

79-7205

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
GEORGE SASSOWER,

Plaintiff-Appellant,

- against -

File No.
79-7205

APPELLATE DIVISION OF THE SUPREME
COURT, THE SECOND JUDICIAL
DEPARTMENT OF THE STATE OF NEW YORK,

Defendant-Appellees.
-----x

BRIEF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the (unreported) Opinion of
Hon. CHARLES L. BRIEANT dated February 9, 1979 (12) and the
Judgment entered pursuant thereto.

QUESTION PRESENTED

Did the District Court err in dismissing the
Complaint pursuant to Rule 12(b)(1)(6) of the Federal Rules
of Civil Procedure?

STATEMENT
(AN OVERVIEW)

Plaintiff, an attorney brought this action pursuant
to 42 U.S.C. §1983, seeking equitable relief.

Plaintiff has not been disbarred, suspended,
censured, or in any way disciplined.

Nevertheless, defendant, in an Opinion where it
did not have subject matter jurisdiction, made factually
false and status- affecting remarks inferring otherwise

about plaintiff, a truly involuntary litigant in that Court.

The District Court accepted the plaintiff's allegations as true (S.M.6) but nevertheless granted defendant's motion to dismiss holding

"This Court was not established for the purpose of correcting errors in memorandum decisions of state courts. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973).

It is certainly not unusual for a busy and overworked Judge or panel of Judges making a written decision in an action to set forth reasons or conclusions, some of which may later appear to be in the nature of obiter dicta. Indeed, some such statements in opinions and decisions may be wrong, unfair, or both. This experience is by no means confined to the state courts. A successful litigant is unable, usually, to review such expressions on appeal.

Our regard for the delicate fabric of federalism suggests that there would be utter chaos in the nation if the federal district courts were to undertake to expunge unfounded or unfair statements of fact in the opinions and decisions of state judges. That this has not been done in some 190 years of partially concurrent state and federal jurisdiction suggests that to do so would create more mischief than it would eliminate. I decline to initiate any such practice here."

FACTS

Plaintiff was tried, convicted, and sentenced to be incarcerated for criminal contempt, all in absentia (5 \$4).

Plaintiff's Writ of Habeas Corpus was sustained by Special Term of the State Supreme Court as obviously violative of his constitutional rights (5 §7).

A clearly frivolous appeal was taken by the incarcerating Judge (who had subsequently recused himself) from this eminently correct determination (5 §9).

The only questions presented to the defendant tribunal on such appeal were whether (1) there was jurisdiction to try, convict and sentence plaintiff, and (2) whether the Writ of Habeas Corpus was an appropriate remedy (6 §13).

In such appeal, plaintiff obviously appeared as an "involuntary litigant" in order to sustain the determination of Special Term.

Defendant affirmed the determination of Special Term (6-7 §14), but nevertheless, like a "loose torpedo" made various egregious, irrelevant and status-affecting remarks, infringing on plaintiff's "life blood earning capacity" (9 §25; 10 §26; S.M.7).

Such factually erroneous remarks never appeared in the Appendix or Briefs submitted to the defendant, nor were such false factual remarks in any way relevant to the merits of the appeal before defendant (7-8 §15, §16, §18; 9 §22, §23; 10 §29).

Defendant denied plaintiff's motion to delete and expunge such gratuitous matter, alternatively, to compel the production of various official documents as proof that the

gratuitous remarks were false.

Since plaintiff was successful in Special Term and that Order was unanimously affirmed by the Appellate Division, the State Court of Appeals has no jurisdiction because, inter alia, the plaintiff is not "legally aggrieved".

Thereafter, defendant's Opinion was officially and unofficially published (65 A.D.2d 756, 409 N.Y.S.2d 762).

STATE LAW

1. By virtue of state statutes (Judiciary Law §90 [10]), custom, and practice, all charges of professional misconduct are confidential and the publication by the defendant of a disbarable offense - as here - signifies to the bar that an attorney has been tried and convicted of professional misconduct.

