

8841-7737

To be argued by:
DAVID S. COOK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

-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-Appellees.

ON APPEAL FROM A DECISION AND ORDER OF
THE UNITED STATES COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
ROBERT ABRAMS AND THE SUPREME
COURT OF THE STATE OF NEW YORK

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BRIEF FOR DEFENDANTS-APPELLEES
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Preliminary Statement

This brief is submitted on behalf of defendants-respondents Robert Abrams, Attorney General of the State of New York, and the Supreme Court of the State of New York, County of New York ("the State defendants"). The court below, the United States District Court for the Eastern District of New York (the Honorable Eugene J. Nickerson, U.S.D.J.), granted, by

Memorandum and Order dated August 1, 1984, the motions of all defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for the award of attorneys' fees pursuant to 42 U.S.C. § 1988, and Rules 11 and 56(g) of the Federal Rules of Civil Procedure. The district court granted the State defendants' motion on the grounds of Eleventh Amendment and judicial immunity and the lack of a substantial federal question (A 7-10). The district court also denied plaintiffs' motion for partial summary judgment (A 18).

Questions Presented

1. Is plaintiffs' action, brought under 42 U.S.C. § 1983 against the Attorney General of the State of New York solely in his official capacity barred by the Eleventh Amendment to the Constitution?

The Court below answered in the affirmative.

2. Is plaintiffs' action, brought under 42 U.S.C. § 1983 against the Supreme Court of the State of New York, County of New York barred by the Eleventh Amendment to the Constitution and the doctrine of judicial immunity?

The Court below answered in the affirmative.

3. Was the Court's award of attorneys' fees pursuant to 42 U.S.C. § 1988 proper?

The Court below held that plaintiff and his attorney must pay attorneys' fees.

Facts

The facts, insofar as they relate to the State defendants' involvement in the case, are as follows:

On June 4, 1980, Justice Thomas Sinclair of the defendant Supreme Court ordered the dissolution of PUCCINI CLOTHES, LTD. in accordance with the provisions of Article 11 of the New York Business Corporation Law (A 95, 54). He simultaneously appointed defendant the Honorable John V. Lindsay as receiver of the dissolved corporation, in accordance with the provisions of Article 12 of the New York Business Corporation Law (A. 54).

On February 2, 1982, defendant Lee Feltman qualified as receiver of PUCCINI CLOTHES, LTD. (A 75), Lindsay having declined his appointment (A 54). Mr. Feltman remains as the receiver.

The duties of the receiver, the Attorney General and the Supreme Court with respect to the receivership of a dissolved business corporation are set forth in Article 12 of the New York Business Corporation Law. Generally, the receiver is to collect the assets of the dissolved corporation, reduce them to cash, and distribute them to creditors and shareholders. The Attorney General is given the discretion to intervene in the receivership. The receiver is required to notify the Attorney General before taking certain enumerated steps. See N.Y. BCL §§ 1203, 1207, 1213, 1216 (McKinney 1963).

The Supreme Court is the body which appoints the receiver and to which the receiver must account for the conduct of his receivership.

POINT I

THE COURT BELOW CORRECTLY HELD THAT THE ELEVENTH AMENDMENT TO THE CONSTITUTION BARRED PLAINTIFFS' ACTION BROUGHT UNDER 42 U.S.C. § 1983, AGAINST THE ATTORNEY GENERAL IN HIS OFFICIAL CAPACITY.

The State of New York is sovereign and may not be sued by one of its citizens in any court without its consent. United States Constitution, Eleventh Amendment; Hans v. Louisiana, 134 U.S. 1 (1890); People ex rel. Swift v. Luce, 204 N.Y. 478 (1912); N. Y. Court of Claims Act § 8 (McKinney 1963). Even though the State is not a named defendant as such in an action, the doctrine of sovereign immunity, embodied in the Eleventh Amendment, applies to actions against state officers who are acting within the scope of their lawful authority. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). When a state officer is named as defendant, however, the Court must determine whether or not the action is truly against the State or merely against the officer as an individual. If the relief sought runs against the State, the action is one against the State and is barred by the Eleventh Amendment, as the Court below held (A 8, 9) Edelman v. Jordan, 415 U.S. 651 (1974). Cf. Ex parte Young 109 U.S. 123 (1908).

