

To be argued by:
ROBERT S. HAMMER

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

-----X
GEORGE SASSOWER, :
Plaintiff-Appellant-Respondent, :
-against- :
ANTHONY MASTROIANNI, JOHN P. FINNERTY, :
ALAN CROCE, and ANTHONY GRIMALSKI, :
Defendants-Respondents-Appellants, :
-and- :
ERNEST L. SIGNORELLI, HARRY E. SEIDELL, :
NEW YORK NEWS, INC. and VIRGINIA MATHIAS, :
Defendants-Respondents. :
-----X

BRIEF FOR NON-PARTY JUDICIAL
OFFICERS IN SUPPORT OF AFFIRMANCE
OF ORDER DENYING PRE-TRIAL DISCOVERY

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Preliminary Statement

This brief is submitted on behalf of Hon. Ernest L. Signorelli, Suffolk County Surrogate; Hon. Milton Mollen, Presiding Justice of the Appellate Division, Second Department; now retired Associate Justice of the Appellate Division, Hon. Frank A. Gulotta; Clerk of the Appellate Division, Second

Department; Hon. Irving N. Selkin, and Hon. Anthony J. Ferraro,* Justice of the Supreme Court whom plaintiff seeks to examine as non-party witnesses pursuant to CPLR 3101(a)(4).

Special Term (Hon. Bruce McM. Wright, J.) denied plaintiff's motion for such permission (9-15) and for other relief in an order entered June 27, 1983. Plaintiff appeals from this order and other pre-trial discovery orders. This brief is limited to that part of the proceedings dealing with these "judicial witnesses" and in urging that Justice Wright's order be affirmed insofar as it denied the CPLR 3101(a)(4) motion as to them.

Question Presented

Whether plaintiff, an attorney suing pro se, has shown "adequate special circumstances" within the meaning of CPLR 3101(a) (4) to justify the pre-trial examination of Suffolk County Surrogate Ernest L. Signorelli, two justices of the Appellate Division, Second Department, its Clerk and another justice of the Supreme Court, where only bare, conclusory allegations are offered to justify the relief; and the action is one of a series of repetitive, vexatious, and unmeritorious litigations?

Special Term answered in the negative.

* See plaintiff-appellants' brief at p. 10. Apparently he refers to Hon. Nicholas Ferraro, now retired.

Statute Construed

CPLR 3101, "Scope of Disclosure", provides in pertinent part:

(a) Generally there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof by:

* * *

(4) Any person where the court on motion determines that there are adequate special circumstances. (Emphasis added)

Statement of the Case

This action for "defamation, assault, false imprisonment and various other torts" (2)* arose out of plaintiff's conduct as the executor of the estate of one Eugene Paul Kelly. As a result of plaintiff's failure to render accountings, he was removed as executor in March, 1976.** By

* Numbers in parentheses refer to pages of the record on appeal.

** Plaintiff also appears to have had problems in preparing and filing a proper accounting as trustee of an inter-vivos trust created by the same testator, Eugene Paul Kelly. See Kelly v. Sassower, 52 A D 2d 539 (1st Dept., 1976); and was eventually held in contempt for his continued failure to file an accounting Kelly v. Sassower, 78 A D 2d 502-03 (1st Dept., 1980), this Court remarking that plaintiff's proffered accounting was "incomprehensible and unacceptable."

order of Surrogate Signorelli dated April 28, 1977, plaintiff was directed to turn over his files in order that an accounting could be conducted. When plaintiff failed to comply with the turnover order he was summarily held in contempt and briefly jailed. However, this adjudication was annulled by Supreme Court, Suffolk County on the ground that only a contempt committed in the actual presence of the Court could be punished summarily. This judgment was affirmed. Sassower v. Signorelli, 65 A D 2d 756, 757 (2d Dept., 1978). Further contempt proceedings on notice were instituted in the Suffolk County Surrogates Court. Acting Suffolk County Surrogate Seidell found plaintiff in contempt of the turnover order. This judgment was confirmed at Special Term, but was recently held in abeyance by the Appellate Division, Second Department for further proceedings to determine if plaintiff had voluntarily waived his right to a hearing, Sassower v. Finnerty, 96 A D 2d 585, (2d Dept., 1983).