2. Under state law, as defendant itself recently stated, there is no judicial immunity where the published portion is not possibly pertinent to the issues presented (Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844-2nd Dept.).

POINT I

PATENTLY THIS PROCEEDING IS
NOT BARRED BY "ROOKER" AND
"TANG". THOSE DETERMINATIONS
IN FACT SUPPORT THE VIABILITY
OF THIS ACTION

The nucleus of Rooker v. Fidelity Trust Co.
(supra) is the prior existence in the state courts of a

"[1] judgment [2] (with) jurisdiction of both the subject matter and the parties, [3] that a full hearing was had therein; [4] that the judgment was responsive to the issues, and [5] that it was affirmed by the Supreme Court of the State on an appeal by the plaintiff." (p. 415)

1. Rooker v. Fidelity Trust Co. (supra) and Tang v. Appellate Division (supra) have their genesis in the recognized value of a "judgment" and the appropriate procedures in attempting to vacate, reverse, or modify same. It is such final judgment, under the doctrine of res judicata or collateral estoppel, which prohibits the existence of any other proceeding which might result in an inconsistent adjudication.

This proceeding is not an attempt to vacate, reverse, or modify any determination made in any state court or to thwart any criminal or disciplinary proceedings.

Defendant's Order of Affirmance was wholly and completely favorable to plaintiff. The relief requested by plaintiff will not in any way be incompatible with any extant final Order or Judgment of the state court.

2. The complaint alleges that the gratuitous remarks of the defendant were not "responsive to the issues" submitted to it nor pertinent to the issues determined. The defendant in the proceeding before it had to determine only whether the writ of habeas corpus was an available remedy and whether the writ was properly sustained.

The defendant itself recently reiterated the

holding that where the remarks were not pertinent, there is no judicial immunity (Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844).

The right to litigate or adjudicate does not carry with it an immunized opportunity to factually defame on subject matters not pertinent. It is as to those irrelevant remarks that defendant had no subject matter jurisdiction (Ellentuck v. Klein, 570 F.2d 415, 423 [Moore,J] 431 [Lombard, J] -2nd Cir.).

If the District Court is correct, the defendant, under the circumstances, could falsely publish in haec verba that plaintiff was disbarred and may not practice law and not obtain federal relief.

3. Obviously from the aforementioned and explicitly from the complaint, "no full hearing was had" as mandated in Rooker, in order to make the doctrine of res judicata applicable.

4. Ironically, it is the affirmance by defendant which precludes plaintiff from access to the "Supreme Court of the State" (State Court of Appeals) since plaintiff is not legally "aggrieved", and therefor may not appeal (CPLR §5511). This is another reason that the Rooker doctrine is inapplicable and no bar to this federal action.

In Ellentuck v. Klein (supra), the lead opinion of Judge Moore states (p. 423):

" If the New York Court of Appeals lacked jurisdiction to render a constitutional decision on the

merits ... res judicata and collateral estoppel are inapplicable, and their (plaintiff's) failure to seek review from the Supreme Court of the United States would be of no moment."

Tang v. Appellate Division (supra) is a variant of the Rooker v. Fidelity Trust Co. restriction and does not permit a party to resort to the federal forum once the states judicial procedures have been (voluntarily) invoked for the wrong that was allegedly committed.

This action does not meet with several of the criteria necessary for the invocation of Tang, as the following analysis will reveal.

1. Plaintiff herein has not invoked the state procedures (e.g. Gair v. Peck, 6 Misc. 2d 739, aff'd 5 A.D.2d 303, reversed on other grounds 6 N.Y.2d 97, cert. denied 361 U.S. 374), to have the defamatory, unsupportable, gratuitous remarks expunged.

In Tang v. Appellate Division, Judge Mulligan, in his lead opinion, stated (p. 141):

" There is no doubt that after having been denied admission to the New York bar, Tang could have immediately initiated his §1983 action in the federal district court. In fact this is the usual procedure in cases where state admission requirements have been attacked on constitutional grounds. Instead he selected the state forum to raise the constitutional question which he had the perfect right to do."

