UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

CITIBANK, N.A., and JEROME H. BARR, individually, and as executors of the Estate of MILTON KAUFMAN; KREINDLER & RELKIN, P.C.; LEE FELTMAN; FELTMAN, KARESH, & MAJOR; ARUTT, NACHAMIE, BENJAMIN, LIPKIN & KIRSCHNER, P.C.; RASHBA & POKART, P.C.; EUGENE DANN; ROBERT SORRENTINO; ROBERT ABRAMS, as Attorney General of the State of New York; JOHN V. LINDSAY; and SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

Defendants.

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MEMORANDUM
AND
ORDER

GEORGE SASSOWER, ESQ.
Brooklyn, New York
for plaintiff

KREINDLER & RELKIN, P.C.
(Donald B. Relkin, Michael J. Gerstein, Edward Weissman, Esqs., of counsel)
New York, New York
for defendants Citibank, N.A., Barr, and Kreindler & Relkin, P.C.

FELTMAN, KARESH & MAJOR
(John I. Karesh, Donald F. Schneider, Ave Maria Brennan, Lee Feltman, Esqs., of counsel)
New York, New York
for defendants Lee Feltman and Feltman, Karesh & Major

D'AMATO & LYNCH
(Robert E. Meshel, Timothy P. Butler, Esqs., of counsel)
New York, New York
for defendant Arutt, Nachamie, Benjamin Lipkin & Kirschner, P.C.

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SCHNECK WELTMAN & IVES
(Edward S. Weltman, Jonathan I. Price, Esqs., of counsel)
New York, New York
for defendant Rashba & Pokart

ARUTT, NACHAMIE, BENJAMIN, LIPKIN and KIRSCHNER, P.C.
(Kenneth Kirschner, Esq., of counsel)
New York, New York
for defendants Dann and Sorrentino

WEBSTER & SHEFFIELD
(Charles T. Lee, J. Kearney, Esqs., of counsel)
New York, New York
for defendant Lindsay

ROBERT ABRAMS, ESQ., Attorney General of the State of New York
(David S. Cook, Esq., of counsel)
New York, New York
for defendants Abrams and Supreme Court of the State of New York

NICKERSON, District Judge

Plaintiff brought this action pursuant to 42 U.S.C. §1983 alleging that defendants have violated and continue to violate his civil rights. He seeks $50,000,000 in compensatory and punitive damages, the removal of defendant Lee Feltman as receiver of Puccini Clothes, Ltd., and the removal of the related pending state action to "a constitutional and appropriate forum meeting federal standards."

Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56 and this court's order of June 29, 1984 converting their motions to dismiss the complaint into summary judgment motions. Defendants also move, pursuant to 42 U.S.C. §1988 and Federal Rules of Civil Procedure 11 and 56(g), to recover attorneys' fees expended in the defense of this suit.

Plaintiff moved twice to amend the complaint to include findings of a March 1984 accounting report, a copy of a check and conclusions drawn from that evidence. Plaintiff also applied for interim relief against the New York State Supreme court on June 8, 1984, which the court denied. Most recently plaintiff moved for partial summary judgment "imposing liability on behalf of plaintiff, Puccini Clothes, Ltd." (Puccini), against defendants for all losses sustained by Puccini since June 4, 1980.

The parties come to this court with an already long and tortured history of litigation in the New York State courts. The court has before it, in addition to the voluminous file generated here, many of the motion papers and orders produced in the state actions. The dates and dispositions of the state court proceedings, as described by defendants and presented in the state court papers, are not disputed by plaintiff, who has failed to set out a coherent statement of those facts. They are as follows.

Plaintiff Raffe, Milton Kaufman, whose estate is a defendant here, and defendants Eugene Dann and Robert Sorrentino each owned 25% of the shares of Puccini, a New York corporation. Kaufman, who was President and a director of Puccini, died in 1979; defendants Citibank and Jerome H. Barr qualified as executors of his estate. The remaining shareholders did not call a meeting to elect a successor director to Kaufman, in violation of the corporation's shareholders' agreement. Nor did they implement the provision in the shareholders' agreement governing the disposition of Kaufman's shares. Finally, the shareholders, allegedly led by plaintiff and George Sassower, his attorney, refused to allow Puccini to pay obligations that had been guaranteed by Kaufman; as a result, Kaufman's estate was diminished.

