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

GEORGE SASSOWER,

Plaintiff-Respondent,

- against -

ERNEST L. SIGNORELLI, et al.,
Defendants,

- and -

ANTHONY MASTROIANNI, JOHN P. FINNERTY, ALAN CROCE and ANTHONY GRZYMALSKI,

Defendants-Appellants.

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S ADDITIONAL MOTIONS

New York County Clerk's Index No. 5774/83

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

ROBERT M. CALICA, being duly sworn, deposes and says:

1. I am a member of the firm of REISMAN, PEIREZ & REISMAN, ESQS., who are "of counsel" to the County Attorney of Suffolk County (Hon. Martin B. Ashare, Esq.), the attorney for defendants Anthony Mastroianni (Public Administrator of Suffolk County), John P. Finnerty (Sheriff of Suffolk County) and Alan Croce and Anthony Grzymalski (Deputy Sheriffs). [The "Suffolk County defendants"].

2. The Suffolk County defendants have made a rather simple and straightforward motion to consolidate their appeals from three orders of the Supreme Court, New

York County, directing their oral depositions in New York County, and to stay Court-ordered depositions pending the disposition of those appeals. Although an interim stay (pending the hearing and determination of the motion) was denied by Mr. Justice Fein, the Suffolk County defendants have, in the interim, made a well-grounded motion for partial summary judgment and other relief, now pending in New York County Supreme Court. That motion operates automatically to stay depositions, even though court-ordered, under CPLR 3214(b) and on authority of Fidelity Deposit Insurance Corp. v. Hyer, 66 A.D.2d 521, 413 N.Y.S.2d 939.

3. As my previously filed "reply affidavit" points out, it is our well-founded belief that the depositions of Deputy Sheriffs Croce and Grzymalski, originally ordered by Justice Gammerman for February 1, 1984, were justifiably stayed. Should this Court deem that conclusion unwarranted, we have previously asked that the Suffolk County defendants be spared any unwarranted sanction, by permitting that deposition to proceed, if this Court so determines, promptly following the determination of this and the related motion initiated by the plaintiff.

Cross-Motions and Separate Motions
Initiated By Plaintiff

4. These events have triggered a virtual avalanch of motions and applications by the attorney-plaintiff.

Among other things, he cross-moved at Special Term, to accelerate the Suffolk County defendants' summary judgment motion, and to strike the statutory stay under CPLR 3214(b), ex parte. When Special Term declined to do so, he made application before this Court last week under CPLR 5704, but the Clerk apparently advised him that such motion must be entertained by a full panel of the Court. Accordingly, his application under CPLR 5704 to vacate the stay of depositions "nunc pro tunc", seeking counsel fees, and other relief, is to be considered as a cross-motion here. He has also cross-moved to vacate all stays of disclosure, submitted a writ of prohibition which this Court declined to entertain (it is now pending in the Appellate Division, Second Department), and sought other relief here and at Special Term.

The Status of the Summary Judgment Motion

5. By our agreement with plaintiff, we have accelerated the return date of the Suffolk County defendants' motion for partial summary judgment to February 14, 1984, at Special Term, Part I of the Supreme Court, New York County. Thus, to the extent that Mr. Sassower's motion below, which is the subject of his 5704 application here, seeks to accelerate the return date of the Suffolk County defendants' summary judgment motion, he has achieved that relief, with our concurrence.

6. Plaintiff's papers in this Court proceed on the apparent assumption that he may make unrestricted and unchallenged references to alleged extra-judicial matters, such as oral argument before Justice Fein, and the contents of correspondence we have exchanged, and then seek to "bootstrap" those arguments concerning the alleged misconduct of the Suffolk County defendants. I respectfully submit that no response is called for, nor would it be appropriate to be "baited" into plaintiff's litigation tactic of making broadside charges of misconduct against adverse litigants and counsel, so as to obscure simple the legal and procedural considerations at issue. This tactic has well-served the plaintiff in the past, who has demonstrated a clear penchant for making fragmented and duplicative motions and cross-motions in all proceedings, so as to stampede, confuse, and avoid the clear import of prior court holdings against him.

7. Our answer, on the merits, to plaintiff's various arguments, both legal and dehors the proceedings, is set forth in our carefully prepared memorandum of law in support of our present motion for summary judgment at Special Term. A copy of that memorandum which, because of its length and complexity, is still in draft form, (and subject to certain insubstantial revisions before being filed in the Court below), is annexed as a single exhibit A here. We furnish it to this Court solely because it

demonstrates the well-founded basis upon which the Suffolk County defendants have moved to dismiss plaintiff's discredited claims. In short, as that memorandum demonstrates, plaintiff has no legal right to pursue in this tort action claims which were adjudicated and determined adversely to him in his twice-dismissed Federal court actions, under the settled New York Court of Appeals authority which gives claim preclusion and issue preclusion effect to dismissals of actions brought in the Federal courts under the civil rights laws (42 U.S.C. §1983). See Zarcone v. Perry, 55 N.Y.S.2d 782, 447 N.Y.S.2d 448 [affirming on the opinions of Hopkins, J. at 78 A.D.2d 70, 434 N.Y.S.2d 437] and Hines v. City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512. Also see Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980).

8. We are not tendering the merits of the Suffolk County defendants' motion for summary judgment below, to this Court in connection with the present motions. Nevertheless, we are submitting a draft copy of that memorandum here solely to demonstrate the bona fide basis upon which that summary judgment motion has been made, the undeniable merit to it, and so that the Court, in weighing the various applications before it now, may well consider the interest of judicial economy, and the merits of the Suffolk County defendants legal position, in considering whether or not the stay of disclosure proceedings should be continued.

9. It is, we respectfully submit, quite clear that it would be onerous, and essentially fruitless, to require Suffolk County deputy sheriffs, actively pursuing their statutory duties in Riverhead, to be deposed in New York County at this time concerning claims which are presently the basis of a meritorious motion to dismiss virtually all of the claims in the present lawsuit against them.

10. For these reasons, we respectively request that the Court deny plaintiff's various applications seeking to vacate stays of disclosure, plaintiff's motion to impose sanctions against the Suffolk County defendants and their counsel, and that the stay of disclosure proceedings be continued, or at a minimum, that the Suffolk County defendants be permitted to proceed therewith promptly upon order of this Court to do so.

ROBERT M. CALICA

Sworn to before me this
7th day of February, 1984.

Notary Public

RITA SOKOLER
Notary Public, State of New York
No. 30-3762325
Qualified in Nassau County
Commission Expires March 30, 1985

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

GEORGE SASSOWER,

Plaintiff,

- against -

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

Index No. 5774/83

Defendants.

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MEMORANDUM OF SUFFOLK COUNTY DEFENDANTS (DEFENDANTS MASTROIANNI, FINNERTY, CROCE AND GRZYMALSKI) IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Preliminary Statement

This,* and a multitude of related cases, arise out of plaintiff's role and conduct as executor of the Estate of one Eugene Paul Kelly, probated in the Surrogate's Court, Suffolk County.

Plaintiff, an attorney, was adjudged to be in criminal contempt by judgment of that Court dated March 8, 1978 (Hon. Harry Seidell, Acting Surrogate), granted following an evidentiary hearing on March 7, 1978 at which the plaintiff, despite written notice of the charges, and written notice of the hearing date, defaulted in appearing.

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* This action, initially commenced in Westchester County, was removed to Suffolk by virtue of the mandatory venue provisions of CPLR 504. Venue was subsequently changed again to New York County.

His subsequent habeas corpus petition to collaterally attack the lawfulness of that conviction was thereafter dismissed by order and judgment (one paper) of the Supreme Court, Suffolk County dated February 10, 1981 (Hon. James Gowan, J.). The dismissal of plaintiff's habeas corpus proceeding has never been reversed, although the Appellate Division, Second Department (People ex rel. George Sassower v. Sheriff of Suffolk County, 96 A.D.2d 585, 465 N.Y.S.2d 543) has ordered plaintiff's appeal therefrom "held in abeyance", pending a remand to the trial justice to determine whether or not plaintiff's default in appearing at his contempt trial was excusable.

In the intervening years since his criminal contempt conviction, plaintiff has brought two separate actions in the United States District Court of the Eastern District of New York under the Civil Rights Act (42 U.S.C. §1983), seeking, inter alia, to recover damages against the Suffolk County Surrogate and Acting Surrogate, the Sheriff (defendant Finnerty), his deputies (defendants Croce and Grzymalski) and the Public Administrator (defendant Mastro-ianni). Both actions were flatly dismissed by the District Court (Hon. Jacob Mishler, J.), and plaintiff's application to further amend his complaint in the second of those dismissed actions, was denied. Both dismissals were affirmed by the United States Circuit Court of Appeals for the Second Circuit. In those dismissed federal actions, plaintiff

assserted, among other things, that the criminal contempt proceedings against him in Suffolk County, initiated on the complaint of the Public Administrator (defendant Mastroianni) were tainted with gross illegality, and violative of his constitutional rights. He charged the Sheriff, and Sheriff's deputies, with unlawfully arresting and imprisoning him in pursuance of assertedly illegal court mandates, and with otherwise acting in excess of their lawful jurisdiction, seeking to recover millions of dollars in compensatory and punitive damages.

