before [I] wrote the story' (SM31).

'I was the author of that story [Exhibit "1" to the complaint]' (SM13), 'I doubt very much that it [the published story] was changed' (SM-15), 'I may have called them [the News] on a Friday [June 24, 1977]'.

'In my own mind I am sure I did [speak to Judge Signorelli about this case after June 27, 1977]' (SM104), 'during the following two months after publication ... no one ... advise[d] [me] that there were errors in [the] published article' "(SM27).

F1. In examining plaintiff's complaint, while Special Term considered only the remarks made by "Signorelli" to "Penny", the Appellate Division only considered the remarks made by "Signorelli" which were published by the "News".

In other words the Appellate Division did not consider the defamation of "Signorelli" to "Penny", which even had they all been not published by the "News" would have stated a cause of action by plaintiff.

Thus, clarity and technicality indicates that each pubication be bifurcated, so that (1) a cause of action be set forth against "Signorelli" and "Mastroianni" for their remarks to "Penny", and (2) a separate cause of action against "Signorelli", "Mastroianni", and the "News" for the remarks which were subsequently republished by the "News".

With respect to the remarks made by "Signorelli" to "Penny" which were not published by the "News", "Penny" could or would not set forth the exact words only that "Signorelli" "indicat[ed] that $90,000 was never accounted for" (SM51).

On such subject, and in order to comply with CPLR 3016(a), plaintiff desires testimony from "Signorelli" in order to frame his complaint so as to comply with CPLR 3016(a). Such order is not needed as against "Mastroianni" since there is now extant an Order compelling him to submit to an examination before trial.

A similar bifurcation is desired as to the second publication by the "News".

Gl. The law is clear that "absent prejudice or surprise resulting directly from the delay" leave to amend "shall be freely given" (McCaskey v. New York City Health and Hospital Corporation, 59 N.Y.2d 755, 463 N.Y.S.2d 434).

2. Thus, as the record clearly reveals, the delay has essentially been because of the inordinate time this matter was sub judice at Special Term and the Appellate Division, and cannot be attributed to the parties.

3. The law is also clear that should plaintiff opt to commence a new action against "Signorelli" based upon the pleading requirements newly set by the Appellate Division, it would not be barred by the Statute of Limitations (175 East v. Hartford, 51 N.Y.2d 585, 590 n. 1, 435 N.Y.S.2d 584, 586; DeRonda v. Greater Amsterdam, 91 A.D.2d 1088, 1089, 458 N.Y.S.2d 310, 311 [3d Dept.])

4. A needless procedural dance, by way of a new action, would be a judicial waste of time, money, and energy on everyone's part.

11a. This multifurcation would substantively simplify the issue of damages.

b. Except where the "single publication rule" is involved, it is hornbook law that each publication or republication results in a separate and distinct cause of action.

Consequently, a claim against the talemaker ("Signorelli") for the republication by the talebearer ("News"), should be set forth as two distinct causes of action (Union Associated Press v. Heath, 49 App. Div. 247, 249, 63 N.Y. Supp. 96, 97 [1st Dept.]; Spriggs v. Associated Press, 55 F. Supp. 385, 386 [Wyo]. But where there is no statute of limitations problem (Billingsley v. Triangle, 194 F. Supp. 330 [SDNY]) or problem apportioning the damages, since obviously the talebearer ("News") is not responsible for the talemaker's ("Signorelli's") initial defamation, a review of the

cases reveals generally that no such separation is made in the pleading (e.g. Park Knoll v. Schmidt, 89 A.D.2d 164, 454 N.Y.S.2d 901 [2d Dept.], reversed on other grounds, 59 N.Y.2d 205, 464 N.Y.S.2d 424 - Rec. on Appeal p. 71 [A.D.]).

c. To summarize, to prevent needless substantive problems, plaintiff desires to multifurcate his second cause of action, into four causes of action, to wit., (1) against "Signorelli" and "Mastroianni" for their defamations to "Penny" in June 1978; (2) against "Signorelli", "Mastroianni", and "News", for the republication of part of said defamations by "Signorelli" and "Mastroianni"; (3) against "Signorelli" and "Mastroianni" for their defamations to "Penny" subsequent to June 27, 1978; and (4) against "Signorelli", "Mastroianni", and the "News", for the republication of the "Signorelli" and "Mastroianni" on August 17, 1977.

No substantive changes are intended and the proposed portions of the pleading intended to be amended appears as Exhibit "B".

* * *

CPLR 5015(a)[1][2]

1. Alternatively, plaintiff requests the aforementioned relief under the aegis of CPLR 5015(a)[1][2].

2. The newly established pleading doctrine set has no support in any case or authority that plaintiff can find, including that cited by the Appellate Division (Bradford v. Pette, supra).

On the contrary, it is unsupportable by every case and authority, directly or sub silentio.

3a. Thus, in 1978, when plaintiff amended his complaint after the Court directed defendant, "News", to deliver to plaintiff copies of its published defamation, the only evidence available to plaintiff was the logical analysis that the information given by defendants, "Signorelli" and "Mastroianni", to "Penny" had to have been out-of-court. At the time plaintiff executed his complaint, he did not know whether the defamation published to "Penny", but not thereafter republished in the "News", was true or mere scuttlebutt.

b. Not until the decision of the Appellate Division on July 25, 1983, all authority was that plaintiff's cause was properly pleaded for the purpose intended and more than sufficient to defeat a CPLR 3211(a)[7] motion.

c. Furthermore, neither "Signorelli", nor any of the other defendants, contended that the defect thereafter alleged to have existed by the Appellate Division (whose correctness, as hereinafter shown, is seriously questioned), was in fact a defect in the pleading.

Obviously, if "Signorelli" or his attorney had, in their motion papers, contended that there was a vital pleading deficiency, leave would have been requested to correct same, even if plaintiff believed the assertion meritless.

The technical pleading deficiency alleged to have existed by the Appellate Division was completely sua sponte and unsupported by all extant cases and authorities.

In view of CPLR §3026, the holding by the Appellate Divison is indefensible, revealing a manifest purpose of reaching a particular result.

d. Thus, only by impossible prescience could plaintiff have pleaded in 1978, in such manner as determined by the Appellate Divison in July of 1983.

The construction by the Appellate Division on the other causes of action makes it painfully clear that even if plaintiff had pleaded affirmative fact by "Signorelli", that Court would have found other reasons for this cause of action.

4. The Appellate Division, in dismissing plaintiff's second cause of action held:

> "absent an allegation that Surrogate SIGNORELLI procured the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against him." (at p. 587, 547) [emphasis supplied]

5a. Prior to the aforesaid decision of the Appellate Division, "Signorelli" clearly had the burden of pleading and showing "his entitlement" to absolute privilege. The complaint did not need to negate immunity. It was for the defendant to plead his entitlement to either the immunity or privilege, absolute or qualified, and failure to allege or assert same in his answer or on motion constitutes a waiver thereof. Memory Gardens v. D'Amico (91 A.D.2d 1160, 1160-1161, 458 N.Y.S.2d 958, 960 [3d Dept.]; Boyd v. Carroll, 624 F.2d 730, 732-733 [5th Cir.]) are directly in point.

b. Numerous cases, with only one unsupportable [post-1978] exception, are all in accord (Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 408; Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578; Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 183, 190; Dellums v. Powell, 660 F.2d 802, 807 [D.C. Cir]; LaBelle v. County, 85 A.D.2d 759, 761, 445 N.Y.S.2d 275, 278 [3d Dept.]).