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PLAINTIFF'S AFFIDAVIT
[A172-A194]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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GEORGE SASSOWER,

Index No.
5774-1983

Plaintiff,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, ALAN CROCE, ANTHONY GRYZMALSKI, HARRY E. SEIDELL, NEW YORK NEWS, INC., JOHN P. FINNERTY, and VIRGINIA MATHIAS,

Defendants.

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

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

1a. This affidavit is submitted in opposition to the cross-motion for summary judgment by the defendant, New York News, Inc. ["News"], dated June 22, 1984.

b. Incorporated by reference, in this opposing affidavit, is the material contained in plaintiff's four (4) cross-motions and his order to show cause. Some of the more relevant material from the aforesaid is annexed hereto (Exhibits "1" and "2").

Also annexed are plaintiff's unanswered interrogatories to the News (Exhibit "3"). Deponent verily believes that if the News were compelled to answer such interrogatories, it would capitulate to the plaintiff on the question of compensatory damages. A mere perusal with only a cursory understanding of the facts in this litigation should manifest agreement in such conclusion.

c. With the consent of the Suffolk County ["S.C."] Attorney, plaintiff has until the completion of his examinations before trial in order to submit his opposing papers to the S.C. Attorney's (third) motion for partial summary judgment.

d. The inter-relationship between the S.C. Attorney's motion and the News' cross-motion, mandates that either the News' cross-motion be denied or it be held in abeyance until plaintiff submits all his papers, after completion of pre-trial disclosure, including pre-trial disclosures by the News' and of its former employees.

e. Clearly, the News' may not, but indeed does, request summary judgment treatment, simultaneously asserting a Civil Rights Law §79-h privilege, and without waiving any defenses that might be overcome had it not invoked such statutory privilege (Oak Beach v. Babylon, 62 N.Y.2d 158, N.Y.S.2d ; Greenberg v. CBS, 69 A.D.2d 693, 419 N.Y.S.2d 988 [2d Dept.]).

At bar, assuming arguendo, the "true and fair report" and Chapadeau defenses are applicable, they may not be asserted simultaneously with a §79-h privilege.

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Thus far, the News' has opted to assert the §79-h privilege, as shown by the Order dated September 29, 1982 (Exhibit "4"), wherein Mr. Justice JOSEPH JASPAN stated:

> "The defendant News does not claim that the items sought by this method of discovery are not relevant (case cited) or even that they are not 'material and necessary' in the prosecution of this action, regardless of burden of proof ...
>
> The News relies instead upon a claim of privilege granted by Section 79-h of the Civil Rights Law and asserted in the answers of that defendant dated June 25, 1982. ...
>
> Further ... [News] alleges that the matter published was received by defendant [News] from reliable sources and published without malice toward plaintiff. Since defendant News thereby puts in issue the very privilege upon which they rely they cannot use Section 79-h(b) as a shield (Greenberg v. C.B.S., Inc., supra)."

Whether the News thereafter waived such privilege, prior to its instant cross-motion, has never been definitively resolved.

Nevertheless, the contents of the News' papers on these motions are certainly inconsistent with such §79-h privilege. The News should now be compelled to also answer the interrogatories that were before Hon. JOSEPH JASPAN, without a §79-h shield, before moving for summary judgment. Alternatively, the News should request leave of the Court to withdraw its papers so that it could reincarnate its §79-h shield.

When Art Penny was examined before trial on April 8, 1983, the News' attorney <u>again</u> asserted the §79-h privilege.

In opposition to plaintiff's motion to compel disclosure, the News' attorney, in an affidavit to this Court dated May 18, 1983 (Exhibit "5") stated:

> "In the course of the examination before trial Penny, upon advice of counsel, refused to answer certain of plaintiff's questions based on his claim of privilege under §79-h of the Civil Rights Law ...
>
> Penny, as a non-party witness, is not testifying on behalf of the News; his privileges are separate and distinct from the News' privileges. ... Thus, even if the News had 'waived' its privilege under §79-h, such a 'waiver' would not affect Penny's claim of privilege. ...

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> Further, even if the News' and Penny's privileges were not separate and distinct, plaintiff's claim ... that the News has waived its privileges is incorrect and attempts to mislead the court."

Penny's supporting affidavit, on the News' cross-motion, sets forth matter on which inquiry was made on his aforesaid examination before trial, and on which the News' attorney asserted a 79-h privilege on his behalf.

Only a few months ago, before the Appellate Division, First Department and Fourth Department, the News' attorneys, on the News' behalf, and on behalf of Penny, asserted the §79-h privilege!