It is settled legal authority in this State (Zarcone v. Perry, 55 N.Y.2d 782, 447 N.Y.S.2d 248, [affirming on the opinion of Hopkins, J. at 78 A.D.2d 70, 434 N.Y.S.2d 437], cert. den. 456 U.S. 979, and Hines v, City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512) that the dismissal of a Federal Civil Rights action brought under 42 U.S.C. §1983 is issue preclusive, barring, upon res judicata grounds, a subsequent State court proceeding claiming related common-law torts. Nevertheless, plaintiff has brought the present tort action against, inter alia, the same defendants, alleging (with but minor exceptions discussed hereafter), the same claims of illegality and tort. Moreover, notwithstanding the res judicata effect of plaintiff's unreversed conviction for criminal contempt before the Suffolk County Surrogate's Court, plaintiff presses the present action, seeking collaterally to undo the conclusive

effect of that unreversed judgment. See, Matter of Amica Mut. Ins. Co., 85 A.D.2d 727, 445 N.Y.S.2d 820.

Based upon familiar principles of claim preclusion and issue preclusion (res judicata and collateral estoppel, respectively) treated in this brief, the Suffolk County defendants (defendants Anthony Mastroianni, the Public Administrator, John P. Finnerty, the Sheriff of Suffolk County, and defendants Alan Croce and Anthony Grzymalski, deputy sheriffs) move:

a. For partial summary judgment pursuant to CPLR 3212(e), dismissing those portions of the amended complaint here (Exhibit A to plaintiff's moving papers) which were litigated and decided adversely to plaintiff in the dismissed Federal actions brought under 42 U.S.C. §1983; and

b. To otherwise stay proceedings in this action pursuant to CPLR 2201, pending the final determination of the Appellate Division's remand of plaintiff's dismissed habeas corpus proceeding, by which he sought to review his conviction for criminal contempt, (People ex rel. Sassower v. Finnerty, 96 A.D.2d 585, 465 N.Y.S.2d 543). That stay is sought because plaintiff's adjudication for criminal contempt (unless modified or reversed upon appeal or a retrial) is legally conclusive upon the efficacy of the facts necessarily found therein, additionally mandating the dismissal of plaintiff's claims here, Matter of Amica Mut. Ins. Co., supra.

We also seek to dismiss, for failure to state a cause of action, plaintiff's derivative claim to recover damages for the alleged unlawful imprisonment of his wife and daughter (eighth cause of action), under the settled legal doctrine that no cause of action exists in tort for mental distress and anguish premised upon injuries allegedly inflicted upon another person. In all events, plaintiff's wife and daughter have separately sued in their own right to recover tort damages for their alleged unlawful imprisonment and detention in an action now pending in the Supreme Court, Westchester County (Doris Sassower, et ano. v. Ernest L. Signorelli, et al., Westchester County Clerk's Index No. 3607/79, the pendency of which this Court can judicially notice (Richardson on Evidence, 10th Edition, §30).

We also seek to dismiss plaintiff's claim of defamation against Public Administrator Mastroianni, based upon the legal principles set forth by the Appellate Division, Second Department, in a companion holding in this case to its previously mentioned remand (Sassower v. Signorelli, 96 A.D.2d 585, 465 N.Y.S.2d 543), where it dismissed identically grounded claims against Surrogate Signorelli.

Finally, we demonstrate, under statute and settled case law, that the present motion for summary judgment operates automatically to stay previously court-ordered depositions of the Suffolk County defendants pursuant to

CPLR 3212(e) and on authority of Fidelity Deposit Insuance Corp. v. Hyer, 66 A.D.2d 521, 413 N.Y.S.2d 439.

. . .

The present motion for summary judgment is of far reaching importance, not only to the litigants themselves, but because a final judgment of dismissal is urgently required to forever bring a halt to the plaintiff-attorney's unprecedented assault upon public officials, the courts, and the State-court and Federal court system. Since his initial arrest and incarceration in 1977, the plaintiff has eroded judicial resources, and vexatiously burdened the courts with groundless and duplicative applications in an effort to fragment, confuse, and stampede the courts and the parties herein. Such tactics have earned him not only the condemnation of the courts passing upon his applications, but have resulted in an outright injunction against his further groundless litigation against the Suffolk County Surrogate arising over the subject contempt proceeding, all of which he continues to ignore. Thus, it is was not suprising that the Appellate Division, First Department, in affirming a related civil contempt order against the plaintiff herein (Kelly v. Sassower, 78 A.D.2d 502, 431 N.Y.S.2d 819) said:

> "It is sufficient to say that our study of the record reflects that appellant [George Sassower], a member of the New York Bar) has chosen to disobey the court orders directing him to account and by reliance upon legal technicality has succeeded in weaving a complex and tortious

procedural thicket through which he has attempted to frustrate accountability." (emphasis supplied).

And, in enjoining the plaintiff herein from bringing any further litigation arising out of the Estate of Kelly matter from which his criminal contempt conviction arose, the court said:

> "Suffice it to say the plaintiffs [George Sassower and his wife, Doris L. Sassower, an attorney] have embarked on a course of endless, unceasing, vexatious litigation, directed at the defendant [Surrogate Signorelli] herein." (Exhibit N to the moving papers.)

It is in this context that we briefly trace the prior proceedings herein, before we analyze the pleaded allegations of the amended complaint (Exhibit A to the moving papers), and demonstrate that they are virtually coextensive with the dismissed allegations contained in plaintiff's complaints and proposed amended complaints, in his twice-dismissed Federal actions brought under 42 U.S.C §1983.

Background and Prior Proceeding

The moving papers*, based upon copies of the documented prior proceedings herein and in related actions, establish the following:

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* We point out that the moving affidavit of defendants' attorney, is properly relied upon where, as here, summary judgment is sought upon the basis of documented court proceedings, copies of which are annexed thereto. (See Russo Realty v. Wilbert, ___ A.D.2d ___, 469 N.Y.S.2d 451 [2d Dept. 1983]; Getland v. Hofstra University, 41 A.D.2d 830, 342 N.Y.S.2d 44, app. dsmd., 33 U.S.2d 646, 348 N.Y.S.2d 544.

a. Plaintiff George Sassower, an attorney, was formerly the executor of the Estate of one Eugene Paul Kelly, administered in Suffolk County Surrogate's Court. Following rulings by Surrogate Signorelli that Sassower failed adequately to account for the assets of the estate, the Suffolk County Surrogate's Court ordered Sassower removed as executor, and appointed Public Administrator Mastroianni in his stead. When, Surrogate Signorelli concluded, Sassower repeatedly failed to comply with an order directing the turnover of books, records and estate property to the Public Administrator, Sassower was cited for contempt, and adjudged in summary criminal contempt by Surrogate Signorelli. He was then apprehended and jailed by deputies of the Suffolk County Sheriff's Office (defendants Croce and Grzymalski);

b. Sassower successfully obtained a writ of habeas corpus, and was released. The Appellate Division, Second Department, upheld that writ, ruling that summary contempt was impermissible because the subject contempt was not committed in the immediate presence of the court (Sassower v. Signorelli, 65 A.D.2d 756, 409 N.Y.S.2d 762). Plenary criminal contempt proceedings against Sassower were, however, expressly sanctioned;

c. Thereafter, formal criminal contempt proceedings were initiated on behalf of the Public Administrator

(defendant Mastroinni) against Sassower, based upon claims

of Sassower's continued failure to comply with the Surrogate's turnover order. Sassower was served with formal contempt papers, appeared in the proceeding, and requested a hearing, which was scheduled before an Acting Surrogate (Hon. Harry Seidell) other Surrogate Signorelli, who had initially adjudged Sassower in criminal contempt;

d. Sassower failed to appear on the scheduled hearing date, March 7, 1978. (The Court, in dismissing his habeas corpus application, found that Sassower's affidavit of "actual engagement" in another Court was mailed only one day before the hearing, and was received the day after the hearing on March 8, 1978.) Sassower, having failed to appear on the scheduled March 7, 1978 hearing date, and his affidavit not having been received by the Court, an evidentiary hearing was conducted in his absence, at which time, Sassower was adjudged in criminal contempt by acting Surrogate Seidell, and sentenced to a prison term of 30 days in the Suffolk County jail, unless he should soon purge himself by complying with the turnover order;

e. Following the second criminal contempt conviction before Acting Surrogate Seidell (the first conviction having been set aside), Sassower was again apprehended and imprisoned by Suffolk County deputy sheriffs (defendant Grzymalski and one Deputy Sheriff Edward Morris, not a party). He shortly thereafter sought to secure his release from jail, in connection with a habeas corpus proceeding

which was ultimately dismissed by the Supreme Court, Suffolk County (Gowan, J.) by decision dated March 20, 1980 (Exhibit B to the moving papers) implemented by a formal order and judgment (one paper) dated February 10, 1981;* and

f. On appeal to the Appellate Division, Second Department, that court affirmed the dismissal of the claims against the judicial defendants in this case (96 A.D.2d 585, 465 N.Y.S.2d 543), and, with respect to Mr. Sassower's conviction in absentia for criminal contempt, remanded to Justice Gowan for the determination of the single factual issue of whether or not Sassower's failure to appear at his contempt trial was excusable, and thus not a waiver of his right to appear and defend. Sassower's attempt to appeal as of right from the Appellate Division's order was dismissed by order of the Court of Appeals dated January 17, 1984 (Exhibit D to the moving papers). Parenthetically, Mr. Sassower has recently brought a writ of prohibition against the Appellate Division, Second Department, returnable in that court on February 15, 1984, seeking to restrain that court's remand of his habeas corpus application to Justice Gowan in Suffolk County.

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* That decision also granted leave to renew the Suffolk County defendants' motion for summary judgment upon a detailed res judicata analysis, denying a prior motion without prejudice.

