

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
GEORGE SASSOWER,

77 C 1447

Plaintiff,

-against-

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

Defendants.

-----x
GEORGE SASSOWER,

Memorandum
of Decision
and Order

Plaintiff,

-against-

78 C 124

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.
-----x

November 29, 1984

-----x
 GEORGE SASSOWER,

CV 84-2989

Plaintiff,

-against-

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

Defendants.
 -----x

A P P E A R A N C E S :

GEORGE SASSOWER, ESQ.
 Plaintiff, Pro Se
 2125 Mill Avenue
 Brooklyn, New York 11234

HONORABLE ROBERT ABRAMS
 ATTORNEY GENERAL OF THE
 STATE OF NEW YORK
 Attorney for Defendants
 Signorelli and Seidell
 190 Willis Avenue
 Mineola, New York 11501
 Dewey Lee, Esq., Of Counsel

HONORABLE MARTIN BRADLEY ASHARE
 COUNTY ATTORNEY OF SUFFOLK COUNTY
 REISMAN, PIEREZ & REISMAN, ESOS., Of Counsel
 Attorneys for Defendants
 Mastroianni, Finnerty, Croce,
 Grzymalski and County of Suffolk
 1301 Franklin Avenue
 Garden City, New York 11530
 Robert M. Calica, Esq., Of Counsel

MISHLER, District Judge

This matter is presently before the court on several motions and cross-motions in three connected cases. This Memorandum of Decision and Order is intended to dispose of all of these pending motions.

Sassower, an attorney proceeding pro se, brought this most recent civil rights action (No. CV 84-2989) pursuant to 42 U.S.C. § 1983. Defendants move to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and seek an order assessing costs, disbursements and attorneys fees against Sassower. Defendants Signorelli and Seidell also move for a preliminary injunction seeking to enjoin Sassower from filing any subsequent lawsuits in federal court arising from the underlying transactions which form the subject matter of these actions. Sassower cross-moves for an order "dismissing and/or denying" defendants' motion to dismiss.¹/ Sassower further moves to vacate the judgments entered in two previous memoranda of decisions and orders filed by this court on September 20, 1977, Sassower v. Signorelli, No. CV 77-1447 (E.D.N.Y.) ("Sassower I"), and on April 20, 1978, Sassower v. Signorelli, No. CV 78-124 (E.D.N.Y.) ("Sassower III") and for summary judgment to be awarded in his favor in those actions. Both of these prior memoranda of decisions and orders were dismissals

of Sassower's respective actions. Furthermore, both of these decisions were affirmed by the Second Circuit in a consolidated appeal. Sassower v. Signorelli, 594 F.2d 852 (1978) (affirming in an unpublished opinion).

Prior Proceedings and Factual Background

This action is the most recent in a series of state and federal court actions arising out of Sassower's administration of the estate of Eugene Paul Kelly.^{2/} Most of the underlying facts of this action have been summarized in one of the previous memoranda of decision and orders by this court, Sassower III, supra, (unpublished decision), aff'd, 594 F.2d 852 (1978) (unpublished decision) and are as follows:

"Under the will of Eugene Paul Kelly, who died in April, 1972, George Sassower was nominated as executor of his estate. The appointment was subsequently confirmed by order of the Suffolk County Surrogate, and the will ultimately admitted to probate on September 9, 1974. A petition praying for an executor's accounting was thereafter filed, and by order dated March 27, 1975, was granted. The accounting, however, was not rendered. Plaintiff's failure was met by an order of the Surrogate's

5

Court dated March 9, 1976 which purportedly removed him as executor.

"The accounting was eventually filed and objections noted. On a legatee's application, defendant Mastroianni was appointed temporary administrator by order dated March 25, 1977. Sassower, however, allegedly continued in possession of certain books and records pertaining to the estate. Therefore, on April 28, 1977, plaintiff was directed to relinquish control and surrender the documents to the court.

"The [Surrogate's] court ordered Sassower to show cause why he should not be punished for contempt of court on account of his willful failure to comply. On June 22, 1977, the scheduled return date, Sassower failed to appear. The court held a hearing on the application, found plaintiff in contempt of court, and sentenced him to thirty days imprisonment. A warrant of commitment thereupon issued.

