UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GEORGE SASSOWER,

Plaintiffs,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALLEN KROOS, ANTHONY WISNOSKI, and LEONARD J. PUGATCH,

Defendants.

File No. 77Civ1447 [JM]

GEORGE SASSOWER, individually, and on behalf of all others similarly situated or affected

Plaintiff,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALLAN CROCE, ANTHONY GRZYMALSKI, CHARLES BROWN, LEONARD J. PUGATCH, and THE COUNTY OF SUFFOLK,

Defendants.

File No. 78Civ124 [JM]

GEORGE SASSOWER,

Plaintiffs,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRZYMALSKI, HARRY SEIDELL, and THE COUNTY OF SUFFOLK,

Defendants.

File No. 84Civ2989 [JM]

PLAINTIFF'S MEMORANDUM

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GEORGE SASSOWER, Plaintiffs, -against- ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALLEN KROOS, ANTHONY WISNOSKI, and LEONARD J. PUGATCH, Defendants.	File No. 77Civ1447 [JM]
GEORGE SASSOWER, individually, and on behalf of all others similarly situated or affected Plaintiff, -against- ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALLAN CROCE, ANTHONY GRZYMALSKI, CHARLES BROWN, LEONARD J. PUGATCH, and THE COUNTY OF SUFFOLK, Defendants.	File No. 78Civ124 [JM]
GEORGE SASSOWER, Plaintiffs, -against- ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRZYMALSKI, HARRY SEIDELL, and THE COUNTY OF SUFFOLK, Defendants.	File No. 84Civ2989 [JM]

PLAINTIFF'S MEMORANDUM

This memorandum deals only with the contended quintessential errors and misapprehensions regarding the Court's "Memorandum of Decision and Order" dated November 29, 1984, against which a timely Notice of Appeal has been served and filed.

STATEMENT

STATUTE OF LIMITATIONS:

On the Statute of Limitations question, the Court failed to note that leave to appeal to the New York State Court of Appeals from the CPLR 3211(a)[7] dismissal of plaintiff's 1978 complaint against defendants Ernest L. Signorelli and Harry Seidell was denied on March 22, 1984 (61 N.Y.2d 985, 475 N.Y.S.2d 283), and that as to the Sheriff of Suffolk County and his deputies the litigation is still alive and active in the state court.

Consequently, as to those defendants whose action has been dismissed, this Court must consider the applicability of CPLR §205(a).

RES JUDICATA:

1. While the authorities cited by the Court do state and hold that a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits", it is not a cut and dry, mechanically process, blithely applied, either in the state or federal courts (Gilberg v. Barbieri, 53 N.Y.2d 285, 441 N.Y.S.2d 49; Teltronics v. L.M. Ericsson, 642 F.2d 31 [2d Cir.]).

Whether the judgment is a "judgment on the merits" of that pleading only, or of the case as presented and tried, or of the complete underlying action, generally requires.

Clearly, the doctrine of res judicata does not preclude Rule 60(b) relief, and particularly, at its extreme, extrinsic fraud (United States v. Throckmorton, 98 U.S. 61).

2a. The Court completely ignored the subsequent state proceedings, plenary and preclusive in nature, which came to conclusions completely at odds with the pleading determinations of His Honor (18 Federal Practice & Procedure, Wright & Miller, §4404, p. 28).

b. Thus, weighed against the federal judgment of dismissal "with prejudice" based upon Rule 12(b)(6), is the state judgment vindicating plaintiff based primarily on the confessions and admissions of Signorelli and his entourage that the facts asserted by His Honor in 1977 and 1978 were a complete and contrived sham.

c. In fact, Signorelli himself, recognizing his subsequent confessions in the state proceedings has sub silentio abandoned the defense of res judicata based upon an alleged removal of plaintiff in 1976, as His Honor found in his 1977 and 1978 opinions, and now places plaintiff's removal as 1977, without any evidence to support such new date.

MOTION TO VACATE:

Rule 60(b), in all its variants, requires the court, in plaintiff's view, to determine whether a litigant was given a "fair, one bite at the apple", as the facts and evidence later reveal themselves.

In plaintiff's view, particularly when the dismissal is pursuant to Rule 12(b)(6), such dismissal is intimately related to relief under Rule 60(b).

THE COURT'S OPINION

RES JUDICATA:

1a. The Court, in its opinion of November 29, 1984, reviewed its holdings in 1977 and 1978, noted affirmance thereof, and ended its discussion of the case.

b. In plaintiff's view the Court was bound to evaluate the res judicata effect of the state proceedings which found, mostly as a result of confessions, the Signorelli allegations (which His Honor adopted in 1977 and 1978) to be a contrived sham, as weighed against the res judicata effect of the Court's Rule 12(b)(6) determination.

MOTION TO VACATE:

1a. Again, the Court, in its opinion of November 29, 1984, reviewed its holdings in 1977 and 1978, noted its affirmance thereof, and ended its discussion of the case.

b. In plaintiff's view the Court should have evaluadated the evidence as of 1984 and determined whether the 1977-1978 judgments were the result of e.g., misconduct or deception by the defendants or their attorneys.

c. Thus, for example this Court repeats its statement that plaintiff was removed as executor on March 9, 1976 [a date that Signorelli employed as the linchpin justifying his subsequent conduct]. In his present affidavit it is now changed to 1977, although the evidence is that plaintiff served his accounting in 1975.