In the instant action, plaintiffs have not alleged that the Attorney General acted unconstitutionally; rather they have alleged merely that he failed to "protect those who have interests in Puccini. On the contrary, the AG [sic] has undertaken to represent , optional [sic] and conflicting interests" [(complaint, ¶ 34) (A 30)]. Even assuming the allegation to be true, it does nothing more than allege a wrongful exercise of the Attorney General's discretion. See N.Y. Business Corporation Law § 1214 (McKinney 1963).

The Attorney General is sued solely in his official capacity. Thus, on the face of the complaint, the fiction of Ex parte Young, that an action under 42 U.S.C. § 1983 is one against the state officer as an individual who is stripped of the cloak of sovereign immunity because he has acted beyond his constitutional authority, is inapplicable. The complaint against the Attorney General must be deemed to be one against the State, for which the State would be answerable in damages. As such, Judge Nickerson properly held the suit barred by the Eleventh Amendment.*

* The caption of this action confirms that plaintiffs have sued Abrams only as Attorney General of the State of New York.

The mere allegation that the Attorney General failed to adhere to state law cannot support, under the Eleventh Amendment, the exercise of the District Court's pendent jurisdiction of state law claims. Pennhurst v. Halderman, supra at 4.

In reaching holding of Pennhurst, the Court reasoned that a claim for relief on the ground that only state law has been violated does not trigger the application of the Ex parte Young exception to Eleventh Amendment sovereign immunity. The exception of Ex parte Young was necessary to vindicate the supreme authority of the Federal Constitution. But when a plaintiff alleges that a state officer has violated a state law, the basis of Young disappears. Thus, if a suit against a state officer on a claim of violation of state law is a claim against a state which is protected by the Eleventh Amendment (because the relief sought runs against the State), it cannot be brought into a federal court under the doctrine of pendent jurisdiction.

The reasoning of Pennhurst applies a fortiori to the instant case. The relief appealed from there was injunctive. Since Pennhurst rejected a pendent state-law claim for injunctive relief, which claim putatively had less Eleventh Amendment protection than a claim for damages, it follows that a pendent state-law claim for damages is also foreclosed.

POINT II

THE COURT BELOW CORRECTLY HELD
THAT BOTH THE ELEVENTH AMENDMENT
AND THE DOCTRINE OF JUDICIAL
IMMUNITY BARRED PLAINTIFFS' ACTION,
AGAINST THE SUPREME COURT OF THE
STATE OF NEW YORK, COUNTY OF NEW YORK.

This Court has held the Supreme Court of the State of New York, as an institution, is the State of New York.

Zuckerman v. Appellate Division, 421 F.2d 625 (2d Cir. 1970).
N.Y. Const. Art. VI, § 1. Under the Eleventh Amendment, the State of New York may not be sued in federal court by a citizen of New York, Hans v. Louisiana, supra at 4; Cory v. White, 457 U.S. 85 (1982).

Although the plaintiffs alleged that the Supreme Court has violated their "federal rights" (complaint ¶ 35-38, 43, 45, 46) (A 30-35), they cannot rely on Ex parte Young to except themselves from the operation of the Eleventh Amendment. Because no individual member of the Supreme Court is named, either in the caption or in the complaint, any relief must perforce run against the state. See Zuckerman v. Appellate Division.