In 1979, the defendant executors instituted an action against Raffe, Dann, Sorrentino and Puccini in New York State Supreme Court, New York County based on their guarantees to Kaufman. Kaufman's estate received a judgment against the shareholders.

In 1980, the executors petitioned the New York State Supreme Court for the dissolution of Puccini pursuant to New York Business Corporation Law §1104 on the ground that the shareholders failed to comply with the shareholders' agreement. The court granted the dissolution on June 4, 1980; the order appointed defendant John V. Lindsay as receiver. Plaintiff appealed the order; it was affirmed unanimously by the Appellate Division, First Department.

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In May 1980, after the commencement of the dissolution proceeding, Raffe brought an action in New York State Supreme Court. He sought to recover $35,000,000, alleging that the executors had damaged Puccini by refusing to allow the assets of Kaufman's estate to be used as collateral for obligations incurred by Puccini in the course of its business. The court dismissed the action; the Appellate Division, First Department unanimously affirmed.

In November 1980, Kaufman's executors commenced a second action in New York State Supreme Court against Raffe on his responsibility for the obligations of Puccini that had been secured by Kaufman. The estate was awarded a judgment of $350,000 against Raffe. Raffe was in turn awarded judgment against Dann, Sorrentino and Puccini.

In January 1981, Lindsay declined the appointment as receiver of Puccini. In February 1981, the Supreme Court denied Raffe's motion to have himself appointed receiver and appointed defendant Lee Feltman. That order also disqualified Sassower from representing Raffe in all related state proceedings due to the conflict of interest caused by his previous representation of Dann and Sorrentino. Defendants allege that Sassower continues to participate in the state actions despite that order.

Following his appointment, Feltman retained the defendant firm of Feltman, Karesh & Major (the Feltman firm) as

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counsel and, pursuant to court order, the defendant firm of Rashba & Pokart as accountants in connection with his duties as receiver. In the March 1983 order concerning the appointment of Rashba & Pokart, Supreme Court Justice Rettinger dismissed Raffe's contentions that Feltman, his law firm and Rashba & Pokart, as well as the other shareholders and their attorneys, had conspired to "rape Puccini's assets" as without support.

Following the issuance of Justice Rettinger's order, Feltman directed Rashba & Pokart to review Puccini's books and records and issue a report as to whether there was any impropriety in the conduct of Puccini's financial affairs. The report issued in March 1984.

Raffe has moved at least five times in the state courts to have Feltman removed as receiver based on his alleged misconduct in that position. Three such motions were denied on the merits, and a fourth denied as "premature at least" because Rashba & Pokart's report on Puccini's financial status had not yet been issued. Another motion to remove Feltman is now pending before the state courts.

Raffe and Sassower, as plaintiffs, also brought an action in New York State Supreme Court against the Feltman firm and the defendant Arutt firm based on alleged improper actions in their representation of Feltman, and Dann and Sorrentino, respectively. The case against the Feltman firm

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was dismissed for failure to state a cause of action. The appeal was dismissed as well. The Arutt firm's motion to dismiss was held in abeyance pending determination of whether or not the complaint was timely served.

Raffe contends that all of the defendants performed acts and/or conspired to take control of Puccini and "dissipate its assets and affairs as suited their individual and joint private purposes," and to conceal these alleged unlawful activities by having deceptive financial reports prepared, so as to deprive him of his constitutional rights. Plaintiff characterizes the alleged transactions as belonging to "The Rape Period" and "The Concealment Period"; we are currently in "The Period of Revelations."

In response to defendants' weighty motion papers, Sassower has submitted his own affirmation stating that he "asserts, as fact, the material set forth in the complaint," and setting forth additional unsupported allegations. No affidavit of plaintiff or any other person with personal knowledge of the facts, as required by Rule 56, has been submitted.

