

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

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GEORGE SASSOWER,

A61
Asst. Atty Gen. Robt. S. Hammer

A61-A64

Plaintiff,

- against -

: AFFIDAVIT IN
: OPPOSITION TO
: MOTION TO AMEND

ERNEST L. SIGNORELLI, ANTHONY
MASTROIANNI, JOHN FINNERTY, ALAN CROCE,
ANTHONY GRYMALSKI, et al.,

: Index No. 5774/83
:
:

Defendants.
:
:
-----X

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

ROBERT S. HAMMER, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for defendants, Judges Signorelli and Seidell. I am familiar with the facts of this case and make this affidavit in opposition to plaintiff's motion for leave to serve a personal amended complaint and for an order directing Surrogate Signorelli to answer in Interrogatories so that plaintiff may draft a third amended complaint.

2. This motion is prompted by the recent affirmance by the Appellate Division, Second Department of the dismissal of this action against Judges Signorelli and Seidell. See Sassower v. Finnerty, 196 AD2d 585, 465 N.Y.S. 2d 543 (2d Dep't 1983). On January 17, 1984, the Court of Appeal via pronto dismissed an appeal from the order of the Appellate Division.

A copy of the Court of Appeals' decision is annexed hereto as Exhibit A. (It should be noted that the venue of this action was, subsequent to the dismissal at Special Term, transferred to New York County).

3. In affirming the dismissal of the defamation claim against Surrogate Signorelli, the Court noted 465 N.Y.S. 2d at 547:

The second, sixth and seventh 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 appellant 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 sufficient to satisfy the pleading with particularity requirement of subdivision(a) of CPLR 3016 (see *Cabin v. Community Newspapers*, 50 Misc. 2d 574, 270 N.Y.S. 2d 913, affd. 27 A.D. 2d 543, 275 N.Y.S. 2d 396; accord *Rinaldi v. Village Voice*, 79 Misc. 2d 57, 359 N.Y.S. 2d 176, mod. on other grounds 47 A.D. 2d 180, 365 N.Y.S. 2d 199). "[I]n the absence of proof of affirmative acts causing a publication to be made, a slanderous statement uttered in the presence of the third persons is not the proximate cause of an injury alleged to have been sustained by its subsequent publication in newspapers by such persons (*Schoepflin v. Coffey*, 162 N.Y. 12 [56 N.E. 502], even though made with intent that such slanderous statement should be widely circulated (*Lewis v. Chemical Foundation*, 233 App. Div. 287 [251 N.Y.S. 296].)" (*Bradford v. Pette*, 204 Misc. 308, 318, mod. to dismiss app. granted 285 App. Div. 960,

139 N.Y.S. 2d 907). Although appellant 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.

The proposed amended pleading seeks to cure this defect.

4. On behalf of Surrogate Signorelli, I respectfully submit that this motion should be denied in all respects for the following reasons:

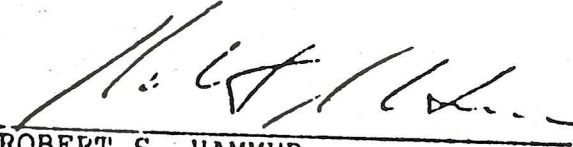
First, plaintiff has waited nearly seven years after the events in question and nearly six years after he first amended his pleadings before seeking leave to amend. He admits prior knowledge of the essential circumstances and context in which the allegedly defamatory statement were given. (see pp. 9-10 of his affidavit in support of his motion). Moreover, the proposed amendment does not add in any significant substantive fashion to ¶ 24 of the amended complaint, which six judges--one at Special Term and five in the Appellate Division, have found legally insufficient. As the decision of the Appellate Division shows, it is well-established rule, that a pleader must show "affirmative acts" by a defendant in causing the publication of allegedly defamatory status; and that it is not sufficient to allege that such statement was uttered in the presence of third parties, even with the intent that they

should be widely circulated. The proposed amendment adds nothing new to what plaintiff has previously pleaded; yet, he seeks, at this unconscionably late date, yet another opportunity to relitigate a legally insufficient claim; all to the prejudice of the defendants.

The affidavit of Robert M. Calica, Esq., sworn to January 20 1984, submitted in opposition this motion, details the procedural history of this case. The decisions of the various courts that have passed upon this and related actions speak for themselves. Plaintiff patently attempts to avoid the one-year statute of limitations for defamation; he also attempts to avoid the injunction issued against him by Justice Coppola against further litigation arising out of his handling of the Kelly estate. (Calica affid. Exhibit "E")

Plaintiff's attempt on this motion to avoid the decisions of the Appellate Division and other courts that have passed upon his claims again demonstrate his utter disregard for the rules of res judicata, law of the case and, of orderly procedure, in general.

Plaintiff's motion should thus be denied, as insufficient in law, and in the exercise of the Court's discretion.


ROBERT S. HAMMER

Sworn to before me this
2nd day of February, 1984


Assistant Attorney General
of the State of New York