Neither the News nor Penny may simultaneously blow "hot and cold" with the judicial system. Now, on its cross-motion, the News and Penny having impliedly waived the §79-h privilege, Penny must now respond to the questions asked on his examination before trial and respond to the prior interrogatories, before moving for summary judgment!

f. There is no authoritative decision to deponent's knowledge, in defamation law or otherwise, where summary judgment was even entertained as an available remedy when, as here, pre-trial disclosure was still to be completed on matters going to the heart of the litigation, unless the (cross) movant concedes the possible adverse nature of the still unfinished disclosure proceedings.

Prior to the completion of pre-trial disclosure it must be presumed, as a matter of law, that the response to plaintiff's interrogatories and the testimony of the witnesses would be as devastating as is imaginable for the News (Feingold v. Walworth, 238 N.Y. 446).

Furthermore, where state of mind is an issue, as here, summary judgment is out (Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411; Gaeta v. New York News, N.Y.2d , N.Y.S.2d [6/12/84, p. 8]).

g. The News' cross-motion for summary judgment is a transparent ploy to stonewall expeditious disclosure ordered by several judges of this Court and Mr. Justice ARNOLD L. FEIN, at the Appellate Division.

h. The present factual contention of the News and its attorneys is pure "hogwash", at odds with the News published defamations, Penny's testimony at his examination before trial, the answers to its prior interrogatories, and about everything else.

Deponent is willing to tender to this Court for an in camera inspection some of the documented and testimonial evidence which will "conclusively" reveal that the News' and Penny's present assertions are false and contrived.

Obviously, plaintiff intends to keep such evidence out of defendants' hands until the time of trial, if possible. Certainly, plaintiff will resist such disclosure prior to full and complete pre-trial disclosure by defendants, including by the News.

2a. In any event, whether considered now or later, as a matter of law, the News' motion for summary judgment must be denied.

This is not the traditional type of defamation action, but a deliberately planted story (Williams v. Williams (23 N.Y.2d 592, 298 N.Y.S.2d 473), of confidential material (Judiciary Law §90]10]; Shiles v. News, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert. den. 400 U.S. 900, 91 S.Ct. 454, 27 L.Ed.2d 450), intending to deprive plaintiff of a fair and constitutional trial (Martin v. Merola, 532 F.2d 191, 198 [2d Cir.]).

The traditional defenses are therefore inapplicable (Williams v. Williams, supra; Shiles v. News, supra).

b. The defamatory publications were part and parcel of a constant and continuous campaign of intentional and deliberate defamation, which included not only the publications complained of, but also the overpublication of his "diatribe" in February 1978, and the conduct of the Suffolk investigator and the Suffolk County Sheriff's Office.

Deponent knows of nothing in the McCarthy era or in the Nixon "dirty trick" campaign which reached this depth of unconstitutional, illegal, immoral, and unethical conduct.

It was a campaign waged also against plaintiff's wife and children, in order to compel plaintiff to succumb!

It will be set forth as part of the opposing papers to the S.C. Attorney and is related to the News' publications.

3a. Almost exclusively, the two articles reveal the sources as being the [out of court] statements of Surrogate Ernest L. Signorelli, Vincent G. Berger, Anthony Mastroianni, and the "[identifiable] attorneys for the beneficiaries".

b. Anthony Mastroianni, at his examination before trial, repeatedly denied that he ever spoke or discussed the matter with the reporter for the News, denied the truth of the information published, and denied the testimony that Penny ascribes to him, in fact he denied testifying.

c. In the libel of August 17, 1977 (News Exhibit "B"), the publication reads:

> "Mastroianni said he never received the accounting and yesterday testified that Sassower was writing checks last month on Kelly's estate. He said that checks for $236 to an insurance company and $466 to a bank were made out by Sassower." [emphasis supplied]

It is a clear question of fact whether Mastroianni is lying (Snell affidavit 6/25/84, Exhibit "D"), or Penny's article false and contrived. Who of the defendants, if not both, are lying is for the trier of the facts, not for summary judgment determination!

Not only do pages 21-24, 30-31 of Mastroianni's testimony (Snell affidavit of 6/25/84, Exhibit "D") contradict the News' published defamatory article, but also do pages 73-76 (Exhibit "6").

d. The article of June 27, 1977 (News, Exhibit "A") says:

> "Mastroianni never received the accounting ..."

In the context of the article, it seems that this statement was also received by Penny from Mastroianni, which Mastroianni denies.

But assuming, arguendo, Penny received such statement from the Surrogate's Court file, which is the News' revised version of the facts, where is such filed statement?