I

Defendants Abrams and the Supreme Court contend that the action against them is actually one against the State of New York and therefore is precluded by the Eleventh Amendment to the United States Constitution. In addition, they

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argue that, as quasi-judicial and judicial officers, they are immune from suit.

The Supreme Court of the State of New York is the body that appoints the receiver and to which that receiver is held accountable. Under New York Business Corporation Law §1214, the Attorney General is given discretion to intervene in the receivership of a dissolved business corporation when "he deems it to be to the advantage of shareholders, creditors or other persons interested in the assets" of the corporation.

Plaintiff alleges that the Attorney General and the Supreme Court knew of the alleged unlawful dissipation of funds by the "conspirators" and failed and neglected to protect those with interests in Puccini. He further alleges that the Attorney General has undertaken to represent "optional and conflicting interests," and that the Supreme Court has taken numerous actions during the course of the state litigations intended to deprive plaintiff of his rights, including allegedly appointing as receiver a "relative, associate or close friend."

The United States Supreme Court has consistently held that the Eleventh Amendment bars suit against an unconsenting state by citizens of that state. Furthermore, even though a state is not a named party to an action, the suit will be barred when it in essence seeks recovery of money

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from the state. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

Plaintiff sues Abrams solely in his official capacity as Attorney General. The damages he seeks for alleged unconstitutional acts thus would be paid from the state treasury. The damages action is therefore barred by the doctrine of sovereign immunity.

The allegations in the complaint against the Supreme court are framed in terms of the conduct of the "SC." The caption indicates as well that plaintiff sues the Supreme Court as an institution of the state rather than suing any individual judges. The Supreme Court is not a "person" within the meaning of 42 U.S.C. §1983. Zuckerman v. Appellate Division, 421 F.2d 625 (2d Cir. 1970). In any event, sovereign immunity bars suit against this subdivision of the state. Id.

Even if plaintiff's complaint were to be liberally construed as an action for damages against individual judges, the action would be barred. A judge is absolutely immune from damages liability except in the clear absence of jurisdiction, even if an action was taken "in error, was done maliciously, or was in excess of his authority." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). There is no allegation that any judge lacked jurisdiction over the various state proceedings.

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Plaintiff's attempt to remove the state actions to federal court is based upon his meritless contentions of Supreme Court misconduct. In the absence of a viable federal issue, this claim for relief cannot stand.

II

As to defendant Lindsay, the complaint alleges that defendant Kreindler and Relkin, P.C., counsel for the executors of Kaufman's estate, caused Lindsay, as receiver, to delay taking control of Puccini's assets and affairs, which made it possible for Kreindler & Relkin and other of the named defendants, all private parties, to dispose of the assets as suited their own purposes. Plaintiff claims that Lindsay agreed not to act on the appointment for over seven months.

An essential element of a Section 1983 claim is the existence of "state action." Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982). State action is implicated when a state court-appointed receiver acts under color of state law. City Partners, Ltd. v. Jamaica Savings Bank, 454 F. Supp. 1269, 1275 (E.D.N.Y. 1978). This element is met as well where private parties act jointly with a receiver acting under color of state law. Id. Of course, there can be no state action or conspiracy under Section 1983 prior to the appointment of a receiver if that is the only form of state action. Hohensee v. Grier, 373 F. Supp. 1358, 1364

(M.D. Pa. 1974), aff'd mem., 524 F.2d 1403 (3d Cir. 1975), cert. denied, 426 U.S. 940 (1976).

It is not disputed that Lindsay never took the oath or filed a bond so as to qualify as a receiver under New York law. Thus, he never had the power to assume the duties as receiver of Puccini. See Maki v. Estate of Ziehm, 55 A.D.2d 454, 391 N.Y.S.2d 705 (3d Dep't 1977); Capasso v. Rosenblum, 50 A.D.2d 584, 375 N.Y.S.2d 143 (2d Dep't 1975). Nor is it alleged that he took any action as receiver. Thus, there was no state action on Lindsay's part. A mistaken belief of plaintiff's that Lindsay qualified as receiver does not constitute state action. White v. Scrivner Corp., 594 F.2d 140, 144 (5th Cir. 1979).

