STATE OF NEW YORK : COURT OF APPEALS

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ACCOUNTING OF ANTHONY MASTROIANNI, as TEMPORARY ADMINISTRATOR, CTA,
Petitioner-Respondent,
ESTATE OF EUGENE PAUL KELLY,
Deceased.
GEORGE SASSOWER,
Respondent-Appellant.

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STATEMENT OF JURISDICTION

PRELIMINARY STATEMENT

1a. On the face of the Order and unofficial report of the decision of the Appellate Division, dated February 14, 1989, it reveals the lack of participation of (a) the appellant, either personally or as the trustee of the Kelly Trusts, and (b) of the Kelly beneficiaries.

b. The record at the Appellate Division, for which judicial notice may be taken, reveals that appellant was not served with the Appendix or Brief by or on behalf of the attorneys for ANTHONY MASTROIANNI, the appellant in that Court.

c. Judicial notice can also be taken of the fact that the attorney for the Kelly beneficiaries died approximately one-half year before argument at the Appellate Division, and the statutory stay created thereby (CPLR 320[c]).

2. Appellant herein contends that, inter alia, all proceedings in this Court should be stayed pending compliance with CPLR 320[c] or intervention by the Attorney General on their behalf.

STATEMENT

1a. The within is submitted in support of appellant's assertion that this Court has jurisdiction in this matter since his appeals are from "final" Orders.

b. Since there can be more than one "final" order in an action or proceeding, there can be more than one notice of appeal and there is no significance in the fact that both notices of appeal are found in a single paper.

2a. Unquestionable the Order of February 14, 1989 is "final" since it disposes of all issues in the litigation, and facially leaves nothing more to be done.

b. The Order of February 14, 1989 was never served, with or without notice of entry which, unlike the federal system, extended appellant's time to appeal.

c. Appellant could have filed a separate notice of appeal from this February 14, 1989 Order and never received any 10 day notice from this Court concerning "finality".

3. The Order of February 5, 1991, or almost two years later, is "final" because (1) the nature of the proceeding was coram nobis; (2) appellant was personally "fined" for bringing to the Appellate Division's attention, essentially as a trustee, a judicial fraud, and (3) because of judicial estoppel.

4a. A coram nobis proceeding may be entertained in a civil, as well as criminal, action (Black's Law Dictionary, 6th Ed., p. 337), which may be brought on by motion or independent action (FRCivP, Rule 60[b]).

b. There is no significance, for the purpose of "finality", that the particular matter was initiated by motion, rather than an independent action or proceeding (Merrill Lynch v. Griesenbeck, 21 N.Y.2d 688, 287 N.Y.S.2d 419 [1967]).

c. Had the Appellate Division granted appellant's motion, the order would have been "non-final". However it does not follow that the denial thereof is also "non-final" (cf. Mangold v. Neuman, 57 N.Y. 2d 627, 454 N.Y.S.2d 58 [1982]).

d. This is not a case where the court refuses to vacate a clerk's dismissal, or where the court had jurisdiction over the parties and refused to vacate a judgment or order based upon neglect or similar reason.

e. At bar, because of lack of service, the Appellate Division did not have jurisdiction over appellant, although his personal and trust interests were adjudicated; and the Appellate Division did not have jurisdiction over the beneficiaries of the Kelly Estate by reason of the prior death of their attorney (CPLR §321[c]).

The general statement of law made in Newman's Appellate Practice [11.04], based on a single case (Michaels v. Hartzell, 64 N.Y. 1028, 489 N.Y.S.2d 65 [1985]) seems unwarranted and unjustified. In any event, to the extent that the aforementioned authority distinguishes the Michaels v. Hartzell (supra) situation from the default cases, appellant agrees,

5a. For bringing to the attention of the Appellate Division the judicial fraud involved, which appellant contends the Appellate Division was a knowingly participant thereon,

appellant was personally assessed motion costs in the sum of $100, notwithstanding CPLR 8110, which may ministerially docketed as a judgment (CPLR 2222), without any further judicial intervention.

b. Appellant asserts that he may not be penalized for any monetary sum for exposing a quasi-criminal conduct in the nature of a judicial fraud, any more than he can be assessed a monetary penalty for reporting a crime or any other conduct which he is compelled to perform (Code of Professional Conduct, 1-103; Holt v Virginia, 381 U.S. 131 [1965]).

c. To the extent that any statute or by custom or usage fines, penalties, and/or costs may be imposed upon a person, individually or as a trustee, for performing an act which society or his profession compels him to perform, particularly where professional sanctions may be imposed upon him for non-performance, it is unconstitutional and void (Holt v Virginia, supra).

d. The predominant aspect of appellant's motion resembled an exercise of his constitutional right to petition (Amendment I, U.S. Constitution).

6a. Under the unique, if not bizarre, circumstances at bar, because of the misconduct at, inter alia, the Appellate Division and the Office of Court Administration this Court should be estopped from asserting the appeals are non-final.

b. This matter, and related matters, are inundated with judicial fraud and misconduct, with every possible obstacle

placed in appellant's path to have this matter reviewed by this Court.

c. Included in such obstacles were the sham proceedings in the Appellate Division, a tribunal which actually knew that affirmant had not been served, and who should have known that the attorney representing the Kelly Estate beneficiaries were either betraying his professional obligations or dead.

d. Where it appears on the face of the proceeding in the Appellate Division, that the Estate was compelled to pay penalties for the failure to timely pay federal and state taxes, the Appellate Division was compelled to inquire as to the absence by a representative for the Kelly beneficiaries to press a surcharge claim (Wood v. Georgia, 450 U.S. 261, 265 n. 5 [1981]).

e. The Appellate Division cannot prevent an appeal to this court by the simple expedient of having a sham appellate process, without jurisdiction over essential parties, and then deny a motion to vacate, without triggering the doctrine of estoppel.

7. The substantial nature of the constitutional questions, as set forth in this statement and in the 500.2 statement need not be further belabored.

Dated: April 12, 1991

GEORGE SASSOWER