Collateral Litigation by Sassower

Before turning to an analysis of the dismissed Federal actions upon which our partial summary judgment motion rests, we point out, as the moving papers clearly document, that Mr. Sassower has inflicted a virtual "reign of terror" upon the defendants and the courts, bringing unceasing, frequently vexatious, and fragmented litigation against them. He has sued repeatedly in Westchester County Supreme Court, and in numerous other forums. He has sought to challenge every aspect of the proceedings against him, and to recover damages for assault resulting from his arrest and incarceration, and for defamation stemming from the ultimate reporting of these events in the various news media. He has indiscriminately sued the judges, his jailors, and the reporters of these proceedings against him as well. When his actions have been dismissed in one forum, he has sued again in another, for example, suing in the United States District Court for the Southern District of New York upon claims almost identical to those twice dismissed in the Eastern District. He has literally sued the Appellate Division, Second Department itself for monetary damages in connection with a proceeding in which they actually ruled in his favor (Exhibit L to the moving papers). He has repeatedly sought the disqualification of Justices, heaped calumny upon them, and attempted to depose the courts, and its personnel, seeking, among other things, depositions of

Appellate Division Justices Mollen, Gulotta, Chief Appellate Division Clerk Irving Selkin, and others (see Exhibit M to the moving papers). He has sued, or threatened to sue, his lawyer-adversaries, and repeatedly moved to depose or disqualify the lawyers opposing his actions. As aforesaid, he has been enjoined by a Supreme Court Justice in Westchester County from initiating any further proceedings whatsoever against Justice Signorelli arising out of the Kelly estate so as to avoid "judicial gridlock" (Exhibit N to the moving papers).*

Plaintiff's Dismissed Civil Rights
Actions in the Federal Courts

As the moving papers document, Mr. Sassower previously sued in the United States District Court, Eastern District of New York, on the heels of his conviction for criminal contempt before Surrogate Signorelli, seeking to hold the Surrogate, the Public Administrator, the Sheriff, and his deputies liable for a multitude of allegedly illegal actions in connection with his conviction, and detention.

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* Indeed, in one of his most recent applications in this case, Mr. Sassower said of the undersigned attorney representing the Suffolk County defendants herein:

> "Deponent entertains little doubt that the representative of the Suffolk County Attorney's Office is taking his directions directly or indirectly, from the Prince of Hell [referring, apparently, to Surrogate Signorelli]."

That action (see complaint, Exhibit G to the moving papers) was dismissed by Judge Mishler's decision and order dated September 20, 1977. When, following the setting aside of his initial contempt conviction, formal contempt proceeding against Sassower were sanctioned, he sued again before Judge Mishler in a second civil rights action, seeking an injunction against the State prosecution, which was refused. After his conviction by Acting Surrogate Seidell (but before Sassower was apprehended and jailed by Suffolk County deputy sheriffs in pursuance of that mandate), Sassower amended his second civil rights complaint (see amended complaint, Exhibit H), and sought leave to serve it (see proposed second amended complaint, Exhibit I thereto). Judge Mishler dismissed plaintiff's second civil rights action, and denied leave to interpose a further amended complaint (see Judge Mishler's decision and order dated April 20, 1978, Exhibit F to the moving papers). On appeal to the United States Court of Appeals for the Second Circuit, that Court unanimously affirmed, Exhibit J to the moving papers).

As the detailed analysis of the pleadings in each of the dismissed federal actions, and the present amended complaint (Exhibit A hereto) show, the allegations of both are virtually identical, save for the scope of events (since at the time of dismissal of Sassower's second Federal action, he had not yet been apprehended and imprisoned in pursuance of acting Surrogate Seidell's adjudication of

criminal contempt). In all other pertinent respects, his present action, charging Surrogate Signorelli, Sheriff Finnerty and his deputies (defendants Croce and Grzymalski), Public Administrator Mastroianni, and others, with various violations of his constitutional rights, with unlawful arrests and imprisonments, assault, and other torts, are virtually coextensive with the discredited allegations in his dismissed federal civil rights actions. Moreover, Sassower is pursuing legal arguments here which were flatly rejected by Judge Mishler, and by the Second Circuit Court of Appeals, in dismissing his federal civil rights claims.

We demonstrate in the argument portion of this brief, under the settled Court of Appeals authority of Zarcone v. Perry, 55 N.Y.2d 782, 447 N.Y.S.2d 248, and on authority of Hines v. City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512, that the principles of res judicata and collateral estoppel mandate the dismissal of plaintiff's totally duplicative tort action herein against the Suffolk County defendants.

The Amended Complaint Herein

By his amended complaint in this action (Exhibit A hereto), plaintiff seeks to recover aggregate compensatory damages of $10 million, and punitive damages of $10 million against Surrogate Signorelli, Public Administrator Mastroianni, Sheriff Finnerty, and his deputies Croce and Grzymalski, Acting Surrogate Seidell, and others, based upon

wholesale charges of violations of his civil rights, false arrest and imprisonment, assault, and defamation. Included as defendants are the New York Daily News, which reported the proceedings against Sassower, the attorney for the Public Administrator [defendant Berger] and a court reporter [defendant Mathias]. The action has since been dismissed as against the judicial defendants, which dismissal has been upheld by the Appellate Division, Second Department (Exhibit C to the moving papers).

The first cause of action of the amended complaint charges that the defendants, knowing that the initial criminal contempt proceedings involving the plaintiff were jurisdictionally and constitutionally defective, and acting without jurisdiction, caused plaintiff to be tried, adjudicated, sentenced, and ordered committed for criminal contempt by Acting Surrogate Seidell on March 7 and March 8, 1978. It is also charged that defendants published the proceedings knowing it was false, in order to defame plaintiff. It is further charged that the Sheriff and his deputies, lacking jurisdiction outside of Suffolk County,* went outside of their jurisdiction to "defame, harass, intimidate, imprison, assault and abduct the plaintiff and otherwise transgress

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* As we show, the Federal courts, applying New York law, have flatly held that the deputy sheriffs have statewide jurisdiction, and were obligated to enforce the facially valid commitment order in accordance with its terms.

and deny him his constitutional and legal rights (amended complaint, para. 9). It is further charged that the Sheriff and his deputies refused plaintiff's offers to make himself available for execution of the warrant of committment outside of Suffolk County (where plaintiff could have pursued his habeas corpus and other legal remedies), and that the sheriffs acted in an alleged absence of jurisdiction for the purpose of obstructing plaintiff's access to his habeas corpus remedies (amended complaint, paras. 10-11). Finally, it is charged that on June 10, 1978, defendant Grzymalski, and another deputy sheriff, one Edward Morris (not a defendant) unlawfully went outside of Suffolk County (see footnote at prior page) where they "assaulted, imprisoned and abducted" the plaintiff and "otherwise denied him his constitutional rights of habeas corpus, access to counsel, access to police authorities, and other legal rights" (complaint, para. 12). Plaintiff claims serious physical injuries resulting from the assault and abduction, and that he was thereafter unlawfully incarcerated in Suffolk County jail, there allowed to be mistreated by other prisoners, and wrongfully detained in jail following his ordered release upon a writ of habeas corpus.

The second cause of action alleges that on June 27, 1977, the New York Daily News published an article concerning plaintiff's conviction for criminal contempt, which is alleged to have been defamatory, and not privileged.

It is charged that the information therein was disseminated out-of-court by defendants Signorelli, Mastroianni, and Berger (his then-counsel).

The third cause of action charges that official court reporter Mathias failed to deliver stenographic minutes ordered and paid for by Sassower.

The fourth cause of action claims that defendants Signorelli, Mastroianni, and others, in retaliation for the dismissal of the first criminal contempt proceeding, conspired to commence a second contempt proceeding against Sassower, without jurisdiction, and to convict him in absentia, and that in furtherance thereof, the defendants drew up a contempt order and warrant based upon false and jurisdictionally defective facts. It is further charged that deputy sheriffs Croce and Grzymalski arrested Sassower, without prior notice outside, of their Suffolk County jurisdiction,* with knowledge of the illegality of proceedings, and wrongfully brought plaintiff before Surrogate Signorelli, where he was wrongfully detained and subjected to other alleged torts.

The sixth cause of action charges that, notwithstanding the provisions of Judiciary Law §90(10) rendering any disciplinary complaint against an attorney confidential, Surrogate Signorelli caused his complaint against Sassower

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* See footnote, p. 15.

to be published in the New York Law Journal, allegedly to injure plaintiff and to prejudice subsequent proceedings before Acting Surrogate Seidell.

The seventh cause of action charges Surrogate Signorelli with defamation in causing an opinion about the plaintiff to be published in the New York Law Journal.

The eighth cause of action charges that the defendants (other than the Daily News) have conspired to harrass and intimidate plaintiff's family, particularly his attorney-wife, by issuing subpoenas to her, telephoning her, depriving her access to visit plaintiff while incarcerated, by wrongfully imprisoning her and their daughterwhen she presented a writ of habeas corpus, and by issuing subpoenas to her.

The ninth cause of action alleges that, by unspecified methods, the defendants entered upon a course of conduct intended to "harass, annoy and injure plaintiff", including bringing meritless legal actions, taking meritless appeals, making false and spurious complaints and charges, and in charging the plaintiff with the crime of assault in the second degree.

The Dismissed Federal Actions

Irrefutably documented by the moving papers is that the plaintiff has previously asserted virtually identical claims against the same defendants, and others, in two separate actions which he commenced under 42 U.S.C. §1983 in

the United States District Court for the Eastern District of New York, both of which were dismissed by Judge Mishler, dismissals which were thereafter affirmed by the United States Court of Appeals for the Second Circuit. The documents consist of: (a) plaintiff's complaint in the first of his civil rights actions (Exhibit G), brought against Surrogate Signorelli, Public Administrator Mastroianni, Sheriff Finnerty, and his deputies (therein incorrectly identically as "Kroos" and "Wisnoski", which designations were corrected by Judge Mishler in his decision); (b) his amended complaint in the second of his Federal civil rights actions (Exhibit H), brought in class action form, against Surrogate Signorelli, Public Administrator Mastroianni, Sheriff Finnerty, his deputies Croce and Grzymalski, and others; (c) his proposed further amended complaint in the second civil rights action (Exhibit I), which Judge Mishler denied leave to interpose; (d) Judge Mishler's opinion and order dated September 20, 1977 (Exhibit E), flatly dismissing Sassower's first civil rights action; (e) Judge Mishler's second opinion and order dated April 20, 1978 (Exhibit F), dismissing Sassower's second civil rights action, and dening leave to further amend his complaint; and (f) the opinion order of the United States Circuit Court of Appeals for the Second Circuit dated December 19, 1978 (Exhibit J), affirming Judge Mishler's dismissals.