Tang formerly petitioned the Appellate Division and obtained a 3-2 split determination. Instead of following or attempting to follow the state judicial hierarchy and then attempting to obtain United States Supreme Court review, he abandoned his state proceeding and commenced a new proceeding in the federal courts. The doctrine is based on nothing more esoteric than the inability or refusal of the federal courts to relitigate matters already litigated in the state courts and cause conflicting judgments to exist side by side (Kane v. Graubard, 442 F. Supp. 733 [S.D.N.Y.]). It is a refusal to permit a litigant to have "two bites" at the same cherry" (Paddington East v. Roth, 70 F.R.D. 458, 459 [S.D.N.Y.]).

2. In order to invoke Tang (or Rooker), it is necessary that there exist a prior judgment in the state court which is entitled to res judicata or collateral estoppel application.

Winters v. Lavine (574 F.2d 46-2d Cir.) holds that state law is determinative on the subject and that in New York

"the doctrine of res judicata,
... displays the predominant
characteristic of the rule
of collateral estoppel."
(at p. 57).

Since Winters v. Lavine (supra) enunciates New York law on the subject of res judicata and collateral estoppel, such state law may be extrapolated from that decision.

a. For res judicata or collateral estoppel to be applicable

"the determination of the issue must have been necessary to the [prior] decision." ...it must be 'decisive' "Winters v. Lavine, supra, 57, 57 note 12).

Certainly the complained of material was neither "necessary" nor "decisive" to defendant's determination, which it itself recognized, since it sustained plaintiff's writ, although it (incorrectly) stated that such writ had been improperly obtained.

b. In order to invoke the doctrine of res judicata

"the plaintiff must have had a 'full and fair opportunity' in the earlier litigation to address the issue now claimed to be decisive in the later action. ... Thus, a prior state court proceeding cannot bar federal court consideration of matters which were not actually litigated and determined in that prior proceeding." (Winters v. Lavine, supra, at p. 56-57)...

There was no full or fair opportunity afforded to plaintiff to address such defamatory assertions by defendant, since they were irrelevant to the issues presented and therefore unexpected.

c. In Winters v. Lavine (supra), this Court held that the fact that one does not have a right to appeal to the Court of Appeals as a matter of right, or that the Court of Appeals refuses permission, or refuses permission because,

in its opinion, no substantial constitutional question is involved, does not affect the applicability of res judicata or collateral estoppel. In the instant situation, plaintiff did not have a right of appeal nor was he eligible to apply for permission to appeal since he was not "aggrieved" by defendant's Order of affirmance.

d. In Winters v. Lavine (supra), the Court indicated that res judicata or collateral estoppel might not be applicable if various extraneous elements are present such as "sympathy or prejudice" in the state courts (note 14 at p. 60).

In the case at bar, the defendant is a claimed culprit by the receipt of ex parte erroneous and thereafter published information. Certainly then, defendant could not be considered a detached and neutral judicial tribunal who could adjudicate its own misconduct (U.S. v. United Mine Workers, 330 U.S. 258, 308-9 [Frankfurter, J., concurring]).

The mere request that the erring defendant expunge the irrelevant material is not a submission to the state judiciary, no more than was a similar request made to a Judge of this district for relief held a bar to a suit in the 3rd Circuit (Lowenschuss v. West Publications, 542 F.2d 180, 183-3rd Cir.).

Similar requests made by school teachers or policemen to their employers does not bar federal relief.

Simple courtesy is not a submission to the jurisdiction

of the erring tribunal.

e. In its broad review of the subject, this Court in Winters v. Lavine (supra), stated that the "involuntary litigant" was he

"who 'was not dragged into the state court, [not one who] freely chose that forum.'" (p. 58).

Examination of the genesis of this action is that plaintiff was legally compelled to seek state habeas corpus relief in the first instance since federal relief was refused pending the outcome of state proceedings. Having sustained plaintiff's writ, the incarcerating and recused judge and the State Attorney General "dragged" plaintiff to the Appellate Division, in a case which it knew had no merit.