Finally, the grievance against Lindsay, by plaintiff's own admission, fails to state a necessary element of a Section 1983 claim, that of intentional deprivation of plaintiff's civil rights. Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964). Sassower, in his affirmation, "concedes, as he has always, that he has no information which would reveal any moral or ethical culpability on the part of this defendant or his law firm." In addition, Sassower's March 14, 1984 letter to the court states that he expected to "delete" Lindsay as an active defendant" since he did "not appear to have been motivated by avarice."

III

In support of its motion, Rashba & Pokart (Rashba) has submitted, among other things, an affidavit of Burton Laskin, a member of the firm, which details the accounting work it performed with respect to Puccini. In 1980, after the dissolution of Puccini, Kreindler & Relkin, attorneys for the Kaufman estate, retained Rashba to review Puccini's books. Dann and Sorrentino joined in the request for that review. Laskin states that Rashba neither took nor destroyed any of Puccini's books or records; nor does Laskin know of facts indicating that anyone else did so. Rashba was paid $6200 for this work by a check not drawn on Puccini's account.

In April 1983, the affidavit continues, Feltman retained Rashba pursuant to court order to audit Puccini and to assist Feltman in his duties. Rashba proceeded to conduct a review of all available records and to produce a report responsive to the questions posed by Feltman's attorney. Again, Rashba claims to have never taken or destroyed any books or records, diverted or dissipated Puccini funds, or caused such diversion or dissipation.

Rashba also claims that any delay in issuing the report to the receiver was due to plaintiff's continual harassment, including letters written by plaintiff and sent to the Office of Professional Discipline and the District Attorney.

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This caused Rashba to retain an attorney to review the situation prior to issuing the report.

Plaintiff has submitted a copy of the $6,200 check to Rashba dated October 10, 1980, drawn on the Arutt firm's account. Written on the check stub is "Re: Puccini Clothes." Plaintiff claims that the funds for the check improperly came from Puccini, and that the existence of this check indicates that Rashba was an active participant in producing a report intended to cover up the diversion of Puccini assets. The court does not find in this payment to Rashba for services it performed, or in the report Rashba issued in March 1984, any basis for plaintiff's claim against the defendant or any contested issue of fact. Neither the mere possibility that a factual dispute may exist nor plaintiff's reiteration of a series of conclusory allegations is sufficient to overcome Rashba's convincing presentation of the facts. See Quinn v. Syracuse Model Neighborhood Corp., supra, 613 F.2d 438, 445 (2d Cir. 1980).

IV

Defendants Citibank, Barr, Kreindler & Relkin, Lee Feltman, the Feltman firm, the Arutt firm, Dann and Sorrentino all have been intimately involved in the state court proceedings. They argue now that plaintiff should be barred from asserting in this Section 1983 action the same underlying claims of misconduct that have yet to succeed in the state courts. Plaintiff's only response to this argument is that "there is uncertainty as to what judgment some of the defendants contend form the basis for invocation of the doctrine."

The United States Supreme Court has held consistently that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City School District Board of Education, 104 S. Ct. 892, 896 (1984). That preclusive effect is not diminished in cases brought pursuant to Section 1983. Id.; Allen v. McCurry, 449 U.S. 90 (1980).

The law in New York of res judicata, or claim preclusion, is that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981).

There are two necessary elements to the invocation of the doctrine of collateral estoppel, or issue preclusion, under New York law. First, there must be an identity of issue which was necessarily decided in the prior action and is decisive of the present action. Second, there must have been a full and fair opportunity to contest that decision. Langert v. Festa, 563 F. Supp. 692, 695 (E.D.N.Y. 1983).