Analysis of those documents leaves room for no doubt whatsoever that each and every one of plaintiff's discredited claims against the defendant here, with the single exception of those acts alleged to have occurred after he was apprehended and jailed in pursuance of Acting Surrogate Seidell's second contempt citation, have previously been raised, considered, and dismissed upon the merits.* Moreover, as to virtually each claim of wrongful conduct arising out of the second of Sassower's imprisonments in implementation of Acting Surrogate Seidell's judgment of criminal contempt, the legal basis of plaintiff's claims were fully considered by Judge Mishler and the United States Circuit Court of Appeals, which, applying both New York law and constitutional principles, ruled that such claims were without legal basis and, consequently, dismissible.

We turn now to an analysis of those pleaded claims, and of Judge Mishler's orders, and that of the Second Circuit Court of Appeals, dismissing plaintiff's prior Federal actions.

Plaintiff's First Civil Rights Action

In the first of plaintiff's civil rights actions brought before Judge Mishler (Docket No. 77 Civ. 1447, see complaint, Exhibit G to the moving papers), plaintiff,

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* As we later show, Fed. R. Civ. P. 41(b) renders pleading dismissals in Federal court "on 'the merits'", entitling them to preclusive effect. McLearn v. Cowen & Co., 48 N.Y.2d 606, 422 N.Y.S.2d 60, 61 (fn.).

asserting Federal jurisdiction under the Civil Rights Act, 42 U.S.C. §1983, alleged in the first cause of action that the Surrogate's Court in Suffolk County was unconstitutionally operated, because of the patronage connection between the Surrogate and Public Administrator and other court employees and officials. Plaintiff asserted that the system and organization of the Surrogate's Court deprived him, as a non-judicial litigant in that Court, of equal rights secured by the United States constitution.

The second cause of action, asserted against Judge Signorelli and Sheriff Finnerty, charged that on June 22, 1977, Judge Signorelli issued a summary order of criminal contempt and warrant of committment against plaintiff to the Suffolk County jail for a period of 30 days, in plaintiff's absence, and under other allegedly unlawful circumstances, including, inter alia, violations of his constitutional rights and those provided for under State statute. Plaintiff claimed that the absence of a bail remedy rendered that contempt order constitutionally infirm.

His third cause of action charges that defendant "Allen Kroos" (subsequently identified as defendant herein Alan Croce) and "Anthony Wisnoski" (subsequently identified as defendant herein Anthony Grzymalski), both Sheriffs employees, Surrogate Signorelli, Public Administrator Anthony Mastrionianni, and the latter's attorney, Victor G. Berger, Jr., unlawfully altered court records, had orders

made without jurisdiction, and "unconstitutionally orchestrated a criminal proceeding", based upon allegedly false charges, in pursuance of which plaintiff was imprisoned by the deputy sheriffs, allegedly obstructed in his rights of obtaining a writ of habeas corpus, assaulted or permitted to be assaulted while in custody, illegally detained against his wishes at places other than the Suffolk County jail, and that the defendants otherwise acted illegally and unconstitutionally in violation of their statutory duties, and based upon jurisdicitonally defective mandates, all resulting in damages to plaintiff in the amount of $5,000,000 and entitling plaintiff to other declaratory and injunctive relief.

Judge Mishler's Dismissal of
Plaintiff's First Civil Rights Action

In his opinion and order dated September 20, 1977, dismissing plaintiff's first civil rights action on the merits (Exhibit E to the moving papers), Judge Mishler found and determined as follows:

1. In 1972, Sassower was appointed executor of the Estate of Eugene Paul Kelly. He was removed as executor by Surrogate's Court order dated March 9, 1976 for failure to render an accounting, and replaced by Public Administrator Mastroianni. Sassower repeatedly failed to comply with an order of the Surrogate's Court dated April 28, 1977 to turn over all books, papers and other property of the Kelly Estate to Mastroianni, for which, on June 22, 1977, the

Surrogate's Court adjudged plaintiff in criminal contempt. He was arrested the following day pursuant to a warrant of committment by Sheriff's employees "Kroos" and "Wisnowski" (identified as defendants herein Alan Croce and Anthony Grzymalski) (see opinion, p. 3, footnote 2), who brought him to the Surrogate's Court where plaintiff again refused to submit to the turnover order, and was remanded to County jail. Sassower filed a petition for a writ of habeas corpus that day, and on July 28, 1977, the writ was granted and the summary contempt adjudication was annulled;

2. Addressing plaintiff's first cause of action, which Judge Mishler characterized as "a broad attack upon the powers granted to, and exercised by, the Surrogate of Suffolk County", Judge Mishler dismissed that claim for failure to state a claim;

3. Addressing plaintiff's second contention that New York law arbitrarily denied bail to persons serving sentences for criminal contempt imposed by the Surrogate's Court, the court dismissed that claim as moot, Sassower having been released from incarceration because his writ was sustained;

4. Most notably, addressing the third cause of action, which had charged, inter alia, that Public Administrator Mastroianni, and deputy Sheriffs Croce and Grzymalsi acted illegally in arresting and imprisoning Sassower in pursuance of the Surrogate's Court's warrant of committment,

in assaulting him or permitting him to be assaulted while in custody, in illegally detaining him, and in otherwise acting in excess of their jurisdiction, Judge Mishler said:

> "The third cause of action, for which plaintiff demands $5,000,000 in compensatory and punitive damages, is directed against all defendants. It contains a series of vague and conclusory allegations which are wholly devoid of factual support. Such conclusory statements are insufficient as a matter of law to state a claim for relief under 42 U.S.C. §1983 [citing cases].
>
> Although this Court is well-apprised of the rule that pro se complaints are to be liberally construed [citing cases], plaintiff in the instant action is an attorney. Therefore, his pleadings are held to the same high standards as those of any other professional. It is well-established that a complaint in the civil rights action, particularly one drafted by an attorney, is subject to dismissal unless it specifically pleads a cause of action [citing cases]. Plaintiff's broad, conclusory allegations, unsupported by specific factual contentions, clearly fail to state a cause of action." (Exhibit E, pp. 7-8);

5. Judge Mishler then went on to point out that even if Sassower had actually demonstrated a factual basis for his charges, dismissal would nevertheless be required as against Judge Signorelli, Public Administrator Mastroianni, his counsel Berger, Sheriff Finnerty, and Sheriff's deputies Croce and Grzymalski. Judge Mishler said:

> "On the other hand, a complaint in a civil rights action is not subject to dismissal at the pleading stage unless it appears beyond the doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief (citing cases). For the following reasons, even if sufficient factual allegations were stated, and could be proven, additional grounds require dismissal of this count.

Plaintiff's charges against defendant Signorelli concern acts committed within his judicial role. Therefore, he is absolutely immune from liability for damages under 42 U.S.C. §1983 (citing cases).

Defendants Finnerty (Sheriff of Suffolk County), Kroos and Wisnofski [referring to Croce and Grzymalski] (employees of the Sheriff's Office) are also immune from suit. The affidavits filed by the moving parties disclose that defendants' sole participation consisted of taking plaintiff into custody pursuant to the validly-issued orders of contempt and warrant of commitment. It is a well-grounded principle that immunity is extended to police and other officers for acts pursuant to Court order (citing cases).

* * *

For the foregoing reasons, the complaint is dismissed as against all defendants, and it is SO ORDERED." (Exhibit E, pp. 8-11) (emphasis supplied.)

Plaintiff's Second Civil Rights Action

Undaunted by the dismissal of his first civil rights action by Judge Mishler, plaintiff sued again in the United States District Court for the Eastern District of New York (Docket Number 78 Civ. 124), this time in "class action" form. He moved, unsuccessfully, to enjoin the formal criminal contempt proceedings before Acting Surrogate Seidell, which had been sanctioned by the Appellate Division, when affirming the dismissal of Surrogate Signorelli's initial summary contempt conviction. He thereafter filed an amended complaint (Exhibit H to the moving papers), against Surrogate Signorelli, Public Administrator Mastroianni, the latter's counsel Mr. Berger, Sheriff Finnerty, Deputy Sheriffs Croce and Grzymalski, and others.

His first cause of action again alleged that the Surrogate's Court in Suffolk County was unconstitutionally organized and administered, and that plaintiff, as against whom criminal and civil proceedings were then pending in that Court, was subjected to a deprivation of his constitutional rights.

The second cause of action, brought against Surrogate Signorelli, Public Administrator Mastroianni and his counsel, Sheriff Finnerty, and the County of Suffolk, alleged that plaintiff was ordered imprisoned in the Suffolk County jail for a period of 30 days by Surrogate Signorelli's criminal contempt order dated June 22, 1977, which order resulted from a "mock trial" in plaintiff's absence, and which was otherwise unconstitutional and in violation of plaintiff's rights. Plaintiff challenged the bail procedures, the jurisdiction of the officials to bring or pursue that proceeding, and challenged the Surrogate's appeal from the writ of habeas corpus which had invalidated Sassower's first criminal contempt conviction. Plaintiff charged the Surrogate and Public Administrator with proceeding in bad faith, and maliciously with a purpose to deprive plaintiff of his constitutional rights and to injure him.

