UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of the Application
of

HYMAN RAFFE, individually and on behalf of PUCCINI CLOTHES, LTD.

Petitioner.

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GEORGE SASSOWER, Esq., an attorney admitted to practice law in the courts of the State of New York and to this Court, affirms the following to be true, under the penalty of perjury:

1. This affirmation is made in support of the petition to compel Hon. EUGENE H. NICKERSON to accept for filing petitioner's papers in response to defendants' affirmative assertions, before rendering a determination under Rule 56, so that a proper Record on Appeal may be presented to this Court, if petitioner is so advised to appeal after such disposition.

2a. Clearly unquestioned in His Honor's opinion [Exhibit "A"], is that petitioner has set forth a cause of action, in his first cause of action, bottomed on 42 U.S.C. §1983.

Such cause was not, in any essential respect, disputed in any of defendants' papers.

b. Thus, although the Court's decision [Exhibit "A"], is improperly orientated in favor of defendants, in view of the limited relief sought herein, no attempt is made to correct same, except as to reveal that there is merit to petitioner's position against defendants affirmative claims.

c. It is on the issues of res judicata, privileges, and immunities, on which the defendants have the burden of pleading and proving, that His Honor prevented affirmant from submitting papers.

3a. On July 27, 1984, four (4) days after receipt of the last of defendants' Rule 56 papers, affirmant desired to file his response to those issues on which defendants had the burden of pleading and proving (Denis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 183), but inexplicably His Honor even refused to hear your affirmant on the matter, to the point that affirmant's insistence obviously irritated His Honor.

b. Affirmant had been previously treated very courteously by His Honor's staff, and in view of affirmant's letter of July 23, 1984, had every reason to expect that if His Honor did not desire to have a further submission by affirmant, his office would have so advised affirmant.

c. The fact was that affirmant had his response to defendant's affirmative assertions ready, in draft form on July 25, 1984, but desired to await the outcome of the events of July 26, 1984 in the state tribunal so as to incorporate them in such submitted papers.

d. Affirmant's attempted telephone communication to His Honor's chambers on July 26, 1984 for a pro forma confirmation of his letter of July 23, 1984, was unsuccessful.

e. The events of the afternoon of July 26, 1984, in the state tribunal, revealed themselves to be highly relevant, consequently affirmant spent a good part of the night incorporating them into his papers. They were not finished by dawn, but were in a state wherein they could have been filed by early afternoon of the 27th.

f. The colloquy between Court and affirmant was that even if your affirmant had such papers in completed form with him, the Court would not accept them. In fact the Court's tenor was that it apparently would not accept those previously prepared papers by affirmant without the July 26, 1984 events incorporated therein.

4a. Based upon such affirmative defenses, the Court, several days later, dismissed plaintiff's complaint. Petitioner desires to appeal to this Court, and wishes to incorporate his facts and documents related to such affirmative defenses, for such appeal.

b. Petitioner's position clearly has merit!

c. Only briefly are the facts shown herein, reserving on appeal, if this application is granted, a fuller exploration of the breath of same.

Res Judicata -- The Phantom Defense:

5a. There does not exist in the state proceeding any final judgment or final order which triggers a res judicata defense in this action -- nor can there be, under the admitted facts.

b. On June 4, 1980, the affairs and assets of Puccini Clothes, Ltd. ["Puccini"], a solvent domestic corporation, became the subject of "color of law" when, the State Supreme Court, involuntarily dissolved it, and in its administrative capacity vested itself with title and right of possession -- custodia legis.

The Court prohibited, in haec verba, everyone from dealing with Puccini's affairs or dissipating its assets, except for the court designated receiver, the Hon. JOHN V. LINDSAY ["JVL"], who became an agent of the court.

Confirming the fact that under New York law, state action is triggered upon entering of such order of dissolution, is the fact that the judge or court is liable for taking insufficient bond, it may relieve the receiver of misfeasance, and consent is generally necessary to sue a receiver. The aforementioned can only be rationalized by rejecting judicial immunity in such cases for such conduct.

c. Before JVL took his oath or filed his bond, Kreindler & Relkin, P.C. ["K&R"], ex parte communicated with JVL, induced the receiver to "delay qualifying", and then K&R, with their co-conspirators, began to unlawfully dissipate these judicially entrusted assets, as they unilaterally saw fit.

d. About seven (7) months later, when petitioner learned that K&R was about to take Puccini's remaining assets, he received a second state court order prohibiting same.