It simply just does not exist!

In fact, in this "keystone cops" contrived defamatory publication by the News the inherent contradiction was not noticed by either Penny or the publisher!

It has gone unnoticed by the News' attorneys in their application for summary judgment!

If the Court desires, in camera, deponent will reveal it! Again, deponent has no desire to reveal same to the defendants or their attorneys, prior to full pre-trial disclosure of both defendants and witnesses.

Plaintiff, prior to disclosure, has no desire to educate the News or its attorneys on the subject, although it stands out, unnoticed, like the side of a barn! It immediately labels the News revised version as false and contrived.

In any event, the Court's attention to the fact that Mastroianni testified that he never demanded any accounting nor does he recall seeing any demand made by his attorney for such accounting (Sassower, affidavit 6/25/84, p. 33; SM 76).

No demand was ever made for an accounting because Mastroianni and/or his attorney had same from the very beginning!

The final possibility from ready this defamatory article is that the statement came from Judge Signorelli. In such event it is the News burden (PJI, Supp. §3:31.p. 112) to produce an affidavit from Judge Signorelli to substantiate that he made such statement.

d. The June 27, 1977 article says:

> ... "the judge explained that he allowed Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate."

News -- produce an affidavit from Judge Signorelli that he made that statement to Art Penny!

Obviously, it cannot, so it now contends it received such explanation from the court file!

In 1977 such statement did not exist in the Surrogate's Court file in any shape, manner, or form. In fact, the prior testimony from an adversary was that the accounting was served in 1975 -- long prior to the March 1976 order -- .

The order of March 1976 was treated by everyone, including Signorelli and the Court, as a nullity, a ministerial error on someone's part. This was the explicit and implicit finding of Judge ALOYSIUS J. MELIA, supported by all of the voluminous evidence on all sides, without any contrary evidence!

It was also the finding of Judge MELIA, again without any contrary evidence, that any delay in filing the accounting was <u>not</u> plaintiff's fault or of his doings.

These finding by Judge MELIA, after a full and fair hearing was afforded to everyone, were confirmed by the Appellate Division.

e. The August 17, 1977 defamatory publication states that plaintiff

> "failed to appear in Surrogate's Court, Riverhead, as ordered by Suffolk County Judge Oscar Murov ..."

Where is there any "order to appear" in the Order to Show Cause dated August 10, 1977 (News, Exhibit "M)?

In fact, in the decision of Judge MUROV of August 19th, 1977 it states that plaintiff (News, Exhibit "N"):

> "submitted a notice of motion seeking to vacate the order to show cause"

News had not advised this Court that in fact, plaintiff's Notice of Motion was granted and the proceedings dismissed on the jurisdictional grounds advanced by the plaintiff.

It may be "true" that plaintiff did not appear, but, as a matter of law, it is not "fair" when instead of an appearance plaintiff moved to vacate on jurisdictionally grounds, particularly when such motion was granted!

Civil Rights Law §74 requires that the publication be "true and fair"!

In any event, the News' may not defend a published defamation on August 17 by a judicial decision on August 19 -- two (2) days later.

In May v. Syracuse Newspapers (250 App. Div. 155, 294 N.Y. Supp. 867 [3d Dept.]), the Court stated:

> "The fact that the answer became a public document subsequent to the publication is without significance, for the statutory privilege does not protect a newspaper when it states anticipated events to be facts. Schaffran v. Press, 258 N.Y. 207." [at 158, 872]

f. Patently false and misleading, is the statement in the published defamation of June 27, 1977 (News, Exhibit "A") that:

> "Sassower [was] ordered to show up in court this morning to explain why he should not serve the jail term."

Art Penny, this alleged experienced reporter who covers the courts, as well as the News' editor, should know that a Writ of Habeas Corpus places the burden of showing the legality of the incarceration on the Suffolk County officialdom. The plaintiff has nothing to explain -- the writ is not concerned with the merits, and plaintiff had nothing "to explain" as to the merits.

g. The News defamatory publication (News, Exhibit "B") further states:

> "Meanwhile the Suffolk district attorney's office is investigating Sassower's handling of the estate, including allegations that he tried to sell Kelly's Bay Shore home last December although he had been removed as executor several months earlier."

Assuming, arguendo, such complaint comes within the "true and fair report" privilege, which it does not, let the News produce its proof of the truth of such statement or its making -- it cannot and will not, because it will show that this fictitious complaint was made so that it could thereafter be published by Penny (Williams v. Williams, supra) and that Signorelli himself "ordered" that plaintiff enter into this contract of sale, and plaintiff obeyed such order made "on the record".