The third cause of action charged that a Suffolk County employee, one Charles Brown, without police authority, had wrongfully acted as an apparent police officer, as an

agent of the Public Administrator and Surrogate, for the purpose of harassing and embarrassing the plaintiff.

The fourth cause of action charged that plaintiff had not received a return of the $300. cash bail which he deposited in connection with his successful Writ of habeas corpus, seeking its return.

The fifth cause of action alleged that Surrogate Signorelli, Sheriff Finnerty, and Suffolk County had acted to obstruct the plaintiff's access to the courts by wrongfully refusing to serve subpoenas and other process on his behalf.

The sixth cause of action charged that Surrogate Signorelli, Public Administrator Mastroianni, and his counsel Berger, in retaliation against plaintiff, and in violation of his rights, misused the authority and powers of the Surrogate's Court.

The seventh cause of action charged that Surrogate Signorelli, Public Administrator Mastroianni, and his counsel Mr. Berger, induced or compelled plaintiff to turn over copies of certain papers to him which they have failed to return with the intent of prejudicing plaintiff in his legal rights, since such papers were allegedly required in the defense of plaintiff's case.

The eighth cause of action charged all defendants with a broad series of wrongful acts arising out of his criminal contempt conviction stemming from the Kelly Estate.

It charged that prior to March 1977, plaintiff was executor of the Estate of Eugene Paul Kelly, recognized as such by the Surrogate's Court. It charged that Surrogate Signorelli wrongfully claimed to have removed plaintiff as executor of the Kelly estate in March 1976, without jurisdiction to do so, and thereafter "orchestrated proceedings[s]", joined in by Public Administrator Mastroianni and his counsel Berger, to conduct a "mock trial", try plaintiff for criminal contempt, illegally arrest him, and do other unlawful acts. It charged that the Surrogate, the Public Administrator, the Sheriff and his deputies (defendants Finnerty, Croce and Grzymalski) wrongfully denied plaintiff access to other Courts (to pursue his habeas corpus rights), that on June 23, 1977, defendants Croce and Grzymalski wrongfully permitted plaintiff access to any place other for arrest than the Surrogate's Court in Suffolk County, falsely arrested plaintiff in his home in Westchester County, denied him access to counsel, denied him access to other courts to obtain a writ of habeas corpus, brought plaintiff before Surrogate Signorelli, who had wrongfully adjudged plaintiff in criminal contempt, incarcerated plaintiff in pursuance of the allegedly illegal contempt warrant, wrongfully brought plaintiff before the Suffolk County Surrogate instead of to the Suffolk County jail as the warrant allegedly required, wrongfully detained plaintiff in the Surrogate's Court before Surrogate Signorelli, permitted defendant Berger to

assault plaintiff, removed plaintiff to the Suffolk County jail, and denied him proper telephone access to counsel. It is further charged that the Surrogate refused to recuse himself, made an unlawful disciplinary complaint against the plaintiff, improperly circulated reports of these proceedings in the media, failed properly to serve plaintiff's legal process upon the Surrogate so that he could defend himself in the proceeding, and obstructed plaintiff's access to resources of the Court. It also charged that the defendants wrongfully reinstituted criminal contempt proceedings against the plaintiff, variously harassed and annoyed plaintiff, both personally and professionally, by making embarrassing inquiries concerning plaintiff, that defendants Signorelli and Mastroianni wrongfully detained plaintiff in Surrogate's Court in January 1978, and commited other unlawful acts.

As part of the same cause of action, plaintiff purported to assert a claim on behalf of his wife, attorney Doris Sassower, by claiming that the defendants, in order to intimidate him, wrongfully subpoenaed Mrs. Sassower, wrongfully directed her to appear in Surrogate's Court, made calls to her, and that defendant Signorelli, Mastroianni and Berger otherwise engaged in the improper use of governmental and official facilities in the Courts. It also charged that the Surrogate published an allegedly improper and defamatory decision concerning plaintiff's conduct, and publicized it,

and otherwise acted illegally, unconstitutionally, and in violation of plaintiff's rights. Declaratory and injunctive relief, as well as $10 million in compensatory and punititive damages, was sought against all defendants.

Judge Mishler's Dismissal of Plaintiff's Second Civil Rights Action

In addition to denying plaintiff's motion to interpose a further amended complaint in his second civil rights suit so as to challenge his second criminal contempt conviction before Acting Surrogate Seidell, Judge Mishler, by his opinion and order dated April 20, 1978 (Exhibit F to the moving papers), flatly rejected and dismissed on the merits, each and every one of plaintiff's now discredited claims against all of the defendants. In pertinent part, Judge Mishler found in his opinion as follows:

1. After recounting the dismissal of Sassower's first action, and the events stemming from plaintiff's handling of the Kelly Estate which had led to his removal as executor, and his initial contempt convinction which was thereafter annulled, Judge Mishler recited plaintiff's allegation that Deputy Sheriff's Croce and Grzymalski arrested plaintiff at his home on June 23, 1977, denied him access to a neighboring Supreme Court to obtain a Writ of habeas corpus, detained plaintiff at the Courthouse before Surrogate Signorelli, and thereafter, upon remand from the Surrogate, removed him to the Suffolk County jail (opinion,

p. 4). Judge Mishler observed that plaintiff thereafter obtained a writ of habeas corpus, and was released and, that the initial contempt conviction was set aside, but that plenary contempt proceedings were initiated before Acting Surrogate Seidell, as the New York Courts had ruled permissible in this case;

2. Judge Mishler noted that Sassower received notice of the contempt proceedings, but failed to appear on the scheduled return date, and that Acting Surrogate Seidell, after a hearing, found Sassower guilty of criminal contempt, and ordered him imprisoned for 30 days, issuing a judgment entered March 8, 1978, and a warrant of committment which, as of the date of Judge Mishler's opinion, was unexecuted (opinion, pp. 5-6);

3. Addressing the causes of action contained in the amended complaint in the second civil rights action, Judge Mishler dismissed each of them:

a. He found that the first cause of action, broadly attacking the practices of the Surrogate's Court of Suffolk County, was a mere restatement of those previously asserted in the first civil rights action, and thus barred by the doctrine of res judicata. Plaintiff's effort to remedy that defect by asserting his claims in class action form did not rescue that defective pleading;

b. The Court also rejected plaintiff's attempt to enjoin his arrest and detention pursuant to the

second warrant of committment following Acting Surrogate Seidell's conviction for contempt. Judge Mishler noted that plaintiff had received notice of the proceedings, but had failed to appear on the scheduled return date, and, also noted the strong State interest in enforcing its contempt process;

c. Judge Mishler dismissed the third cause of action, concerning the alleged misdeeds of Suffolk County employee Charles Brown, in embarassing or harassing plaintiff;

d. He dismissed plaintiff's bail challenge as "frivolous" (opinion, p. 11);

e. Concerning the fifth cause of action, charging the defendants with failure to serve plaintiff's subpoenaes and their effective denial of his access to the Courts, Judge Mishler found that claim dismissible;

f. He likewise dismissed the sixth cause of action, charging the defendants with misusing State statutes and the authority of the Surrogate's Court to "annoy, harrass, embarrass and investigate him" because no constitutional deprivation was alleged. Judge Mishler likewise dismissed the seventh cause of action, concerning papers plaintiff claimed to have turned over to Public Administrator Mastroianni and his counsel, as "specious" (opinion, p. 12);

g. Addressing the eighth cause of action, which Judge Mishler characterized as "a rambling series of

allegations, contained in some 76 paragraphs against all named defendants, seeking $10 million in damages", Judge Mishler said:

> "Sassower seeks $10 million in damages alleging, in essence, that each and every transaction with defendants since his purported removal as executor was tainted by illegality. Plaintiff, in an indiscriminate recitation of factual allegations, complains that he was the target of a vicious conspiracy designed to defame him and strip him of all constitutional rights. In short, plaintiff charges that his removal was unauthorized, that his contempt trial typified a 'star chamber' proceeding; that his arrest and return to the Surrogate's Court violated the mandate of the contempt order which directed immediate incarceration in the Suffolk County jail; that the arresting officers' refusal to permit him access to a neighboring State Court before returning him to the Surrogate's Court violated his constitutional rights; that defendants unlawfully refused during Sassower's two hour detention at the Surrogate's Court all requests to make telephone calls; that defendants caused false and misleading statements to be circulated in the press; that defendants improperly served his subpoenas; that defendants unlawfully instituted a second set of contempt proceedings; that defendants obstructed plaintiff in his attempts to secure a writ of habeas corpus; that defendants, through their counsel, made false representations to this court. The allegations, while exhaustive, cannot withstand dismissal.
>
> We note at the outset that the rambling nature of the 76 paragraph claim violates the command of rule 8(a)2 F.R.Civ. P. requiring a short and plain statement of the grounds for relief (citing cases). Beyond that, the essence of the claim but mirrors the third cause of action in 77 C. 1447 which this Court dismissed with prejudice. To that extent, the claim is barred by the doctrine of res judicata. Expert Electric Inc. v. Levine, 554 F.2d at 1232-33.
>
> That new facts have been pleed does not change the result. The allegations against defendant Signorelli center around actions performed in the course of his judicial duties. As such,

