

a proper re-submission ... etc.". This affidavit is also submitted in further support of our unanswered motion to dismiss the complaint herein as well.

3. Plaintiff misperceives both the purpose of our submission of an appendix consisting of State court exhibits to this court, as well as the pertinent law, in making his cross-motion. The submission of an appendix of State court exhibits for limited purposes was entirely proper. Preliminarily, the appendix was submitted because it contains, as exhibits, copies of the voluminous prior pleadings by Mr. Sassower in his previously dismissed Federal court actions, which form the basis of our res judicata based dismissal motion. The exhibits also include copies of Sassower's pleadings in the Southern District action, and the State court action, upon the basis of which we seek the alternative relief of a stay, pending their disposition. Finally, copies of the prior decisions and orders of dismissal are contained in that appendix, and although this court may judicially notice them (Richardson on Evidence, 10th Edition, §30), the appendix provides a convenient documentary basis for this motion. Finally, a copy our State court memorandum was submitted, because it contains a convenient summary and analysis of Sassower's prior pleadings, amended pleadings, and proposed further amended pleadings in his previously dismissed actions, and of the corresponding determinations in the prior litigation, which form the basis of the present

res judicata based dismissal motion. Neither the submission of that appendix of exhibits, nor of our State court memorandum for such purpose, creates any confusion concerning the basis of our dismissal motion, which is clearly and unambiguously set forth in our notice of motion herein dated September 19, 1984.

4. Addressing Mr. Sassower's evident confusion concerning the propriety of seeking dismissal upon res judicata or statute of limitations grounds by way of a motion under Fed. R. Civ. P. 12(b), we merely point out that the Federal courts have consistently ruled that both res judicata and statute of limitations grounds (as well as an application to stay) may be raised by means of a Rule 12(b) motion to dismiss. See cases cited in Vol 2A, Moore's Federal Practice, §12.07[2] and [3] and §12.08 (and supplement, pp. 96-98). Thus, our submission of an appendix of exhibits to our State court dismissal motion, containing copies of prior pleadings and decisions in support of our res judicata based dismissal motion, does not convert the present motion into one for summary judgment under Rule 56.

5. Inasmuch as Mr. Sassower has failed to oppose our dismissal motion on the merits, and in view of this court's ruling that October 5, 1984 is the final date for plaintiff's submission of all opposing papers, we

respectfully request that our dismissal motion be entertained, and granted, upon its undeniable merits.


ROBERT M. CALICA

Sworn to before me this
2nd day of October, 1984.


Notary Public

IDA M. COMMINS
Notary Public, State of New York
No. 30-0718810
Qualified in Nassau County
Expires March 30, 1985