It was at this point that petitioner, as well as the court, learned for the first time, that JVL had not assumed his appointed position nor filed any bond.

Obviously, the disposition of the assets during this seven (7) month period, became suspect, and JVL, then declined the appointment.

e. Excessive apprehension was mollified, when in late December of 1980, petitioner received an accounting of Puccini prepared by Rashba & Pokart ["R&P"], dated June 30, 1980, which showed that all was well at Puccini, and concealed all evidence of wrongdoing.

Several years later it was learned that R&P had been retained by K&R and paid by Arutt, Nachamie, Benjamin, Lipkin & Kirschner, P.C. ["ANBL&K"], with "laundered" funds taken unlawfully from Puccini.

Obviously, K&R did not retain an accounting firm that was going to reveal larceny of judicially entrusted funds and assets, engineered by K&R and their clients!

f. It took the court approximately one year to appoint a new receiver, Lee Feltman, Esq. ["LF"], who in turn designated his law firm, Feltman, Karesh & Major, Esqs., ["FK&M"] without compliance with the mandated and non-discretionary 22 NYCRR §660.24.

The Smoking Gun:

6a. Petitioner was one of four stockholders of Puccini, each holding a 25% interest, all of whom had executed cross-guarantees for individualized guarantees executed to various financing organizations.

b. Several months after the Order of Dissolution, K&R, on behalf of another 25% interest, commenced an action against petitioner alone for a 75% indemnification, under suspect circumstances.

Petitioner commenced a third party action against Puccini for complete indemnification, and against the clients of ANBL&K, for two thirds contribution.

c. Frustrating pre-trial disclosure (CPLR 3214[b]), K&R back-dated a motion for summary judgment indemnification, and petitioner opposed, setting forth its circumstantial evidence of unlawful dissipation of Puccini's assets.

Petitioner also cross-moved against Puccini and the clients of ANBL&K.

K&R's client, by a perjurious affidavit, denied any wrongdoings regarding Puccini's court entrusted assets. LF, FK&M, and ANBL&K failed to expose the perjury, although they, unlike petitioner, had the hard evidence of same within their possession.

Undeniably, K&R knew beforehand that LF and FK&M, who had in their possession Puccini's financial books and records, would betray the interests of the judicially entrusted assets of Puccini, by not exposing the perjury, thus defeating the motion.

Likewise, K&R knew beforehand that ANBL&K would betray their clients by not exposing the same perjury, thus defeating such motion.

As a result of the aforementioned betrayals, K&R's clients recovered judgment against petitioner for approximately $500,000 (with interest), and petitioner recovered judgment for a like amount against Puccini and for two-thirds that amount against the clients of ANBL&K.

7a. Significantly, the conspiratorial arrangements still exists as LF, FK&M, and ANBL&K do not cooperate, and indeed resist, recent efforts made to vacate the aforementioned judgment by K&R against petitioner and in favor of petitioner against Puccini and the clients of ANBL&K.

b. For such betrayal, K&R permitted ANBL&K to unlawfully take substantial sums of monies from Puccini for an eighteen (18) month period subsequent to June 4, 1980, and have agreed to whatever fees LF and FK&M have requested from Puccini, although K&R's clients have a 25% interest in Puccini's equity.

The Hard Evidence

8a. The co-conspirators resisted all judicial and extra-judicial efforts at disclosure (see Barr v. Raffe, 96 A.D.2d 800, 466 N.Y.S.2d 340 [1st Dept.]), and to conceal the larceny and perjury, LF sought judicial approval for the appointment of R&P, as investigatory accountants.

b. Subject to petitioner's accusation was K&R, ANBL&K, and their clients.

c. The co-conspirators, LF, FK&M, K&R, and ANBL&K, did not advise the court that K&R and/or their clients were in fact the clients of R&P, nor did they reveal that ANBL&K had "laundered" Puccini unlawfully taken monies to R&P for payment of a bill due by K&R and/or their clients.

Such appointment was approved by nisi prius, although it did not comply with the mandatory provisions of 22 NYCRR §660.24.

* * *

9a. Because of the aforementioned refusal of Hon. EUGENE H. NICKERSON to accept evidence on the alleged affirmative defenses, His Honor is unaware that as a result of an Article 78 proceeding by petitioner against the "Justice of the Supreme Court, New York County", the Attorney General, on July 11, 1984, conceded to the Appellate Division, that 22 NYCRR §660.24 is a ministerial, non-discretionary mandate, and appointments made in violation thereof are "null and of no effect" [subd "f"] [Attorney General's Memorandum Exhibit "B"].