> he is cloaked with immunities from damage claims (citing Stump v. Sparkman, and other authorities). Having the power to adjudicate someone in contempt, it cannot be said that Judge Signorelli acted 'in clear absence of all jurisdiction'.... That the contempt proceedings to defendants' knowledge, may have been infected by procedural defects is of no consequence.... The cloak of immunity is nevertheless absolute and defeats the claim.
>
> So, too, defendant Mastroianni, serving as public administrator, and defendant Pugatch, as counsel to Judge Signorelli, are immune to damage claims for their actions respectively taken in prosecuting and appealing the contempt citation. Imbler v. Pachtman, 424 U.S. 409, 424-31, 96 S. Ct. 984, 990-95 (1976). Defendants Croce and Grzymalski, deputy sheriffs acting pursuant to a facially valid warrant in arresting plaintiff, are as well immune from suit.... (citing cases). And, of course, the County of Suffolk, not being a 'person' within the meaning of §1983, is not amenable to suit under the Civil Rights Act.... For this multitude of reasons, the claim is dismissed". (opinion, pp. 12-15) (emphasis supplied);

h. Finally, Judge Mishler denied plaintiff's application for leave to serve a second amended complaint, so as to add Acting Surrogate Seidell as a party, and so as to "raise claims going to the conduct of the second contempt proceedings". Ruling that such claims, even if alleged, would be dismissible, Judge Mishler said:

> "Since such claims would be barred under the doctrine of judicial immunity, there is little purpose in permitting the amendment.
>
> Accordingly, plaintiff's motion for leave to serve a second amended complaint is denied with prejudice. Defendants' motions to dismiss are in all respects granted. The Clerk of the Court is directed to enter judgment in favor of defendants against plaintiff dismissing the complaint with prejudice, and it is SO ORDERED." (emphasis added.)

The U.S. Circuit Court of Appeals' Affirmance of Both Dismissals

On appeal to the U.S. Court of Appeals for the Second Circuit, that Court, in an opinion dated December 1978 (Exhibit J to the moving papers) said:

> "The actions, insofar as they seek to enjoin proceedings in the Surrogate's Court of Suffolk County, New York, NY fail to satisfy the threshold 'actual case or controversy' requirement of Article III of the Constitution imposed upon those seeking to invoke federal jurisdiction.... No immediate threat to the plaintiff-appellant from the alleged illegal or partisan appointment of administrators by the Surrogate's Court is alleged. Plaintiff-appellant's application for a stay of incarceration pending appeal from the state court's adjudication holding him in criminal contempt must be dismissed as moot, in view of the state court's annulment of the contempt adjudication and its release of plaintiff-appellant on bail.
>
> The district court did not abuse its discretion in refusing to enjoin the state court criminal contempt proceedings, in view of the availability of the state court as a forum for adjudication of the issues raised by plaintiff-appellant with respect to those proceedings and plaintiff's actual invocation of state court procedures....
> Plaintiff-appellant's damage claims against Surrogate Signorelli, Acting Surrogate Seidell, Public Administrator Mastroianni, Suffolk County Sheriff Finnerty, Assistant Attorney General Pugatch and Deputy Sheriffs Croce and Grzymalski, to the extent that the claims are based upon acts committed in the performance of their official public duties as part of the judicial process, were properly dismissed on the grounds that these defendants are immune from suit founded on such conduct. (Citing Stump v. Sparkman, 435 U.S. 349; Imbler v. Pachtman, 424 U.S. 409, and other authorities.)
>
> In particular, the sheriff and deputy sheriffs acted with a reasonable grounds to believe that they were authorized to execute the arrest warrant pursuant to its terms in Westchester County. The

process of the Suffolk County Surrogate's Court including an arrest warrant, New York Judiciary Law §757 (McKinney, 1978) extends statewide, N.Y. Constitution Art. 6, §1c; N.Y. Surrogate's Court Procedure Act §212 (McKinney, 1978) and the Sheriff and Deputy Sheriff's are obligated to execute the mandate issued by the Surrogate of Suffolk County according to its command, N.Y. C.P.L.R. §223 (McKinney, 1978); N.Y. Public Officers Law §72-a (McKinney, 1978); see Lockhart v. Hoenstine, 411 F.2d 455, 460 (3d Cir.), cert. denied 396 U.S. 941 (1969). All other alleged acts, such as failure of the Sheriff to serve process at appellant's request, fail to state a claim for relief under 42 U.S.C. §1983.

The allegations against defendant Vincent G. Berger, Jr., Charles Brown and the County of Suffolk failed to state facts indicating any claim upon which relief may be granted. An allegation, for instance, that Brown, a former Suffolk County employee, embarrassed plaintiff-appellant by exhibiting a 'spurious badge or shield' and by loitering and annoying those with whom plaintiff has business relations is wholly insufficient, as are the vague and inconclusory allegations with respect to Berger and the County of Suffolk (citing cases)." (emphasis supplied)

Having concluded our analysis of the claims previously asserted by plaintiff Sassower, and rejected by the Federal courts in his twice-dismissed civil rights actions, we turn now to a discussion of issue preclusion and other legal principles which require dismissal of virtually all of plaintiff's claims in his amended complaint herein.

POINT I

THE DISMISSAL OF PLAINTIFF'S TWO CIVIL RIGHTS ACTIONS MANDATES THE DISMISSAL OF THE VIRTUALLY IDENTICAL CLAIMS IN THE PRESENT ACTION UPON ISSUE PRECLUSION GROUNDS

At pages 13 through 35 of this memorandum, we have carefully demonstrated the virtually identical scope of the allegations of unconstitutional and tortious conduct on the part of the Suffolk County defendants (Public Administrator Mastroianni, Sheriff Finnerty and deputy sheriffs Croce and Grzymalski) asserted in the twice-dismissed federal civil rights actions by comparing the complaints there (Exhibits G, H and I to the moving papers), and the amended complaint herein (Exhibit A thereto).

Dismissal of the duplicative claims here is thus mandated by the settled legal doctrine, that a dismissal or a judgment in a Federal court action to recover damages for deprivation of civil rights under 42 U.S.C. §1983, bars an action in State court to recover damages for common-law tort, predicated upon the same factual allegations, Zarcone v. Perry, 55 N.Y.2d 782, 447 N.Y.S.2d 248, affirming (upon the opinion of the Appellate Division [Hopkins, J.] at 78 A.D.2d 70, 434 N.Y.S.2d 437, cert. den. 456 U.S. 979; Hines v. City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512; and McKinney v. City of New York, 78 A.D.2d 884, 433 N.Y.S.2d 193.

We turn first to a discussion of Hines v. City of Buffalo, 79 A.D.2d 218, 436 N.Y.S.2d 512 (4th Dept. 1981). There, as here, at issue was whether the plaintiff could pursue a State cause of action in tort alleging assault, false imprisonment, malicious prosecution, and negligence against a municipality, where her prior civil rights action against the arresting police officers had been dismissed in a prior Federal court action brought under 42 U.S.C. §1983. Flatly holding that the dismissal of the prior federal civil rights action constituted a res judicata bar to the subsequent State action in tort, the Appellate Division, in a thorough discussion, treatment said:

> "The issue for our determination is whether a prior jury verdict of no cause of action in favor of police officers in an action in Federal District Court under 42 U.S.C. §1983 bars a subsequent state court action under tort law against the municipality employing them based on the same acts asserted in the prior federal action....
>
> * * *
>
> At the outset, we are concerned with the principles of issue preclusion, or collateral estoppel, rather than claim preclusion since the prior action in the Federal District Court was against the officers individually, not against the City....
>
> It has been established that there are but two necessary requirements for invocation of the doctrine of collateral estoppel. There must be an identiy of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling (Schwartz v. Public Administrator of County of Bronx, [24 N.Y.2d 65] at p. 71). Collateral estoppel is

founded on the necessity of conserving judicial resources by discouraging redundant litigation and is premised on the view that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again. (Citing authorities).

In the prior federal action, plaintiff, Pauline Hines, was the plaintiff against the two officers, employees of the City, in the action premised on a claimed violation of her rights under second 1983 of Title 42 of the United States Code. The civil rights action was fully litigated before a jury resulting in a verdict. It appears then that the second requirement has been satisfied (citing Schwartz v. Public Administrator of Bronx County, supra).

.... The purpose of section 1983 is to create a right of action, enforceable against those who, 'under color of' state law deprive any person of any rights, privileges and immunities guaranteed by the Constitution and laws of the United States. It was intended to provide a federal remedy supplementary to any state remedy available where basic civil rights are violated (citing authorities). .... The same set of facts may very well give rise to violations of both the federal statute and the state common law, where the rights are not necessarily common and the essential criteria are not necessarily similar (citing authorities).

We recognize that a single event may provide grounds for separate lawsuits when the factual preduciates needed to establish liability are not necessarily the same. A common-law action for malicious prosecution could coexist with a pending federal civil rights action based upon the same set of facts (Neulist v. County of Nassau, 50 A.D.2d 803, 375 N.Y.S.2d 402). However, it is apparent from a juxtaposition of the federal and state case law the elements that of proof for establishing a prima facie case of false imprisonment and malicious prosecution in a state action in the ordinary case are nearly identical to the prequisites for recovery under section 1983 for the deprivation of a constitutional right involved in an alleged unlawful arrest or wrongful prosecution (citing Broughton v. State of New York, 37 N.Y.2d 451, 373 N.Y.S.2d 87, and other

authorities). Nevertheless, §1983 was never intended to afford any party multiple recovery in separate court actions for the same acts (Zarcone v. Perry, 78 A.D.2d 70, 434 N.Y.S.2d 437) nor may a successful plaintiff in a prior §1983 judgment utilize that verdict offensively in the summary judgment against a municipality (citing authorities).

We hold that the principles of res judicata and collateral estoppel can apply in the context of a civil rights action under section 1983 to bar a subsequent state court action to recover damages for common law torts. While the remedies provided by section 1983 are distinct and supplementary to those provided by state law, this pertains only to the initial option of the plaintiff to seek redress under section 1983 or under the common law courts or both. It does not address the question of whether, under the precise posture of state action, an identical issue has been already decided in federal court or some other court....

