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[19-21]

SEP 11 1979

STATE COURT OF CLAIMS
ALBANY, NEW YORK

At a Motion Term of the Court of Claims of
the State of New York held in its Courtroom
at Two World Trade Center in the County
and City of New York in said State on the
29th day of May, 1979.

PRESENT:

Hon. LEONARD SILVERMAN,

Judge

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SEP 11 1979

DEPARTMENT OF LAW
CLAIMS & LITIGATION BUREAU
MEMORANDUM
and ORDER

GEORGE SASSOWER,

By

NEW YORK

Claimant

- against -

THE STATE OF NEW YORK

Defendant

Claim No. 62894

Motion No. M-22003 and
Cross-Motion #M-22104

On May 29th, 1979, the following papers, numbered 1 to 5

were read on motion by ~~Claimant~~ Defendant for an order dismissing the claim and
on cross-motion by claimant for permission to file a late notice of
claim:

- Affirmation
- Notice of Motion and ~~Annexed~~ Annexed with Exhibit
- Opposing Affidavit
- ~~Opposing Affidavit~~ Reply Affirmation
- Notice of Cross-Motion and Affidavit Annexed
- ~~Reply Affidavit~~ Opposing Affidavit
- Filed Papers: Claim - _____
- _____
- _____

Papers Numbered

- 1
- 2
- 3
- 4
- 5

Upon the foregoing papers, this motion is

This is a motion to dismiss a claim on the grounds that it was
untimely filed, that it fails to state a cause of action against the
State, that the State is immune from suit, and that the acts complained
of are privileged. The claimant, an attorney, cross-claims for leave
to file a late claim pursuant to Subd.6 of §10 of the Court of Claims
Act in the event the Court should find his original claim untimely.

Although the words complained of are not specifically set out in haec verba, in the notice of claim, the action purports to be one in defamation, the position of the claimant being that the Judges of the Appellate Division, with knowledge aforethought, rendered a decision in writing which improperly and unjustifiably casts claimant in a bad light. The decision of the Appellate Division was rendered on November 6th, 1978, and first published by West Publishing Company in the Official Reports on December 20th, 1978. This claim was filed on March 9th, 1979.

Although the Court believes that the action is untimely, we base our decision on these motions on the aspect of judicial immunity because it is that factor which is basic to the question of the existence of merit to the claim, and we have repeatedly held that of the six factors to be considered in allowing a late claim, the existence of merit is of the weightiest. (Falcon v State of New York, Motion #M-20375, filed March 15th, 1978; Macalincag v State of New York, Motion #M-20033, filed December 23rd, 1977; Arthur v State, Motion #M-19490, filed September 19th, 1977.)

In well-written and eloquently worded memoranda, claimant argues essentially, with Lord Chancellor Lyndhurst, that "I believe by the law of every civilised country, where damage is sustained by one man from the wrong of another, an action for compensation is given to the injured party against the wrongdoer." (Ferguson v Earl of Kinnoull, 9 Cl & F 251, 311-314, 8 Eng. Rep. 412, 434-435 [1842].)

Undoubtedly, although not expressly stated, defendant would occur with Chief Judge Fuld of the Court of Appeals to the effect that not

every wrong results in a corresponding right. "It may be unfortunate that the plaintiff must suffer an attack on his professional integrity without any means of judicial redress. But the possible harm to him as an individual is far outweighed by the need — reflected in the policy underlying the privilege here involved — to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings." (Martirano v Frost, 25 NY2d 505, 508.)

Clearly, this Court is bound by the judicial privilege repeatedly recognized by the higher courts of this State. The Cause of action against the State must be dismissed. "[T]he State is not liable for the errors of a judicial officer on the theory of respondeat superior * * *." (Jameison v State of New York, 7 AD2d 944, 945.)

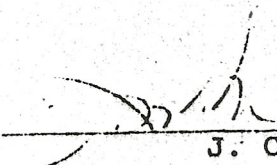
To the extent that the Judges of the Appellate Division might have been acting in a nonjudicial capacity when rendering the allegedly libelous decision, the State would not be liable for their action and would not be the proper party to this action, nor would this Court be the proper forum. The motion to dismiss would thus likewise have to be granted.

Since, as broadly stated by Judge Weisberg of this Court in a decision published during the pendency of this motion, "the State of New York can never be liable for the acts of its Judges" (Murph v State of New York, 98 Misc2d 324, 326), the motion to dismiss must be GRANTED and the cross-motion is DENIED as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 10, 1979,
New York City, New York.

E N T E R ,



J. C. C.