It was in the Appellate Division that the appellant, ERNEST L. SIGNORELLI, communicated ex parte with that tribunal and which led to those irrelevant egregious published statements by such defendant.

The Civil Rights Act was motivated by the actions and neglect of state courts which ranged from an insensitivity to civil rights to outright corruption. The Federal Courts have been reluctant to endorse state decisions in 1983 actions. (Judge Oakes, dissenting in Turco v. Monroe County Bar Association, 554 F.2d 515, 522; Judge Feinberg dissenting in Mitchell v. National Broadcasting, 553 F.2d 265, 277;

Getty v. Reid, 547 F.2d 971, 975-6 Cir.; New Jersey Educational Assn. v. Burke, 579 F.2d 764, 772-74 3rd Cir.)

f. If there is any uncertainty, the doctrine of res judicata or collateral estoppel may not be summarily determined, as defendant has stated on other matters and as it now contrarily requests in this matter (366 Bomar v. Smith, Jackson & Co., 51 A.D.2d 786; Stokes v. Kase, 51 A.D.2d 983).

g. Defendant cannot even show a Judgment from the state court. Therefore, Rooker and Tang do not apply.

POINT II

FEDERALISM AND COMITY ARE NOT APPLICABLE NOR DECISIVE IN THIS ACTION

The post Civil War Amendments to the Constitution of the United States and the Civil Rights Acts were intended to encroach upon the sovereignty of the states, as viewed by Senator John Calhoun.

§1983 was intended to give a federal forum to persons whose constitutional and civil rights were being infringed upon.

This action is not an attempt to stay a criminal action or a disbarment proceeding.

This is not an attempt to have the defendant alter its conclusion. It is merely an attempt by plaintiff to clear his name and set straight his status. Comity is

inapplicable since there are no pending inconsistent proceedings in the state courts respecting this matter and the relief requested.

CONCLUSION

MANIFEST JUSTICE MANDATES THAT DEFENDANT'S MOTION BE DENIED

There is no question that the published assertions by defendant were irrelevant, defamatory, improperly received, and improperly inserted in its opinion.

The obligation of a tribunal to decide and to freely express its opinion is not the issue. Every right and every obligation has its limits, and the fact that the Court of Appeals has the power to expunge material improperly included in an opinion of a District Court (Lowenschuss v. West Publishing, supra, at p. 183) has not affected the proper functioning of the District Court. Unfortunately the limited powers of the State Court of Appeals does not grant unto that august body the same power over the defendant.

Since the publication is violative of plaintiff's federal rights there is no reason why he should not have the same relief that is afforded to a school teacher, policeman, or other person whose status is affected by a "badge of infamy" by the governing body.

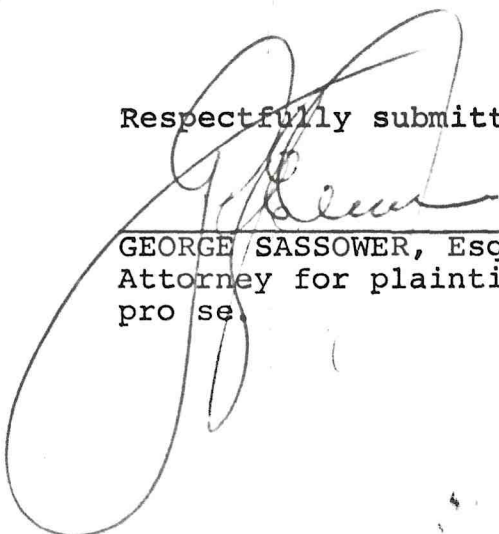
A judicial decision should not be made a font of irrelevant defamatory material beyond the power of another

tribunal to correct (Valentine v. Chrestensen, 316 U.S. 52, 55).

The Judgment appealed from should be vacated and this matter remanded to the District Court for further proceedings.

Dated: May 15, 1979

Respectfully submitted,



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