Even assuming that certain members of the court are named by reference to their acts listed in the complaint (see, in particular ¶ 46 at A 35), the district court was nevertheless correct in granting summary judgment to the state defendants. For, even if the acts alleged were such as to make Ex parte Young applicable, removing the shield of sovereign

immunity, there remains a second shield, that of judicial immunity. Judge Nickerson properly found that all of the alleged acts of members of the Supreme Court were acts performed in the course of their duties as Justices of the Supreme Court. Even those alleged acts which might be interpreted as illegal, extra-legal or legally erroneous were nevertheless performed by justices acting as such.

The well-settled doctrine of absolute judicial immunity protects judges from suits arising from acts they performed in the course of their judicial function, even if the acts performed are done "in error. . . maliciously, or in excess of [their] authority." Stump v. Sparkman, 435 U.S. 349, 356 (1978). The only exception to this doctrine is when a judge acts "in the 'clear absence of all jurisdiction.'" Stump v. Sparkman, 435 U.S. at 356, quoting Bradley v. Fisher, 13 Wall. 335, 351 (1871). However, no such act is alleged here. Even the alleged appointment as receiver of a "relative, associate, or close friend of the designating jurist" [(complaint ¶ 11 (A 22)] is a judicial act, however improper it might be. See Weiss v. Feigenbaum, 558 F. Supp. 265 (E.D.N.Y. 1982) (Sifton, J.).

Appellants, citing Pulliam v. Allen, 104 S.Ct. 1970 (1984) and 48A C.J.S. Judges § 91, erroneously contend that judicial immunity is limited to tort damages (Appellant's Brief at 45). To the contrary, in Pulliam the Supreme Court in no way disturbed the holding of Stump v. Sparkman and held only

that judges were not immune from actions brought under 42 U.S.C. § 1983 for prospective injunctive relief.* 104 S. Ct. at 1981. No such relief was sought in the instant case.

Plaintiffs here sought \$50 million in damages from the defendants, including the Supreme Court. The analysis, in Pulliam, as to the degrees of judicial immunity, was based not on the judge's underlying acts, but on the relief sought: money damages or prospective injunctive relief. All suits for money damages continue to be barred, unless they fall within the exception for a complete want of jurisdiction stated in Bradley v. Fisher. See Pulliam, 104 S. Ct. at 1973, n. 4; see also 104 S.Ct. at 1983 (Powell, J., dissenting).

Appellants' reference to Corpus Juris Secundum is equally misplaced. The encyclopedia merely states:

"A judge may be liable in damages for taking an insufficient bond where the act is considered as ministerial and he has failed to exercise ordinary care in the performance of his ministerial duty; but he is not answerable for damages resulting from this failure to take security or sufficient security where the act is considered a judicial one. . . .

[Id. at 700, (footnotes omitted).]

* The court also held that attorneys' fees could be awarded, pursuant to 42 U.S.C. § 1988 against the prospectively enjoined judge. That issue is not germane to this case.

There can be no question that the very nature of proceedings under Article 12 makes them judicial. A receiver is appointed by a petition, which must be served in a manner similar to a complaint and which may be contested. N.Y. BCL § 1202 (McKinney 1963). The amount of the bond is fixed by the court in its discretion, see N.Y. BCL § 1204 (McKinney 1963). Finally, the court must use its discretion in deciding whether to approve the receiver's account, which may be contested, N.Y. BCL § 1216(c) (McKinney 1963). The acts challenged were judicial (A 30-35), and the Supreme Court is protected by the doctrine of judicial immunity. See Weiss v. Feigenbaum.

Appellants advance the curious notion that relief satisfactory to them can be fashioned in a manner "consistent with the Eleventh Amendment." (Appellants' Brief at 45). They suggest that the District Court may order the Supreme Court and/or its justices": (1) to deposit Puccini's books in federal court; or (2) to order that plaintiffs be permitted to inspect such books or show them to the District Attorney; or (3) to account for Puccini's assets; or (4) to sue on a bond filed by the receiver (Appellants' Brief, at 46). Apart from the Eleventh Amendment bar and the exclusion of the Supreme Court as a "person" under § 1983, the ordering of such relief on the basis of plaintiffs' conclusory allegations would be an unwarranted interference by a federal court in valid state court proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413

(1923); Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973 cert denied, 416 U.S. 906 (1974)). Moreover, appellants at no time requested any such extraordinary relief in their complaint.