Thus also, if plaintiff was removed in 1977, as Signorelli now contends to this Court, the 1976 contract which Signorelli confessed he authorized "on the record", could not have been aborted in 1977, as unauthorized.

2. The Court should have also, in plaintiff's view, determined whether the defendants' interim conduct estopped them from raising the one year limitation provision in some of the Rule 60(b) subdivisions.

POINT I

THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFF'S CLAIM TO RELIEF

1a. As long as jurisdiction is acquired in the dismissed action, CPLR §205(a) saves the subsequent action, based upon the same series of occurrences, from being barred by the subsequently brought action brought within six month period thereafter (Carrick v. Central General Hospital, 51 N.Y.2d 242, 434 N.Y.S.2d 130).

b. The six month period commenced on March 22, 1984, when leave appeal was denied (Gross v. Newburger, 103 Misc.2d 417, 423-424, 426 N.Y.S.2d 667, 673, modified on other grounds, 85 A.D.2d 709, 445 N.Y.S.2d 830 [2d Dept.]).

Consequently, it is respectfully contended that the Court's erroneously stated that:

> "Since all of the relevant conduct by the defendants alleged in Sassower's complaint occurred in 1978 or before, Sassower's entire complaint is barred by the applicable three year period of limitations. ... Thus, whatever portion of Sassower's present claim that may not have been barred by res judicata, is certainly barred by the statute of limitations."

c. In George v. Mt. Sinai Hospital, 47 N.Y.2d 170, 179, 417 N.Y.S.2d 231, 237, the Court stated:

> "The statute (CPLR §205) by its very nature is applicable in those instances in which the prior action was properly dismissed because of same fatal flaw; thus, to suggest that it should not be applied simply because there was a deadly defect in the prior action seems nonsensical. Indeed, the statute will normally 'involve situations in which a suit has been started but, due to an excusable mistake or a procedural defect or ineptitude of counsel or inability to obtain needed evidence, or some other cause that should not be fatal to the claim, the start has been a false one' ". [emphasis supplied]

2a. There is no state, and thereby federal, statute of limitations question involved with the Sheriff and his deputies, since such action still pends, active and alive in the state court.

In short -- the Statute of Limitation should have played no part in the Court's determination.

POINT II

RES JUDICATA WAS NOT PROPERLY EVALUATED BY THIS COURT

1a. This Court, completely ignoring all the subsequent judicially disclosed events in the state and federal courts stated:

> "There is little question that this court's dismissals of its two previous Sassower cases .... under Fed. R.Civ. Pr. 12(b)(6) constituted final judgments on the merits (citing cases)."

b. Assuming, arguendo, based upon the same facts on which this Court rendered its dismissals, the plaintiff recovers judgment against the Sheriff and his deputies in state court, whether it be by summary judgment, as presently pends, or after trial, would not such state judgment be res judicata in the federal court?

How would this Court treat the res judicata effect of a state judgment after a plenary trial when balanced against a federal Rule 12(b)(6) judgment, dismissed because of lack of specificity in pleading?

This is a matter which this Court might have to encounter in the future or is directly before this Court at the present time resulting in plaintiff's complete vindication, after a full and fair hearing, which was affirmed by the Appellate Division!

Such vindication resulted essentially as a result of confessions and admissions by those who now invoke this Court's 1977 and 1978 Rule 12(b)(6) dismissals!

c. The point plaintiff desires to make is that when given a "fair bite at the apple" he succeeded, and that if res judicata is to be applied, the res judicata effect of a subsequent plenary trial should nullify the res judicata effect of a dismissal based upon a pleading! (18 Federal Practice & Procedure, Wright & Miller, §4404, p. 22).

2. In Knox v. Lichtenstein, 654 F.2d 19, 22 [8th Cir.], the Court stated:

> "Rule 41(b) transforms certain procedural dismissals which were not considered adjudications on the merits at common law into adjudications on the merits in federal court. If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit. Costello v. United States, 365 U.S. 265, 286."

POINT III

PLAINTIFF'S MOTION TO VACATE SHOULD HAVE BEEN EVALUDATED BASED UPON PRESENT KNOWN EVENTS

1a. The picture presently presented, after limited pre-trial disclosure, reveals a situation completely at odds with this Court's 1977 and 1978 statements.

b. Plaintiff's legal problems with this Court in 1977 and 1978 was that defendants were able to fabricate and destroy judicial and official records as suited their purpose in this Court during the former years (Universal v. Root, 328 U.S. 575; Hazel-Atlas v. Hartford, 322 U.S. 238).

Thus, factually, this Court found in 1977 and 1978 those facts which defendants themselves had the power to contrive for the purpose of this lawsuit. It was an extrinsic fraud in every sense of the word on defendants' motion for summary judgment.

2a. The Court further failed to consider the question whether the defendants were are are estopped from asserting the one year limitation provided for in some of the subdivisions of Rule 60(b) because of estoppel.

b. Although plaintiff has pursued the matter with great diligence, the defendants have availed themselves of every technicality contained in the law to stonewall all pre-trial disclosure.

CONCLUSION

PLAINTIFF'S MOTION TO REARGUE SHOULD BE GRANTED, AND THE COURT'S DETERMINATION REVERSED.

Dated: January 10, 1985

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pro se