"On June 23, 1977, plaintiff was arrested at his home by defendants Croce and Grzymalski, both Deputy Sheriffs of Suffolk County. Sassower was transported forthwith to the Surrogate's Court, the officers rejecting his request, after conferring with supervisors, that he be

permitted access to a neighboring Supreme Court to file a writ of habeas corpus. Arriving at the court, plaintiff was detained for more than two hours and denied access to all avenues of relief; on orders of Surrogate Signorelli, plaintiff was refused permission to file a writ of habeas corpus and denied the opportunity to make any telephone calls. Sassower was ultimately brought before the court and given the chance to purge himself of the contempt. He refused and was thereupon remanded to the Suffolk County Jail.

"That very afternoon, plaintiff petitioned the State Supreme Court for a writ of habeas corpus and was admitted to bail pending its determination. Before the scheduled hearing date on that application, plaintiff filed suit in this court charging the defendants with a series of civil rights violations. [No. CV 77-1447.] An application for preliminary relief was denied by this court, but plaintiff was successful in prosecuting his application for a writ of habeas corpus. By order dated July 28, 1977, the writ issued, and the adjudication of contempt was annulled.

"Judge Signorelli immediately appealed from the July 28 order. Thereafter Judge Signorelli (and co-defendants) challenged the sufficiency of the complaint

filed in this court. [No. CV 77-1447.] This court, in considering various motions for dismissal and judgment on the pleadings, found the complaint defective and accordingly entered an order of dismissal. [Sassower I, supra.] In the meantime, with the appeal of Judge Signorelli still pending, Acting Surrogate Seidell instituted contempt proceedings grounded on Sassower's continued refusal to comply with the Surrogate's April 28, 1977 turn-over order. Again Sassower filed suit in this court and applied for preliminary relief in the form of an injunction barring his prosecution. Again the application was denied. [Sassower v. Signorelli, No. CV 78-124 (E.D.N.Y. Mar. 21, 1978) (unpublished decision) ("Sassower II").]

"Sassower, having received notice of the impending contempt proceedings, failed to appear on the scheduled return date because of a previous trial commitment. Acting Surrogate Seidell conducted a hearing, found Sassower guilty of contempt, and imposed a thirty (30) day prison term. Judgment was entered on March 8, 1978, and a warrant of commitment issued."

Sassower III, supra, slip op. at 3-6.

This court then turned to the substance of that previous action and dismissed the various causes of action stated in plaintiff's complaint on the following grounds: (1) res judicata; (2) failure to state a claim upon which relief can be granted; (3) Younger abstention; (4) claims of emotional distress are not actionable under § 1983; and (5) defendants, as public officials acting within the judicial process, are immune from suit. Sassower III, supra.

Since this last decision (Sassower III), the following relevant events occurred. On June 19, 1978, Sassower was arrested and taken into custody under the auspices of Suffolk County Sheriff John Finnerty (defendant in this action) pursuant to the warrant of commitment issued on March 8, 1978. Sassower commenced a second habeas corpus action in state court as well as various other actions against the defendants herein and others in state court sounding in tort theories of liability. Sassower's petition for habeas corpus was denied after a "summary hearing" in Special Term of New York State Court. The Appellate Division for the Second Department remanded the habeas corpus proceeding back to Special Term for a fuller evidentiary hearing on the issue.

3

Sassower v. Finnerty, 96 A.D.2d 585, 465 N.Y.S.2d 543
(1983).3/

DISCUSSION

1. Res Judicata

Defendants assert that res judicata is a complete bar to Sassower's present cause of action based on this court's prior rulings in Sassower I, Sassower II and Sassower III. Under the doctrine of res judicata, "a final judgment on the merits bars further claims based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). Thus, there must be: (1) an identity of the parties; (2) an identity of the issues; and (3) a final judgment on the merits of the case.

All of the parties to this action were also parties to the two prior actions in this court with the exception of defendant Acting Surrogate Harry Seidell. Sassower, however, sought to add Seidell as a defendant in his prior action, but leave to amend his complaint was denied by this court with prejudice. Sassower III, supra, slip op. at 15-16.