Section 1983 should be read against the background of tort liability that makes a person responsible for the natural consequences of his actions. The invasion of fundamental rights, for which damages are recoverable under section 1983, as previously noted have fundamental elements in common with traditional torts, e.g., false arrest and malicious prosecution. The principles of res judicata and collateral estoppel should apply where the common law tort coincides with the action granted by section 1983; the analysis in each case depending on its particular facts (Zarcone v. Perry, 78 A.D.2d 70, 434 N.Y.S.2d 437, supra)." (emphasis supplied).

Another trenchant analysis of the preclusive effect of a prior civil rights action upon a subsequent state court action sounding in tort, is found in the opinion of Justice Hopkins in Zarcone v. Perry, 78 A.D.2d 70, 434 N.Y.S.2d 437, upon whose opinion the New York Court of Appeals affirmed at 55 N.Y.2d 782, 447 N.Y.S.2d 248. Justice Hopkins reasoned:

"The questions thus presented are, first, whether the principles of res judicata resting on a judgment in a Federal court in an action to recover damages for the deprivation of civil rights under section 1983 apply to bar a State court action to recover damages for common law torts ....

We hold that the doctrine of res judicata bars the subsequent State court action....

* * *

The invasion of these fundamental rights, for which damages are recoverable under section 1983, have common elements with certain common law torts, such as actions for false arrest, malicious prosecution, and intentional interference with contractual and property rights. At the same time, there are evident differences. .... [Y]et the statute in authorizing a cause of action for the deprivation of rights under the Federal Constitution and laws provides a spectrum which the common law tort action may not encompass (citing authorities).

.... Though the statutory remedy is distinct, the aims of federalism and the language of Congress do not justify the conclusion that all common law tort theories are displaced, for the issue is whether a constitutional or Federal right has been infringed under the color of State law, before the remedy under section 1983 may be invoked. Hence, whether the common law tort coincides substantially with the action granted by section 1983 must depend on an analysis of the facts of the case. That, in a particular case, the tort remedy may overlap with the statutory remedy is clear (citing authorities).

* * *

The test of claim preclusion is therefore one of transactional grouping - that is, whether the plaintiff's claim arises out of 'all or any part of the transaction, or series of connected transactions' forming the basis of the previous action in which the judgment was rendered; and the term 'transaction' is to be given a pragmatic interpretation, taking into account the setting and expectations of the parties at the time.

* * *

In dicta the United States Supreme Court has said that 'res judicata has been held to be fully applicable to a civil rights action brought under

> §1983' (Preiser v. Rodriguez, 411 U.S. 475, 497, 93 S. Ct. 1827, 1840). We think that the reasons of policy underlying the invocation of res judicata generally--conservation of judicial time, the reliance to be properly laid on judgments rendered after a fair trial of the issues, and the avoidance of harassment of litigants - support a conclusion consistent with the expression of that view (citing authorities). As to those causes of action in the instant case against Perry based on the same proof and comprehended within the prior 1983 action, we accordingly hold that they are barred by the principles of res judicata." (emphasis supplied.)

In affirming the Appellate Division's holding, the New York Court of Appeals said (at 55 N.Y.2d 782, 440 N.Y.S.2d 248):

> "Order affirmed, with costs, for the reasons stated in the opinion of Justice James D. Hopkins at the Appellate Division, 78 A.D.2d 70, 434 N.Y.S.2d 437, insofar as the result is based upon the principles of res judicata and collateral estoppel."

An identical result had previously been reached by the Appellate Division, Second Department in McKinney v. City of New York, 78 A.D.2d 884, 433 N.Y.S.2d 193. There, as here, a prior federal court civil rights action was dismissed upon motion for failure to state a claim. The court held that the prior Federal court dismissal, which was "on the merits" under the federal scheme, mandated the res judicata dismissal of a subsequent state court action asserting essentially identical claims. And, the Zarcone rationale has recently been applied by that court in Berg-Bakis Ltd. v. Yonders, 90 A.D.2d 784, 455 N.Y.S.2d 644.

The New York Court of Appeals has elsewhere made clear that a Federal court dismissal of a claim at the pleading stage, operates, unless otherwise stated, as a "dismissal on the merits", entitling the dismissal to preclusive effect where a subsequent state court action is brought based upon essentially identical allegations. In McLearn v. Cowen and Co., 48 N.Y.2d 606, 422 N.Y.2d 60 the Court of Appeals said (at 422 N.Y.S.2d 61):

> "The Federal court granted the motion to dismiss with the statement 'The complaint still fails to set forth the facts and circumstances of the alleged fraud and must be dismissed'. This dismissal was on the merits for failure to state a cause of action.*

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* In Federal court, as distinguished from our State courts, a dismissal is on the merits unless the contrary expressly appears (Fed. Rule Civ. Pro. Rule 41, subd. [b], U.S. Code Tit. 28). In principle, a dismissal on the merits should be accorded the same consequences for purposes of claim preclusion whether it comes after trial or before trial on a motion for summary judgment or on a motion to dismiss for failure to state a cause of action after leave to replead has been granted as in this case." (emphasis supplied.)

We note that the plaintiff in McLearn was later successful in inducing the original Federal district court to modify its decision so that the dismissal there was specifically declared not to be on the merits, resulting in a subsequent modification by the Court of Appeals of its judgment of dismissal, 60 N.Y.2d 686, 486 N.Y.S.2d 461. Here, of course, Judge Mishler's dismissals, affirmed by the

Circuit Court of Appeals, were clearly declared to be "with prejudice" (Exhibit F, p. 16).

Finally, lest the Court entertain any question concerning the applicability of the traditional doctrine of res judicata to actions brought under the Federal civil rights statute, we point out that in Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980), the United States Supreme Court squarely held claim preclusion applicable to actions brought under 42 U.S.C. §1983.

For these reasons, the res judicata-based dismissal of all of the claims against the Suffolk County defendants herein, except for those events arising subsequent to Sassower's imprisonment in pursuance of second contempt convinction and warrant, must be dismissed.

POINT II

PLAINTIFF'S ADDITIONAL CLAIMS ARE RENDERED DISMISSIBLE BY PRIOR HOLDINGS IN THE FEDERAL COURT LITIGATION

At the time of Judge Mishler's dismissal of plaintiff's second civil rights actions, see decision and order dated April 20, 1978, Exhibit F to the moving papers), plaintiff, having been convicted of criminal contempt before Acting Surrogate Seidell, had not yet been arrested or imprisoned in pursuance of the warrant of committment (opinion, p. 6). Judge Mishler denied plaintiff an injunction against that second proceeding (opinion, p. 5). Nevertheless, the legal conclusion by Judge Mishler, affirmed by the Second Circuit Court of Appeals (Exhibit J to the moving papers), concerning the lawful and privileged conduct of the Suffolk County defendants, mandates the dismissal of plaintiff's claims here concerning parallel events subsequent to the date of Judge Mishler's second dismissal. In particular, Judge Mishler's holding, and those of the Second Circuit Court of Appeals, that the Public Administrator, the Sheriff, and deputy sheriffs, were immune from suit where, as here, they acted in pursuance of facially valid court orders, coupled with the square legal holding that the Suffolk County deputy Sheriffs possessed extra-territorial jurisdiction throughout the State of New York, require that plaintiff's identical claims here concerning his second

contempt convinction and incarceration be dismissed, as a matter of law.

Thus, it is of no moment that at the time of the dismissal of his second Federal court action, plaintiff had not yet been arrested pursuant to Acting Surrogate Seidell's warrant of committment, since, as Judge Mishler held in his second order of dismissal (Exhibit F, p. 15):

> "So too, defendant Mastroianni, serving as Public Administrator ... [is] immune from damage claims for [his] actions respectively in prosecuting ... the contempt citation. Imbler v. Pachtman, 424 U.S. 409, 424-31, 96 S.Ct. 984, 990-95 (1976). Defendants Croce and Grzymalski, deputy sheriffs acting pursuant to a facially valid warrant in arresting plaintiff, are as well immune from suit (citing cases)."

And, in affirming the dismissal of both actions, the United States Court of Appeals of the Second Circuit, addressing plaintiff's now discredited argument that the deputy sheriffs did not possess jurisdiction to arrest him in Westchester County (Exhibit J), said:

> "In particular, the sheriff and deputy sheriffs acted with reasonable grounds to believe that they were authorized to execute the arrest warrant pursuant to its terms in Westchester County. The process of the Suffolk County Surrogate's Court, including an arrest warrant ... extends statewide ... and the sheriff and deputy sheriffs are obligated to execute the mandate issued by the Surrogate of Suffolk County according to its command ...." (emphasis supplied).

That these holdings mandate the res judicata - based dismissal of plaintiff's claims here is clear from the Restatement of Judgments, 2d, which, according to the Court

of Appeals in Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, embodies the New York rule. The Restatement reads:

> "(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ... the claims extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usuage." (See discussion in Zarcone v. Perry, supra at 78 A.D.2d 70, 434 N.Y.S.2d at 440-441.) (emphasis supplied).

It is unasailable in this case that Mr. Sassower's second arrest in Westchester County by Suffolk deputy sheriffs in pursuance of Acting Surrogate Seidell's second contempt conviction and warrant of committment, which Judge Mishler refused to enjoin, arose out the same "transaction, or series of connected transactions", so as to require that preclusive or res judicata effect be given to the Federal dismissals concerning those subsequent events which were logically connected with the transaction which the Federal Court addressed in the orders of dismissal there.