Petitioner claims that authority to exercise judicially related functions cannot be given to accountants where the subject of their accusatory inquiry are their own clients and those who "laundered" monies to them -- such authority is "null and void" and an outrage to common sense (Commonwealth Coating v. Continental, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 812; Lowcher v. N.Y.C. Teacher's, 54 N.Y.2d 373, 445 N.Y.S.2d 696; Wilcox v. Supreme Council, 210 N.Y. 370; La Pier v. Deyo, A.D.2d , 474 N.Y.S.2d 597 [3d Dept.]; Scott v. Brooklyn Hosp., 93 A.D.2d 577, 462 N.Y.S.2d 272 [2d Dept.]; Murray v. Murray, 73 A.D.2d 1015, 424 N.Y.S.2d 50 [3d Dept.]; Casterella v. Casterella 65 A.D.2d 614, 409 N.Y.S.2d 548 [2d Dept.]; Cummings v. Christensen, 109 Misc.2d 255, 439 N.Y.S.2d 825; Ellentuck v. Klein, 570 F.2d 414, 424 [2d Cir.]).

b. Because of the aforementioned refusal of Hon. EUGENE H. NICKERSON to accept evidence on the alleged affirmative defenses, His Honor is probably unaware of the legal effect in New York of the appointment of R&P to investigate its own clients and those who "laundered" monies to it (Ellentuck v. Klein, supra).

As a result thereof, the appointments of FK&M and R&P, are infected with jurisdictional invalidity (Ellentuck v. Klein, supra).

c. Because of the aforementioned refusal of Hon. EUGENE H. NICKERSON to accept evidence on the alleged affirmative defenses, His Honor is unaware that as a result of another Article 78 proceeding, the Attorney General has conceded that Hon. THOMAS V. SINCLAIR, Jr., Acting Justice of the Supreme Court, must accept petitioner's application for renewal consideration on the judgment secured by K&R's clients against petitioner, and petitioner's judgment over.

d. Because of the aforementioned refusal of Hon. EUGENE H. NICKERSON to accept evidence on the alleged affirmative defenses, His Honor is unaware of the results of the other Article 78 proceedings, and the Article 78 proceeding resulting from the actions on July 26, 1984.

In short -- the aforementioned judgment, based upon fraud and perjury is not dispositive of the §1983 action, which judgment is not even mentioned by Judge Nickerson, or as having any effect thereon.

There is no other judgment or final order on which claim or issue preclusion can be advanced!

Interim orders, not the product of "full and fair hearings", do not have preclusive affect, and recent proceedings in state court (of which Judge Nickerson is unaware), as a result of recent disclosures of fraud and larceny, are in the process of nullification.

* * *

10a. In any event, on November 7, 1983, four (4) days after the decision of Barr v. Raffe (97 A.D.2d 696, 468 N.Y.S.2d 332 [1st Dept.]), the first pieces of documented "hard evidence" came into petitioner's possession.

b. This was followed by the March 5, 1984 "compelled" filed accounting of R&P, which disclosed over $9,000,000 of unlawful cash transactions after June 4, 1980, and the disappearance of most of Puccini's financial books, the inability to account for any of its large inventory, except for $512, inability to account for accounts receivables, and other assets.

c. This was followed on June 6, 1984, by disclosure of the "laundered" check paid by ANBL&K for K&R to R&P from unlawfully drawn cash assets of Puccini.

d. This was followed by the "confession" of a client of K&R that they also took funds from Puccini after June 4, 1984 and, _sub silentio_, that their summary judgment affidavit was perjurious.

11a. Also in the process of pending mandamus proceedings, also unknown to Judge Nickerson, is for a hearing Ordered by a state jurist to inquire into this entire relationship between K&R, FK&M, and R&P, and other significant factors, which has thus far been stonewalled.

b. Other appellate reversals and recent proceedings are also probably unknown to Judge Nickerson (_Barr v. Raffe_, A.D.2d , N.Y.S.2d [1st Dept.]).

Thus, for Judge Nickerson to have cited or included in His Honor's count, orders the results of motions, but not the appellate reversals or subsequent ordered inquiry, is misleading.

12. In view of the limited relief sought herein, to wit., the opportunity to present evidence to the Court below prior to a determination, further argument would be supererogatory.

WHEREFORE, it is respectfully prayed that the relief requested herein be granted in all respects.

Dated: August 10, 1984

GEORGE SASSOWER