The court finds that plaintiff's claims against these defendants are barred under both doctrines. Although plaintiff brings this action under Section 1983, presumably to redress a deprivation of property without due process of law, his allegations here are basically indistinguishable from those presented in state court in his unsuccessful efforts to remove Feltman as receiver and compel the other defendants to account for Puccini's assets. Plaintiff's state-court papers discuss, in vague and conclusory language similar to that offered here, the wide-ranging conspiracy among Puccini's other stockholders, the receiver, their law firms and the accounting firm.

Justice Rettinger's March 14, 1983 decision in the dissolution proceeding explicitly denied plaintiff's motion and rejected his totally unsupported contentions. The Justice then was able to proceed to grant the receiver's various motions. Justice Grossman's December 28, 1983 decision in Barr v. Raffe, denying plaintiff's motions, and Justice Kaplan's October 16, 1982 decision dismissing the action against the Feltman firm likewise rejected plaintiff's same contentions.

Plaintiff can hardly claim that he has not had a full and fair opportunity to litigate his position in state court. To the contrary, as defendants have documented, he has brought duplicative motions and appeals, over 75 in the last two years, in the same unsupported manner and seeking the same relief. In fact, Justice Grossman, in his opinion, remarked that plaintiff had "absolutely no factual or legal basis" for the relief sought, and that he had "been previously warned about his continued frivolous and baseless motions." The Justice then granted Barr's cross-motion for sanctions against plaintiff. In short, it is clear to this court that no unresolved facts remain in the litigation against these defendants.

Plaintiff's motion for partial summary judgment is without merit. It seeks relief which can be granted only by the court presiding over the Puccini bankruptcy proceedings. In any event, it rests exclusively on Sassower's three-page affirmation consisting of mere conclusory allegations. Plaintiff's motions to amend the complaint, also lacking in merit, are moot in light of the court's disposition of the summary judgment motions.

V

The defendants, other than Lindsay, move for attorneys' fees on the ground that this action is frivolous and repetitive. They request that fees be assessed against Sassower, in addition to plaintiff, since Sassower has a history of bringing frivolous actions, related and unrelated to this case, that have burdened defending parties as well as the court system.

A prevailing defendant may recover costs and fees in a civil rights action where the action is found to be unreasonable, frivolous, meritless or vexatious. Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978). Such fees are awarded "to protect defendants from burdensome litigation having no legal or factual basis." Id. at 420; Gerena-Valentin v. Koch, 554 F. Supp. 1017, 1021 (S.D.N.Y. 1983).

Fees have been allowed where there is no basis in law or fact for a claim, id., and where the plaintiff has sought to relitigate a claim previously determined against him in another forum. Munshi v. New York University, 528 F. Supp. 1088, 1093 (S.D.N.Y. 1981).

Courts in civil rights cases have also assessed fees against opposing counsel who have conducted the litigation in bad faith, that is, by bringing frivolous actions and unreasonably and vexatiously multiplying proceedings. Allen v. New York Board of Elections, No. 83-3227 (S.D.N.Y. May 10, 1984); Davidson v. Allis-Chalmers Corp., 567 F. Supp. 1532, 1538 (W.D. Mo. 1983). In the two cited cases, the courts assessed one-half of the defendants' attorneys' fees against counsel.

In deciding the motions to dismiss, this court has already determined that plaintiff's complaint is entirely without merit and duplicative of the state court dispositions. Sassower knew, or should have known, that plaintiff would be precluded from litigating his claims in this court. Furthermore, Sassower's framing of the complaint in conclusory terms and his failure to support those conclusions warrant the imposition of fees against him. Finally, his manner of conducting this litigation has been vexatious. Defendants' have incurred repeatedly the costs of answering and appearing for plaintiff's entirely frivolous motions. Sassower has also engaged in correspondence clearly aimed at threatening and harassing the various defendants.

Plaintiff and his Sassower are to share equally the burden of paying the attorneys' fees incurred in defending this suit and are held jointly and severally liable for that amount.

VI

Defendants' motions for summary judgment and attorneys' fees are granted. Plaintiff's motion is denied.

Defendants shall submit affidavits of hours spent, fees sought and costs incurred in defending this suit.

So ordered.

Dated: Brooklyn, New York
August 1, 1984

Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.