As for the issues involved in this case, most of Sassower's present complaint is a restatement of his claim already dismissed in Sassower I and then redissmised in Sassower III on res judicata grounds. Sassower I, supra; Sassower III, supra, slip op. at 6-7. The only new claims Sassower alleges concern the conduct of his second contempt proceeding and his second arrest.^{4/}

There is little question that this court's dismissals of its two previous Sassower cases, Sassower I and Sassower III, under Fed.R.Civ.P. 12(b)(6) constituted final judgments on the merits. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 2428 n.3; Mitchell v. National Broadcasting Co., 553 F.2d 265, 271 (2d Cir. 1977).

Therefore, based on the foregoing discussion, Sassower's present complaint, except to the degree it concerns conduct of the second contempt proceeding and his second arrest, is barred by res judicata.

2. Statute of Limitations

It is well settled that because Congress did not provide the courts with a federal statute of limitations for a § 1983 action, this court must apply the most appropriate state statute of limitations. Board of

Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790 (1980). N.Y. C.P.L.R. § 214(2), which provides for a three-year statute of limitations for actions to recover upon a liability created or imposed by statute, has been held by this circuit to apply to § 1983 actions. Pauk v. Board of Trustees of City University of New York, 654 F.2d 856, 861-66 (2d Cir. 1981), cert. denied, 455 U.S. 1000, 102 S. Ct. 1631 (1982). 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. See id. 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.

3. Sassower's Motion to Vacate

Sassower moves to vacate the final judgments issued against him by this court in the Sassower I and Sassower III decisions. The court will construe this as a motion under Fed.R.Civ.P. 60(b). Rule 60(b) sets forth the following grounds:

upon such terms as are just [that] the court may relieve a party . . . from a final judgment, order or proceeding . . .: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered

evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b).

To the degree that Sassower's motion to vacate is based on new evidence,^{5/} such a motion is precluded by the further provision in Fed.R.Civ.P. 60(b) requiring the moving party to make his 60(b)(2) motion "within a reasonable time" and no longer than "one year after the judgment . . . was entered." Fed.R.Civ.P. 60(b). Since the judgment in Sassower I was entered on September 20, 1978 and the judgment in Sassower III was entered on April 20, 1978, this one year period has clearly expired. Since Sassower has not demonstrated to the court any reason that would justify giving him relief from the prior trial judgment, despite his untimely motion, Sassower's Fed.R.Civ.P. 60(b) motion is denied with prejudice.^{6/}

4. Attorney's Fees and Costs

Awards of attorney's fees as part of an award of costs are provided for in 42 U.S.C. § 1983 litigation pursuant to 42 U.S.C. § 1988. This action states: "In any action or proceeding to enforce a provision of [§ 1983,] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The legislative history of § 1988 indicates a strong congressional intent to both encourage private enforcement of the civil rights statutes by awarding attorney's fees to successful plaintiffs as well as to discourage frivolous and vexatious litigation by awarding attorney's fees to prevailing defendants when appropriate. Hensley v. Eckerhart, ___ U.S. ___, ___, 103 S. Ct. 1933, 1937 & n.2 (1983).

The Appellate Division for the Second Department has concluded that Sassower has engaged "in a series of frivolous and repetitious claims, motions, petitions, collateral proceedings and appeals," Sassower v. Signorelli, ___ A.D.2d ___, ___, 472 N.Y.S.2d 707, 703 (2d Dep't 1984), at both the state and federal level, arising from his administration of the Kelly estate. Not only does this court find that Sassower's present claim is frivolous and wholly without merit, but based upon the

pleadings before the court, and our previous decisions in Sassower I, Sassower II, and Sassower III, we further conclude that this suit and Sassower's onslaught of voluminous motions before this court and to the opposing parties was entirely vexatious. Therefore, defendants are awarded costs and reasonable attorney's fees for their defense of this action.