Meanwhile, plaintiff commenced actions against Surrogate Signorelli and others as a result of the contempt proceedings and plaintiff's arrest for failure to appear in response to the court's orders. Plaintiff has unsuccessfully sued in the federal courts under the civil rights laws, Sassower v. Signorelli, et al., U.S. Ct. App. 2d Cir., Dkt. #77-7511, unreported, (113-14) as well as in the state courts. In this action, Judges Signorelli and Seidell were both dismissed as

defendants upon grounds of judicial immunity, Sassower v. Signorelli, reported sub. nom. Sassower v. Finnerty, 96 A D 2d 585, (2d Dept., 1983); app. dis. 61 N Y 2d 756; lv. app. den, ___ N Y 2d ___ (1984). The Second Department recently ordered the dismissal of the complaints against Judge Signorelli in another action by plaintiff and his wife arising out of the same incidents. Sassower v. Signorelli, ___ A D 2d ___, NYLJ 3/8/84, p. 13 col. 6 (2d Dept., 1984).

The dismissal of yet a third action by Mr. and Mrs. Sassower was affirmed in Sassower v. Signorelli, ___ A D 2d ___, NYLJ 3/7/84 p. 13 col. 1 (2d Dept., 1984). In that case, the Court also affirmed the order of Special Term (Coppola, J.) insofar as it enjoined plaintiffs from instituting further actions or proceedings in New York State courts based upon incidents relating to the Estate of Eugene Paul Kelly.

During the pendency of the plaintiff's appeal from the contempt adjudication and the dismissal of the complaint against Judges Signorelli and Seidell, the instant application was made to take the depositions of Surrogate Signorelli, Judge Seidell, Presiding Justice Mollen, Justice Gulotta, Clerk Irving N. Selkin and Justice Ferraro, (32). In a lengthy affidavit (32-70), plaintiff recounted his version of the incidents relating to his being held in contempt for failure to submit an accounting and his arrest and incarceration on contempt charges.

Insofar as it relates to the proposed judicial witnesses, plaintiff alleged (always in conclusory fashion) either claims of official misconduct by Judges Signorelli and Seidell, (40-44, 47-49, 52, 54-57, 63-64) which have already been dismissed or that they, the two Appellate Division justices, the Clerk of that Court and Justice Ferraro were witnesses to tortious conduct by others; again in the most vague and conclusory terms (50, 61-63). "Obviously", he concludes, "the scope of the intended examinations is not intended to be described fully herein" (69).

Plaintiff's attempt to examine the prospective judicial witnesses was opposed on ground that plaintiff had failed to demonstrate "adequate special circumstances" (115); that he relied solely on his unsubstantiated version of the events in question (116, 120-21); and that his true motive appeared to be to harass the judges, particularly, Surrogate Signorelli (116 et seq.).

The Decision Below

Justice Wright agreed with the contentions on behalf of the proposed non-party witnesses and denied plaintiff's motion as to them.

"Formerly a party here Surrogate Signorelli is now a non-party. It would appear that his rulings as surrogate, if they are to be questioned at all, must be challenged by way of appeal. There can be no question concerning his immunity from suit as a judicial officer. The

allegations that would make him an arch-fiend of kidnapping and skull-duggery and a master mind of a plot to have Mr. Sassower arrested and jailed, or to deprive Mr. Sassower of his habeas corpus rights, is simply not made out by the conclusory language employed by Mr. Sassower. (10)

* * *

"The allegations of necessity to examine the Presiding Justice of the Appellate Division of the Supreme Court, Second Department and those urging that permission be granted to depose Justices Anthony J. Ferraro and Frank A. Gulotta, and Hon. Irving N. Selkin, Clerk of the Appellate Division, Second Department, all rest upon the most conclusory of claims." (11)

ARGUMENT

PLAINTIFF FAILED TO DEMONSTRATE "ADEQUATE SPECIAL CIRCUMSTANCES" NECESSARY TO JUSTIFY PRE-TRIAL EXAMINATION OF A NON-PARTY WITNESS.

A litigant seeking the pre-trial testimony of a non-party witness, has the burden of showing "adequate special circumstances" justifying such relief, CPLR 3101(a)(4); Cirale v. 80 Pine Street Corp., 35 N Y 2d 113, 116 (1974); Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 79 A D 2d 558 (1st Dept., 1980); Bonita Maritime Corp. v. St. Paul Mercury Insurance Co., 68 A D 2d 864, 865 (1st Dept., 1979) Fein, J., concurring. Although this burden is not heavy, it still requires some showing beyond mere relevancy, Cirale v. 80 Pine Street Corp., supra, Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,

supra; Kupferman, J., concurring; Bonita Maritime Corp. v. St. Paul Mercury Insurance Co., supra; Villano v. Conde Nast Publications 46 A D 2d 118, 120 (1st Dept., 1974). See also: Frederick v. Maslyn, 84 A D 2d 888 (3d Dept., 1981) which upheld denial of discovery of a party's medical condition where it was irrelevant.

