

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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HYMAN RAFFE, by his attorney, GEORGE
SASSOWER, Esq., respectfully shows this Court and
alleges:

1. This is a mandamus proceeding to compel
Hon. EUGENE H. NICKERSON, United States District Judge,
to accept for filing and consideration, papers by and on
behalf of petitioner, responsive to the alleged
defenses, privileges, and immunities, vel non, of the
defendants before His Honor renders a decision and
order.

2. I am the plaintiff in an action pending in the United States District Court for the Eastern District of New York, bearing the Docket Number 84Civ0305, assigned to Hon. EUGENE H. NICKERSON, United States District Judge.

3. The aforesaid action was brought pursuant to 42 U.S.C. §1983, based upon a complaint executed on January 23, 1984, and filed on January 26, 1984.

4. Plaintiff pleaded the necessary allegations without anticipating any defenses, privileges, or immunities.

5. Defendant's moved to dismiss based on Rule 12(b)6, primarily based on the assertions that they, as non-public defendants, were entitled to a complaint with greater specificity. Petitioner cross-moved for a Rule 56 conversion which His Honor granted.

6. Petitioner's attorney served his Rule 56 papers in the time afforded by the Court, again without anticipating any defenses, privileges, or immunities.

7. All the defendants requested or took additional time to respond, without objection from petitioner or his attorney, with the last document received from the defendants' attorneys on Monday, July 23, 1984.

8. Because of the delay in responding, again at the defendant's request, the pending motion for summary judgment was adjourned from July 20, 1984 to July 27, 1984.

9. On the date of receipt of the last response by defendant on Monday, July 23, 1984, as aforementioned, petitioner's attorney wrote to His Honor as follows:

"July 23, 1984

Hon. Eugene H. Nickerson
United States District Court
Eastern District of New York
225 Cadman Plaza East,
Brooklyn, New York, 11201

Re: Raffe v. Citibank
84 Civ 0305

Honorable Sir:

I received this morning the affidavit on behalf of the firm of D'Amato & Lynch, Esqs., which I assume is the final paper to be submitted by defendants pursuant to Rule 56 on their motions to dismiss.

Hopefully, by Friday, June 27, 1984, when we are scheduled to appear before Your Honor on my motion for summary judgment, which at the request of Kreindler & Relkin, Esqs., was adjourned from June 20, 1978 to this coming Friday, I will file my response to defendants' assertions, which essentially are affirmative defenses, wherein they had the burden of pleading and proving.

If I may, I will telephone Your Honor's Chambers within the next two days to ascertain whether the above meets with the Court's approval.

Thanking you for your kind consideration, I am

Respectfully yours,

GEORGE SASSOWER

GS/h

cc: Kreindler & Relkin, P.C.
Feltman, Karesh & Major, Esqs.
Arutt, Nachamie, Benjamin, Lipkin & Kirschner, P.C.
Webster & Sheffield, Esqs.
Schneck, Weltman & Ives, Esqs.
D'Amato & Lynch, Esqs.
Robert Abrams, Esq.
Clerk, U.S. Dist. Ct."

10. There was no received from defendants' attorneys or the Court to the four (4) day request for the filing of responses to defendants' affirmative defenses beforehand.

11. On the morning of July 27, 1984, petitioner's attorney had with him his response to the defendants' affirmative defenses, but because of the very significant and relevant events of the afternoon of the day preceeding, to wit., July 26, 1984, petitioner's attorney needed a few additional hours to finish the incorporation of such events into his papers.

12. On the morning of July 27, 1984, without even permitting petitioner's attorney to say anything on the aforementioned subject, and without any expressed objection by defendants' attorneys, His Honor, sua sponte prohibited petitioner and his attorney to file any additional papers in the aforementioned matter, then, that day, or thereafter, addressed to such affirmative defenses or otherwise.

13. His Honor on July 27, 1984 even refused to hear petitioner's attorney on said subject.

14. On August 1, 1984, His Honor issued a decision and order [Exhibit "A"], which dismissed petitioner's complaint and wholly and solely relied on affirmative defenses, privileges and immunities.

15. Petitioner intends to file a Notice of Appeal to this Court from the aforementioned decision and order, but wishes to have included therein, his documents and evidence responding to defendants' defenses, privileges, and immunities, for this Court's consideration.

16. It is petitioner's position that assuming, arguendo, his attorney is in error, and it has never been claimed that he is, by either court or the defendants, that he needs to anticipate defenses, privileges, and immunities, His Honor should have permitted him to respond to same before rendering the Court's decision and order.

17. At the very early stages of the underlying action, and on February 28, 1984, on defendants' Rule 12(b)6 motions, petitioner's attorney in a Memorandum stated in part:

"Some of the defendants seem to indicate that they are or may claim immunity. An 'immunity' or absolute privilege, in a §1983 action, as in every other action, requires the showing of 'entitlement' A somewhat similar analysis is required for res judicata to hold. At bar, there is uncertainty as to what judgment some of the defendants contend form the basis for the invocation of the doctrine."

18. If there is any judgment which the "hard core" defendants claim should be the basis of the defense of res judicata, neither the Court nor the defendants have shown same to exist.

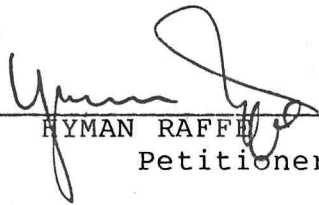
19. In fact petitioner challenges the defendants in the underlying action, to set forth with specificity, the judgment(s) or final order(s) on which such defense is based.

20. In any event, petitioner is entitled to an opportunity, and the constitutional right, to be heard on the issue, both at nisi prius and at the appellate level, before a decision and order are entered (Le Grand v. Evan, 702 F.2d 415 [2d Cir.]).

21. Annexed hereto, and made a part hereof, by incorporation, is the affirmation of petitioner's attorney, which very briefly sets forth the underlying facts to show additional merit.

WHEREFORE, petitioner respectfully prays that Hon. EUGENE H. NICKERSON be mandated to accept petitioner's papers for filing, and that His Honor render a determination dated after such filing so that a proper record can be presented on appeal, if petitioner is so advised.

Dated: August 10, 1984


HYMAN RAFFEL
Petitioner.

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF KINGS)

HYMAN RAFFE, first being duly sworn, depose,
and say:

He is the petitioner herein and has read the foregoing Petition and the same is true of their own knowledge except as to matters stated therein to be on information and belief, and as to those matters deponent believe it to be true.

HYMAN RAFFE

Sworn to before me this
10th day of August, 1984

Kenneth Silverman

KENNETH SILVERMAN
Notary Public, State of New York
No. 24-4608988
Qualified in Kings County
Commission Expires March 30, 1985