Defendants are directed to submit an application to this court along with the necessary affidavits and contemporaneous time records of their legal work in accordance with New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983), to support their motion for attorney's fees. As a deterrent to further frivolous litigation by Sassower, this court directs Sassower to refrain from filing any further suits in federal court arising out of the subject matter of this case or any further motions before this court in connection with this matter until Sassower pays the attorney's fees and costs which the court will assess against him upon defendants' forthcoming application. Cf. Shuffman v. Hartford Textile Corp., 681 F.2d 895, 898 (2d Cir. 1982) (issuing a permanent injunction against the appellant "from proceeding further in any manner whatsoever with the prosecution of the above-entitled

proceeding" with certain enumerated exceptions), cert. denied, 459 U.S. 1206, 103 S. Ct. 1195 (1983); Sassower v. Signorelli, ___ A.D.2d ___, ___, 472 N.Y.S.2d 702, 704 (2d Dep't 1984) (affirming the issuance of a permanent injunction barring Sassower from "instituting further actions or proceedings in connection with this matter," (i.e., Sassower v. Signorelli, et al.) in state court). This order, of course, does not affect Sassower's right to appeal this decision to the Second Circuit or to file affidavits in opposition before this court on the sole issue of defendants' application for attorney's fees.^{7/}

CONCLUSION

For the foregoing reasons, Sassower's complaint is dismissed with prejudice against all defendants; Sassower's motion to vacate the final judgments previously rendered by this court in Sassower v. Signorelli, No. CV. 77-1447 (E.D.N.Y. Sept. 20, 1977) and in Sassower v. Signorelli, No. CV 78-124 (E.D.N.Y. Apr. 20, 1978) is denied; defendants are awarded attorney's fees and costs to be fixed upon application to this court within thirty (30) days of this judgment becoming final; and Sassower is directed to refrain from further litigation in this matter before this or any other federal court except and until he pays such attorney's fees and costs as this court will

direct subject to exceptions previously enumerated, and it
is

SO ORDERED.


U. S. D. J.

FOOTNOTES

- 1/ Since a motion to "dismiss and/or deny" a motion is not a cognizable motion under the Fed.R.Civ.P., the court treats this portion of Sassower's pleading as an affidavit in opposition to defendants' motion to dismiss.
- 2/ Besides the two prior actions by Sassower arising from his administration of the Kelly estate, filed before this court in 1977 and 1978, Sassower filed an action pending before Judge Goettel in the Southern District of New York, (CV. No. 78-4989), which action is presently stayed, as well as a variety of actions on his own behalf and on behalf of his wife and daughter in Westchester and New York County State Supreme Court. See Sassower v. Signorelli, ___ A.D.2d ___, ___, 472 N.Y.S.2d 702, 703 (2d Dep't 1984).
- 3/ As best as can be discerned from the pleadings before the court, Sassower has never pursued the remand of this habeas corpus proceeding with Special Term. (Calica Aff. in Support of Motion to Dismiss, ¶ 2). Thus, his conviction for criminal contempt has never been overturned.
- 4/ Defendants argue that even these claims are subject to res judicata effect as involving the same cause of action dismissed in Sassower I and Sassower III. Defendants cite the transactional approach to determining identity of issues adopted by the New York Court of Appeals in Reilly v. Reid, 45 N.Y.2d 24, 30, 407 N.Y.S.2d 645, 648 (1978) and followed in O'Brien v. City of Syracuse, 54 N.Y.2d 353, 455 N.Y.S.2d 687 (1981). Furthermore, they urge that under such an analysis, all of Sassower's present claims should be barred." Since this is not a case with a prior state court judgment, this court is not bound under 28 U.S.C. § 1738 to apply New York law of res judicata. Whether applying the New York doctrine or a federal law doctrine would preclude these most recent claims asserted by Sassower is a question which need not be reached in light of our

alternative holding regarding the statute of limitations bar. See infra.

- 5/ Presumably, the new evidence which Sassower grounds his Rule 60(b) motion on is the examination before trial of Erick F. Larsen, the previous Suffolk County Attorney holding this case. Assuming arguendo that this motion was timely made, the court can discern nothing of any relevance in this "extract of testimony" by Larsen or in any other evidence submitted by Sassower that would affect the holdings of this court's prior decisions.
- 6/ There is, therefore, little need to address Sassower's motion for summary judgment in these two prior cases.
- 7/ In light of the court's order concerning defendants' application for attorney's fees and costs, defendants' motion for a preliminary injunction need not be reached.