In the instant case, the papers submitted to Special Term show that plaintiff seeks testimony as to matters that have clearly been removed from the case by the dismissal of Judges Signorelli and Seidell from the action, Sassower v. Finnerty, supra, 96 A D 2d 585. As to the remaining areas of proposed inquiry, plaintiff has failed to make a factual showing either that these matters are not reflected in judicial or other documentary records or may be obtained from other sources, McKay v. Pierce, 89 A D 2d 558 (2d Dept., 1982) where the Court held that no special circumstances existed to justify the pre-trial depositions of two non-party attorneys where the evidence could be obtained from other sources. Nor has plaintiff shown that there is even a good faith basis to conclude that the proposed witnesses have any evidence pertinent to the prosecution or defense of the action.

To assert, as plaintiff does (Brief 56), that a party is entitled to everyone's testimony simply begs the question. The cases upon which he relies, United States v. Nixon, 418 U.S.

683, 709 (1974) (White House tapes cases); Herbert v. Lando, 441 U.S. 153, 176 (1979) (discovery of news reporter's sources in libel suit) and Dennis v. Sparks, 449 U.S. 24, 30 (1980) in which the Court, in dictum, states that a judge dismissed from a federal civil rights action on the basis of his judicial immunity would still be required to testify if his non-immune co-defendants' case ever went to trial, pre-supposes that the witnesses have relevant testimony. As we have shown, plaintiff has failed either to show relevance because of the dismissal as to Judges Signorelli and Seidell or a factual basis for concluding that any proposed witness is in possession of relevant evidence. Moreover, unlike the Supreme Court cases which concerned themselves with disclosure under the Federal Rules of Civil or Criminal Procedure, the instant case concerns itself with CPLR 3101(a)(4), which does not automatically allow the depositions of non-party witnesses.

In affirming an injunction prohibiting the bringing of further litigation based upon the Kelly estate, the Appellate Division, Second Department observed:

"To be sure, public policy mandates free access to the courts and zealous advocacy is an essential component of our legal system (Board of Educ. v. Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO, 38 N Y 2d 397, 404; Burt v. Smith, 181 N Y 1) and,

ordinarily, the doctrine of former adjudication will serve as an adequate remedy against repetitious suits.

"Nonetheless, a litigious plaintiff pressing a frivolous claim can be extremely costly to the defendant and can waste an inordinate amount of court time, time that this court and the trial courts can ill afford to lose (see Harrelson v. United States, 613 F. 2d 114). Thus, when, as here, a litigant is abusing the judicial process by hagridding individuals solely out of ill will or spite, equity may enjoin such vexations litigation (e.g., Matter of Hartford Textile Corp., 681 F. 2d 895, 897, cert. den. sub. nom. Shuffman v. Hartford Textile Corp., U.S. ___, 103 S. Ct. 1195; Muka v. New York State Bar Assn., 120 Misc 2d 897, 903, 905, and authorities cited therein; see, also, Wood v. Santa Barbara Chamber of Commerce, 705 F. 2d 1515, 1524-1525; Pavilonia v. King, 626 F. 2d 1075, cert. den., 449 U.S. 829; Heritage Hills Fellowship v. Plouff, 555 F. Supp. 1290, 1298; Martin-Trigona v. Brooks & Holtzman, 551 F. Supp. 1378 [WEINFELD, J.])."

Sassower v. Signorelli, supra, ___ A D 2d ___. NYLJ 3/7/84, p. 13 col. 1. That Court's comments relative to the bringing of repetitive actions by plaintiff applies equally to his attempt to harass judicial officers in the guise of pre-trial discovery. Special Term properly refused to countenance such an attempt.

CONCLUSION

THE ORDER INSOFAR AS IT DENIED PLAINTIFF'S
MOTION PURSUANT TO CPLR 3101(a)(4) TO EXAMINE
THE JUDICIAL NON-PARTIES, SHOULD BE AFFIRMED.

Dated: New York, New York
April 4, 1984

Respectfully submitted,

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