After Signorelli aborted the transaction, as unauthorized, this vacant, non-income producing, property could not be thereafter sold and finally after about one year -- it was sold to the same party for the same price!

Judge MELIA included this in his report, thereafter confirmed by the Appellate Division.

h. To say more at this point would be supererogatory.

In short, there is nothing -- absolutely nothing -- in these published articles that is true and/or truly reported.

Both articles were deliberately contrived and the facts inverted! Even the publication thereof and its timing was arranged with an official of the News!

4a. An order was issued on June 22, 1984, permitting the testimony of Vincent G. Berger, as a witness, to be taken.

Obviously, Mr. Berger will be asked whether he made the statement(s) attributed to him in the News' article.

The News' did not oppose the motion for Berger's examination, and thus judicially conceded that Berger's examination should precede any summary judgment consideration by the News.

b. Pending is plaintiff's motion to examine, as witness, Ernest L. Signorelli, as a matter of constitutional right.

There is no opposition to such examination of Signorelli, as a witness, and the matter need not be belabored.

5a. Since the defendant has not annexed any affidavits from the aforementioned informers whose names or identities are disclosed in the News' defamatory publications, for the purpose of the News' cross-motion for summary judgment it must be presumed that they would testify, as did Mastroianni, that the published articles were false and contrived -- sheer fiction!.

b. There are indications in the News' cross-motion papers that they attempted to obtain confirmation of the publications from the identified or identifiable named informers, and it failed in the attempt.

This seems obvious from Mr. Snell's affidavit of June 25, 1984 (p. 4-5), wherein he states:

> "As the News stated in its cross-motion papers, Mr. Penny actually testified that the first newspaper article in question was based on documents contained in a public file made available to him at the Suffolk County Surrogate's Court."

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If this is the version the News desires to rely on, it proves the publication of the articles actionable. The published articles attributes the information, almost exclusively, to named persons, in the public's eye, as reliable and unbiased!

Since the information has been confessed by the informers to have been false and contrived, even if these witnesses confirm same, the publications are actionable since, except a small portion, information given and not part of an official proceeding does not trigger a "true and fair report" privilege, by the express words of the statute (Civil Rights Law §74) and decisional law (Hogan v. Herald, 84 A.D.2d 470, 446 N.Y.S.2d 836).

c. It seems clear from the News', changed and recently, contrived position that they now have learned that both Signorelli and Berger will testify in similar vein as Mastroianni, and deny speaking to Penny!

d. Therefore, if the other witnesses deny speaking to Art Penny or deny the information published and ascribed to them was so given, then it will be plaintiff's, not the News', application for summary relief which would need serious consideration.

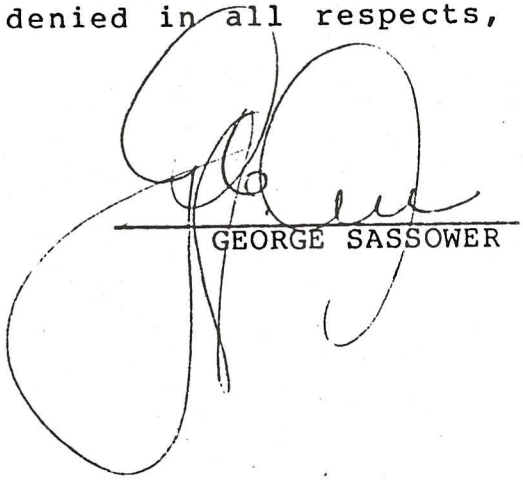
6a. It is sheer arrogance for the News' to assume that assuming arguendo, Chapadeau is applicable, which it is not, , plaintiff will not be able to show that the publications were not made in a "grossly irresponsible manner".

b. That being the News' position, plaintiff is entitled to full pre-trial disclosure (Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115).

7a. The News' cross-motion is an act of desparation since they know that responding to the interrogatories will cause it to "throw in the towel".

b. The fact that Penny destroyed his records, and the News' also destroyed them one (1) month after this suit was commenced [it states], is sufficient to warrant the pre-trial relief requested by plaintiff before summary judgment consideration is given.

WHEREFORE, it is respectfully prayed that the News' cross-motion be denied in all respects, with costs.



GEORGE SASSOWER

Sworn to before me this
3rd day of July, 1984

Kenneth Silverman

KENNETH SILVERMAN
Notary Public, State of New York
No. 24-4608988
Qualified in Kings County
Commission Expires March 30, 19 85