POINT III

THE DEFAMATION CLAIMS AGAINST PUBLIC ADMINISTRATOR MASTROIANNI ARE DISMISSIBLE BY REASON OF THE RECENT HOLDING OF THE APPELLATE DIVISION, AND THE FEDERAL COURT DISMISSALS

As we have previously detailed in our analysis of the prior Federal complaints and orders of dismissal, plaintiff Sassower charged both Surrogate Signorelli and Public Administrator Mastroianni with defamation in causing the newspaper publication of reports of the criminal contempt proceedings against him. Those claims were also contained in plaintiff's amended complaint of the second federal action (Exhibit I to the moving papers, p. 26 et seq.), and were dismissed.

In Zarcone v. Perry, the Appellate Division, subsequently affirmed by the Court of Appeals (55 N.Y.2d 782, 442 N.Y.S.2d 248), ruled that a defamation claim asserted in conjunction with a federal civil rights action, thereafter operates as a bar to the pursuance of a second defamation claim in tort in a State court action. Addressing that specific subject, Justice Hopkins held (at 434 N.Y.S.2d 442):

> "We noted above one possible exception to the scope of section 1983. The plaintiff has alleged a cause of action sounding in defamation. The United States Supreme Court has held that as a general proposition section 1983 affords no right of action for defamation....
>
> We think that where, as here, the claim of defamation arises as an inextricable fragment of the whole episode and forming a sequence of serially related evidents between Perry and the

> plaintiff, we should not attempt to separate the defamation from the other causes of action barred by res judicata. The doctrine of res judicata is a pragmatic exercise of judicial policy, and hence we consider that the pragmatic result must conclude all rights of the plaintiff which emerged from the transaction and which were compensated by the prior recovery obtained by the plaintiff against Perry." (emphasis supplied).

More importantly, the Appellate Division, Second Department, in its recent affirmance of the dismissal of the defamation claims against Surrogate Signorelli (Sassower v. Signorelli), 465 N.Y.S.2d 543, 96 A.D.2d 585 (see opinion, Exhibit C to the moving papers), has ruled, as a matter of law, that the identical defamation claims against Surrogate Signorelli are not legally actionable upon the ground that:

> "[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 ... even though made with intent that such slanderous statements be widely circulated (citing cases).... Although [Sassower] does not have to proffer proof of affirmative acts to defeat a motion [to dismiss under CPLR 3211], absent an allegation that Surrogate Signorelli procurred the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against them." (Id. at 547.)

It is plain from an examination of the second cause of action of the amended complaint here (Exhibit A to the moving papers) that the defamation allegations against Public Administrator Mastroianni are commingled with and identical to those asserted against Surrogate Signorelli,

alleging the same operative facts and circumstances against both of them.

Thus, although the Suffolk County defendants did not then join in Surrogate Signorelli's appeal by seeking dismissal of the defamation claims upon that ground, the Appellate Division holding (Exhibit C to the moving papers), now clearly sets forth the "law of this case". The allegations of defamation asserted jointly against Surrogate Signorelli and Public Administrator Mastroianni have been determined do not to state a cause of action against either.

Perforce, summary judgment, dismissing the defamation claims against Public Administrator Mastroianni are thus warranted, both upon the res judicata principles discussed in Zarcone v. Perry, supra, and because the Appellate Division, Second Department, has ruled in this case that those allegations fail to state a claim against Surrogate Signorelli, based upon identical allegations.

POINT IV

THE EIGHTH CAUSE OF ACTION, CHARGING INJURIES TO PLAINTIFF'S WIFE AND DAUGHTER, ARE DISMISSIBLE

The eighth cause of action of the amended complaint charges that defendants, in an effort to intimidate plaintiff into abandoning his rights, acted to "harass, defame, annoy and injure the family of the plaintiff, and more particularly, plaintiff's wife." It is charged that the defendants wrongfully subpoenaed plaintiff's wife (his attorney at the time), harassed her with telephone calls, made spurious charges of professional misconduct against her, incarcerated her while visiting plaintiff in prison, and also denied plaintiff's daughter the right to visit with plaintiff and incarcerated her when she accompanied plaintiff's wife to serve a writ of habeas corpus (amended complaint, ¶66).

As this Court may judicially notice (Richardson on Evidence, 10th Ed., §30), plaintiff's wife and daughter, Doris Sassower and Carey Sassower, have commenced a separate tort action in the Supreme Court, Westchester County, against the Suffolk County defendants and others, seeking to recover damages for alleged false imprisonment, and other wrongful acts. Consequently, this Court need not be concerned that their remedies, if any, will go unaddressed (Doris L. Sassower and Carey A. Sassower v. Ernest L. Signorelli, et al., Westchester County Clerk's Index No. 3607/1979).

Such claims of alleged intentional torts against the plaintiff's wife and daughter however, under settled New York authority, do not give rise to any cause of action on plaintiff's part. As the discussion in Vol. 2, New York Pattern Jury Instructions, §3:6 makes clear:

> "The 'transferred intent' doctrine recognized in other intentional tort cases does not apply under New York law, to outrageous conduct. Under the New York cases decided to date, the defendant's conduct must be directed toward plaintiff; a bystander whose sensibilities may be so shocked as to cause mental distress cannot recover, though he be closely related to the person toward whom the conduct was directed, Kalina v. General Hosp. Syracuse, 31 Misc.2d 18, 220 N.Y.S.2d 733, affd. 18 A.D.2d 757, 235 N.Y.S.2d 808, affd. on Special Term opinion, 13 N.Y.2d 1023, 245 N.Y.S.2d 599 ... Stout v. City of Syracuse, 2 A.D.2d 801, 153 N.Y.S.2d 728 (family of plaintiff who was assaulted); Hutchinson v. Stern, 115 App. Div. 791, 101 N.Y.S. 145, app. dismd. 189 N.Y. 577 ... (plaintiff, who was assaulted, could not recover damages for miscarriage which resulted to his wife, who witnessed the assault) ..."

Nor, independent of a direct action by plaintiff's wife and daughter, can plaintiff assert a derivative claim for loss of consortium. The cause of action for loss of consortium is derivative, and cannot exist independently of the injured spouse's direct action, see, Millington v. Southeastern Elevator Co., 22 N.Y.2d 509, 293 N.Y.S.2d 305, at 312.

Accord, see O'Hearn v. O'Hearn, 55 A.D.2d 766, 389 N.Y.S.2d 651, 654; Kotary v. Spencer Speedway, 47 A.D.2d 127, 365 N.Y.S.2d 87.

Consequently, the eighth cause of action of the complaint herein, alleging damages to plaintiff by reason of torts allegedly inflicted upon his attorney-wife, and his daughter, must be dismissed.

POINT V

PRE-TRIAL DISCLOSURE PROCEEDINGS HEREIN HAVE BEEN STAYED UNDER CPLR §3214(b)

The pendency of the Suffolk County defendants' well-grounded motion for partial summary judgment operates automatically to stay previously-ordered depositions of them under CPLR §3214(b). In this regard, we point out that this motion was initiated immediately before the February 1, 1984 date scheduled for a deposition of defendants Croce and Grzymalski pursuant to order of the Supreme Court, New York County (Hon. Ira Gammerman, Justice), dated January 25, 1984.

Plaintiff, apparently troubled about the stay of the deposition of the Suffolk County Sheriff's deputies, has cross-moved here to strike the Suffolk County defendants' answer, to impose costs of $25,000, to vacate the automatic stay "nunc pro tunc", and for other relief.

It is nevertheless settled legal authority that a motion, as here, for summary judgment, operates to suspend disclosure until otherwise ordered by the court, even where discovery is court-ordered. This specific issue was addressed by the Appellate Division, Second Department, in Fidelty Insurance Corp. v. Hyer, 66 A.D.2d 521, 413 N.Y.S.2d 939. There, as here, depositions were court-ordered, and subsequent to the order, but before the scheduled deposition date, a party moved for summary judgment. Special Term

deemed the summary judgment motion premature in view of the court-ordered deposition, but the Appellate Division disagreed, holding that CPLR §3214(b) operated as an automatic stay. The Court said:

> " 'Service of a notice of motion ... [seeking summary judgment] stays disclosure until determination of the motion unless the Court orders otherwise' (CPLR §3212, subd.[b]).
>
> 'If when a motion is made ... [for summary judgment] there is outstanding any obligation to disclose, whether pursuant to a mere notice or court order, the mere making of the motion stays the disclosure ... the stay of disclosure is automatic' (citing authorities).
>
> 'The Court may [emphasis in original], of course, direct otherwise but, contrary to the view expressed by Special Term, and adjudiciation of the motion for summary judgment would not have constituted a negation of the order directing discovery since the prior order would automatically have been stayed' (at 413 N.Y.S.2d 942-943) (emphasis supplied).

Consequently, it is our well-grounded belief that the previously ordered depositions of the Suffolk County defendants have now been stayed, and that plaintiff's various applications to impose sanctions against them must, particularly in view of the undeniable merit of the present motion for summary judgment, be rejected.

In all events, as this motion rests on undeniable documentary proof based upon prior adjudications and pleadings involving prior litigation between these parties and others, plaintiff cannot demonstrate the need for disclosure

in this case, as CPLR §3212(f) permits, in order to oppose this motion.

Conclusion

Consistent with the documented prior proceedings and litigation between these parties and others in the Federal courts, and in the Appellate Division, Second Department, all of the claims of the plaintiff asserted in the amended complaint herein against the Suffolk County defendants should be dismissed, except for any which the Court might find not to have been dispelled by the preclusive effect of prior adjudications, or the law as determined herein by the Appellate Division, Second Department, at 96 A.D.2d 584, 465 N.Y.S.2d 543.

Respectfully submitted,

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