Finally, it is noteworthy that Appellants' Brief does not advance any argument or authority in support of their contention that there are no immunities warranting dismissal (Appellants' Brief at 45). Their reservation of the right to address this issue in a reply brief (id. at 47) practically amounts to a waiver of this point, since it is incumbent on appellants to show the error of Judge Nickerson's conclusion in the first instance. See Fed. R. of App. P. 28(a)(2); Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 13, (1st Cir. 1983) (appellant may not preserve a claim merely by referring to it in a reply brief or at oral argument), citing 9 Moore's Federal Practice ¶ 228.02[2.-1] at 28-7 (1983). Having failed to do so in their Brief, it is improper to do so in a reply since that way of proceeding denies appellees the opportunity to respond with particularity to appellants' contentions of error in the decision of the Court below. See Fed. R. of App. P. 28(c); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982).

POINT III

THE COURT BELOW CORRECTLY AWARDED
ATTORNEYS' FEES TO THE PREVAILING
DEFENDANTS.

Section 1988 of the Civil Rights Act (42 U.S.C. § 1988) permits the Court to award attorneys' fees to a

prevailing party, including defendants. Christiansburg Garment Center v. E.E.O.C., 434 U.S. 412, 421 (1938). The court below found that the complaint was "entirely without merit" (A 18). With respect to its allegations against the Attorney General, the court below found that "[t]he damages action is ... barred by the doctrine of sovereign immunity." (A 9). In addition, the court below found that the complaint against the Supreme Court was similarly barred by the doctrine of sovereign immunity (A 9) as well as the doctrine of judicial immunity (A 9). The court also found plaintiffs' contentions of Supreme Court misconduct to be meritless (A 10). Indeed, the frivolous and vexatious nature of this action is manifested by the fact that the complaint fails even to allege an unconstitutional act by the Attorney General.

The legislative history of Section 1988 shows that Congress intended to permit the award of attorneys' fees to a prevailing defendant where the plaintiff's suit was brought in bad faith and was frivolous or vexatious. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912. See also, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 6-7 (1976).

The court below found that plaintiffs' lawyer knew, or should have known that plaintiffs would be precluded from litigating their claims in the district court (A 18). Thus, the court's award of attorneys' fees against "Plaintiff and his

prevailing party, including defendants. Christiansburg Garment Center v. E.E.O.C., 434 U.S. 412, 421 (1938). The court below found that the complaint was "entirely without merit" (A 18). With respect to its allegations against the Attorney General, the court below found that "[t]he damages action is ... barred by the doctrine of sovereign immunity." (A 9). In addition, the court below found that the complaint against the Supreme Court was similarly barred by the doctrine of sovereign immunity (A 9) as well as the doctrine of judicial immunity (A 9). The court also found plaintiffs' contentions of Supreme Court misconduct to be meritless (A 10). Indeed, the frivolous and vexatious nature of this action is manifested by the fact that the complaint fails even to allege an unconstitutional act by the Attorney General.

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Sassower [sic]" (A 18) are justified. General Camera Corp. v. Urban Development Corp., No. 775 (2d Cir. May 8, 1984); Harbubak v. County of Suffolk, 654 F.2d 194 (2d Cir. 1981); Allen v. New York Board of Elections, No. 83-3227 (S.D.N.Y. May 10, 1984).

Given the utter lack of merit to appellants' frivolous and vexatious claims against the Attorney General and the Supreme Court for the reasons stated above, this suit and appeal satisfy the Christianburg standard. Judge Nickerson properly awarded fees to defendants under § 1988.

CONCLUSION

THIS COURT SHOULD AFFIRM THE
DECISION AND ORDER BELOW.

Dated: New York, New York
December 12, 1984

Respectfully submitted,

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